WILL MAKING PROCESS: A MOVE FROM TECHNICALITIES TO SUBSTANCE

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Abstract

Technicalities focus on rules. They concentrate on form so are determined through observable features. The present Will making process appear to tend towards technicalities whereas Wills contain issues that go beyond formal features. This article evaluates the Will making process as it relates to proof of testamentary wishes. It proposes a process that reveals the vital issues about Wills. The study adopted doctrinal research method. It has found that the present Will making process is responsible for frustrated testamentary wishes. The paper recommends a substance based Will making process. The paper has confirmed that the latter will aid the proof of Wills.

Keywords: Will making process, Challenged Wills, frustrated wishes, Technicalities, Substance, Corroborative evidence.

Introduction

Wills are secretive in nature, so, are characterized by many as uncertain instrument for the disposition of the estate of the deceased.[1] The tepid disposition shown towards testamentary disposition by those whom the instrument is supposed to govern may be linked to the fact that Wills are hidden documents and are kept hidden until the time of unsealing. Thus, suspicions which follow its sudden appearance after the demise of the maker often prompt questions about the originality of the document, the true identity of the named maker of a Will and the capability of the testator at the time the Will was made.[2] It could also be the distribution of gifts by a testator among his descendants that may be queried when the Will is made open. A Will or part of its content may be disbelieved by either close or distant relatives of a testator. Therefore, there are numerous questions which persons who did not witness the Will making process can raise about the document.

The Will making process which is adopted with legal approval appears not to have adequate answers to the numerous questions asked about a Will. The process is founded on technicalities so, emphasizes the formal rules of testamentary disposition rather than its substance which is the subject to which the rules are applied. The result of the process which is the Will itself is adjudged valid or invalid based on its compliance to formal rules with total disregard to the reasons for making a Will.[3] Thus, where a Will is queried on vital issues which do not relate to its form, both the process and the document so obtained put together, may fall short of the answers needed as proof in the circumstances.

The present Will making process may be responsible for so many frustrated last wishes made by testators. The process does not provide direct evidence of testators' hidden but acknowledged deeds; instead, it creates room for deductions to be drawn from manifest rules of testamentary disposition before assent can be given to a Will. But, deductions are incomprehensible evidence

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1 *Re Flud (Deceased)* (1965) 3 All E.R. 776 per Scarman J.

2 R J Scalise Jr, 'Undue Influence and the Law of Wills: A Comparative Analysis (2008) *Duke Journal of Comparative & International Law.* Vol. 19:41. p. 43.

3 R K Weisbord, 'Wills for Everyone: Helping Individuals Opt Out of Intestacy' (2012) *Boston College Law Review*. 877.

for the proof of a challenged Will just as mere formal rules may give inaccurate direction to the authenticity of a testator's testamentary wishes. The above explains why arguments over challenged Wills in Court are on technicalities and same could last for years because on it lie the source of the proof needed by the Court to determine a case.[4]

Challenged testamentary wishes are a problem to those left behind by the deceased particularly, as there is no ready and absolute evidence upon which such challenge can be resolved on time. Most often, the Court expends so much time in order to arrive at a possible clue to the true intentions expressed in a Will. In such circumstances, the passing of gifts is delayed and the quantum of gift made out to a beneficiary may be denied contrary to the intentions and desires of the testator. The entire wishes contained in a Will may also not be given assent to where there is course for the Court to so find. The latter creates room for the compulsory application of intestate rules even though the existence of a Will is an indication that the testator would have wished otherwise.

The aforementioned underscores the plights of beneficiaries where gifts made to them are challenged. Attempts at circumventing the problems through the use of equitable remedies where necessary may not have adequately solved the queries in Wills challenged in jurisdictions such as Australia and Queensland.[5] Equitable remedies as employed by the Court have been criticized for lacking uniformity in application and for having no clear defined rules.[6] Thus, the same rules which saved one Will may be incapable of saving another.

A Will making process which *abinitio* has corroborative evidence to substantiate the last wishes made by a testator is needed in today's developed world. Wills made with emphasis on substance not on technicalities appears to be the answer to the numerous challenges raised about a Will. A Will making process that de-emphasizes technicalities will serve useful purpose to the Court because in the making of the Will is cogent proof of what transpired while the testator was alive and expressed the wishes that will take place after his death. The Will making process is crucial to the attainment of testamentary wishes whether same are challenged or not. It is the basis upon which disputed testamentary dispositions can be convincingly clarified so, ought to be properly planned to meet the needs of all times. The incorporation of supportive evidence to the Will making process will give substance to the process and the Wills so made. It will also aid in the decision taken to validate or invalidate inchoate Wills.[7]

In lieu of the above, this article proposes a move from the present Will making process to another which incorporates substance as a possible answer to the numerous queries on Wills. The article reveals the limitations in the present Will making process seen in the decisions made by the Court on selected cases brought before it. It also reviews the inadequacies of equitable remedies as substitute to the present Will making process and presents a Will making process for all times that is based on substance. Conclusion to the article followed thereafter.

Challenged Wills and the Decisions of the Court over Selected Cases.

The decisions of the Court when Wills made in form characterized by technicalities are subjected to trial have shown that the process employed may be inadequate in meeting both the desires of deceased testators and the aspirations of the beneficiaries named under a Will. In fact, the predicament of the Court in trying to decipher the true intentions of a testator from the face of his

4 *Nsefik (Since Dead) & Ors. v. Muna & Ors.* (2013) LPELR-21862 SC.
5 D Horton 'Wills without Signature' (2010) Vol. 99 *Boston University Law Review* p. 9.
6 H J Langbein, 'Substantial Compliance with the Wills Act.' (1975) 88 *Harv. L. Review* 489, 489.
7 G W Beyer, 'Videotaping the Will Execution Ceremony- Preventing Frustration of the Testator's Final Wishes' (1983) Vol. 15:1 *St Mary's Law Journal*. p. 17.

paper Will may be likened to one embarking on a voyage of uncertainties because even the process which gave birth to the form has nothing to speak for it. The success or failure of such exercise may be unknown because the principal actors whose decisions are interpreted would have gone to the world beyond where they would be unreachable to those who are physically alive. Thus, the Courts may thread with caution by not being assertive over certain issues raised about a Will for fear that the dead testator is capable of punishing every wrong move in the physical world and may unleash his wrath upon the custodians of the law at the time the latter would take abode with him at the appointed time.[8] Generally, the challenge of the Will obtained through the formal Will making process brings to bear its inability in meeting the purpose of testamentary disposition because the Court has always found safe landing in technical rules and a Will which failed to follow laid down rules of law may be adjudged bad and not good for probate.

In *Dawodu v. Isikalu & Ors*,[9] the Will lodged at the probate registry was neither signed by the testator nor by the attesting witnesses. The Court held that for a Will or testamentary intentions of the deceased to be given effect to, there must be absolute compliance with the requirements of the Wills law. The Will was not admitted to probate regardless of what the testator may have intended. The facts in *Dan-jumbo v. Dan-jumbo*[10] illustrate how a testator's wishes may be vitiated by non-compliance with the rules of statute which the Will making process invariably promotes. The deceased Chief E. E. Bonny passed on in March 1965 and left a Will in which his property were to be distributed among his five sons. The Will was unsealed after his demise and read to his sons. The last son, Bernard Erefa Dan-jumbo disputed the Will on the ground that the signature in the document was not his late father's signature. He filed a caveat challenging the validity of the Will six years after the death of the testator. His other brothers countered it by asking for a declaration on the validity of the Will in the writ of summons they took out at the High Court against their brother.

The Court of first instance pronounced the Will valid. On appeal, it was articulated that when a caveat is lodged in the probate registry against a Will, the Will of the deceased stands suspended. On further appeal, the Supreme Court emphasized that when a caveat is filed against a Will, the doctrine of *lispendens* would apply to the Will. It further stated that with the application of the doctrine, the parties in litigation over any property are denied rights to the property so as to protect all interest in the case. No testator would want his devised property to be subjected to such endless wait that may lead to depreciation in the value of the property so devised. The above would have been avoided if the Will making process had incorporated observable and convincing proof to buttress the content of the Will.

Nsefik (Since Dead) & Ors. v. Muna & Ors[11] also illustrates how legacies inherited under a Will that is challenged may be reduced in value as a result of prolonged litigation. In that case, the deceased died seven months after she made her Will on 6th July, 1988. Shortly after her death, the respondents then defendants applied for the probate of the Will. There was also a publication in the relevant dailies for the grant sought but no caveat was entered by any person against the application made. Probate was granted upon the satisfaction of the conditions stipulated for the grant.

8 C I Nelson; J M Starck, 'Formalities and Formalism: A Critical Look at the Execution of Wills' (1979) 3(6) *Pepperdine Law Review*.
9 (2019) 4NWLR (Pt. 1663) at 409 SC.
10 (1999) 11NWLR (Pt. 627) 445 SC.
11 (2013) LPELR-21862 SC.

The appellant and plaintiff in the Court of first instance took out a writ of summons challenging the Will ascribed to the deceased and the grant of probate to a non-existent Will. The preliminary issue before the Court was which the party will open their case first. The respondent/plaintiff claimed that since the defendants are the propounders of the Will, it is their duty to adduce evidence that the deceased actually made a valid Will and that it is only when that has been done that the burden of proof of the non-existence of the document in question will shift to them. The defendants on their own part maintained that the burden cast on them as propounders of the Will has been discharged when no caveat was entered during the publication of their application and that the defendants' query on the grant of probate meant that the respondent/plaintiff has the burden of leading evidence first in the case to prove that the grant of probate was in error. It is after that evidence has been led that their own testimony would follow to counter the plaintiffs' claim of illegality in the grant of probate.

The trial Court ruled in favour of the defendants but the ruling was appealed against up to the Supreme Court with the apex Court affirming the ruling of the trial Court and the Court of Appeal. The apex Court's ruling terminated the preliminary objection which lasted for twenty-four years after the demise of the testatrix and for that duration, the property left behind by the deceased remained untouched. Even the apex Court in its ruling lamented that such simple matter could take that long and wondered how much longer it would take for the substantive matter to be concluded before the estate of the deceased would be administered for the beneficiaries to enjoy their gifts. In that case, the Supreme Court blamed the lawyers for using those numbers of years to argue over mere technicality while the substantive issue was still pending. Perhaps, the law should also share part of the blame. If the law had been comprehensive enough to contain an elaborate Will making process where disbelieve in the document may be minimized and uncertainties clarified, arguments against Wills will not take years to be resolved.

A similar scenario as the above exists in other contested Will cases because the present process of making Wills emphasizes technicalities at the expense of substance. But Wills could be challenged even where all statutory requirements have been complied with and that makes the reliance on substance meaningless. In *Amadi v. Amadi*,[12] the document presented as the last and final Will of Augustine Umunakwe Amadi by his second and last wife under whose care he passed on, on 24th October, 1992 was contested by the deceased's first wife and children who maintained that he died intestate**.** The latter led evidence to show that the search conducted after the testator's demise revealed that no Will was registered and lodged in his name. It was also claimed that while the named testator was alive, he was known as Augustine Umunakwe Amadi but the Will presented as that of the deceased has the name Augustine Umunnakwe Duruaku Amadi which has the additional name Duruaku; a name alien to those who knew the deceased during his life time.

The Will was denied probate not for defects on the face of the document but because the provisions of section 133(1) of the Evidence Act 2011 was not followed.[13] The decision reached in the case of *Johnson v. Maja & Ors*[14] was further relied upon to expatiate the provision of the Evidence Act. Assuming but not conceding that there was a Will made by the deceased, failure on the part of the appellant (the one who has alleged before the Court that a Will exists) to properly comprehend and apply the law namely; the provisions of Evidence Act, may have worked great injustice to the desires of the testator. The circumstances which befell the Will may have been

[12] (2017) 7 NWLR (Pt. 1563) at 108 SC.

[13] The section provides that the burden of proof on the existence or non-existence of a fact lies on the party against whom judgment would be obtained where non e of the parties led evidence in court.

[14] (1951) 13 WACA 290.

avoided where the Will making process has supportive evidence to show that the testator himself made his Will as required by law.

Sometimes, the disagreements over the existence or non-existence of a Will could be resolved without recourse to the Court where emphasis is place on substance during the Will making process. In *Odjegba & Ors. v. Odjegba & Ors*.,[15] the Will presented for probate was queried for a number of reasons, one of which was the mark employed by the deceased to authenticate the document. A fraction of the deceased's family who claimed he died intestate argued that their father was educated so his wet signature could have been on his Will if he actually made one not his thumb impression. The propounders of the Will adduced evidence about his failing health at the time the Will was made to explain the testator's use of his thumb to indicate his approval and consent to the document and submitted that the use of thumb impression or any other mark of authentication is approved by the statute on Wills and that a Will containing the former is no less a legal instrument for the administration of the deceased's estate than the one bearing his wet signature. The trial Court held the Will to be valid and that decision was upheld by the Court of Appeal.

The above would not have been resolved amicably if the Will making process had vivid pictures of what the testator did or his voice was captured through a device at the time he gave out instructions concerning his Will. If the Will was typed by the testator on his electronic device, same would have been saved by a password unknown to others until the time of the reading of the Will. Such proof can easily be interpreted by both legal and non-legal persons.

The contention over the Will in *Omenazu v. Omenazu & Ors*.,[16] is with its place of custody. The plaintiff asked the Court to declare the Will which the defendant said the deceased made, an illegal document because the latter gave evidence to the effect that the Will was lodged at the Probate Registry, Umuahia in February, 1991 whereas Abia State came into existence in the eighth month of the same year. Therefore, the assertion pertaining to the Will must be false since it could not have been lodged in a place which did not exist at the time they mentioned.

The Will was admitted to probate by the lower Court and same was affirmed on appeal. The Court held that the defendant's evidence was cogent enough to establish the fact that the Will was kept at the probate registry as claimed so no doubt was cast in the mind of the Court on the validity of the said Will. The above case would have had no business with the Court if the Will had been communicated through electronic medium and electronic device used to store it.

In *Agidigbe v. Danaha Agidigbi & Ors*.,[17] the testator's address of residence as written on his Will is No. 34, Dawson Road, Benin City. He devised the property on that same address to his first son with the belief that it was in accordance with Benin native law and custom which vests the Igiogbe on the first surviving son of the deceased. The Will was challenged as per the will of the deceased. The issues brought before the Court for determination include:

(i) whether the first son of the deceased is entitled to all the three buildings namely buildings 34A, 34B and 34C situated at No. 34 Dawson Road in accordance with Benin native law and custom despite the fact that the deceased lived throughout his lifetime at building 34C;
(ii) whether the wordings of the Will shall be followed strictly even when it violates the dictates of custom and goes contrary to the provisions of section 3(1) of the Wills law of western Nigeria 1958 which is applicable to the States in the west including Edo and Delta.

[15] (2003) LPELR-7211 55.
[16] (2019) LPELR-47282 CA.
[17] (1996) 6 NWLR (Pt. 454) 300.

The Court held that the first son of the deceased was entitled to only building 34C which represents the Igiogbe. The other buildings -34A and 34B cannot devolve to the first son because the deceased did not live in those buildings while alive. It held further that no clause in a Will no matter what the testator intended can override the provisions contained in the statute on Wills.

The Court had to conduct a visit to the locus-in-quo to discover the true position of the gifts contained in the said clause. Perhaps, the vital message about the Igiogbe may have been explicitly stated by the testator when instructions concerning the Will were given but omitted at the point when same was expressed on paper. The act of writing a Will which the Will making process emphasizes may not create enough room for a testator to explicitly convey his intentions as he would wish to. Some testators may need more than mere talking and writing to communicate their thoughts effectively on their Wills. Such unorthodox means of communication convey substance which is germane to a Will.

Therefore, there is the need for a change from the present Will making process to one which will convey the substance of testamentary disposition and reduce the incidence of suspicions in Wills.

The Role of Equitable Remedies in the Determination of Challenged Wills

It would appear that the Court has always noticed the limitations occasioned by emphasis on technicalities in the Will making process hence, the use of equitable remedies to give purpose to the true intentions of testators.[18] Reliance on equitable remedies may have saved Wills made in some jurisdictions where there is an enabling law which provides a backing for such exercise but the application of same appears not have been well defined to ensure reliability in the use of the instruments.

Attempts at solving the inadequacies in Wills created by the present Will making process may have started with the application of equitable remedies to noticeable defects in form which may prevent the realization of the donative intents of testators.[19] One of such remedies employed is the harmless error rule introduced in the mid-1960s in India and late-1970s and at the beginning of 1980 in Australia.[20] The rule acknowledges the importance of a testator's signature on his Will but allows the Court to enforce a Will which would have failed due to the non-inclusion of the latter, provided cogent evidence is led to show that the deceased intended to sign that Will but was prevented by circumstances beyond his control.[21] Where other requirements are found missing, there must be proof that the Will in question was meant to be the last testamentary document of the testator.[22] Thus, the testator's intent should be the focus in any consideration on whether a Will should be deemed valid or not.[23] This is a move away from technicalities to substance.

The above rule was demonstrated by the Michigan Court in *Horton's* case.[24] In that case, the Court applied the harmless error rule to give effect to the testator's testamentary desires which was conveyed in a form that was deficient of the formalities of a valid Will.[25]

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18 Horton (n. 5).
19 *Ibid*.
20 Wills Act Amendment Act (No. 2) 1975 (S. A) Section 9 (Ausl.) (amending Wills Act of 1936).
21 Horton (n. 5).
22 F Torres, 'Electronic Wills: COVID-19 Relief or Inevitable Trouble for California?' (2021) 52 *University of the Pacific Law Review*. p. 403.
23 *Ibid*.
24 925 N. W 2d . at 215.
25 *Ibid.*

The defence offered by proponents of the rule is that the Wills Act requirement is meant to serve testators' interests irrespective of the process used in obtaining a Will. Therefore, the law should accommodate rules which would promote that and same should be paramount in the minds of the Court when determining disputes on Wills.[26] They added that probate should not be denied a Will which would have been properly executed but for the testator's answer to the call of death at the point when he had to sign his Will which would have been seen if the Will making process had focused on the substance of testamentary disposition.[27]

One of the foremost criticisms against the harmless error rule is that it lacked uniformity in application across the jurisdictions where it was put into use to save any inadvertent omission in Wills that is based on technicalities.[28] In California, the rule applied to cure only defects in the signature of those who witnessed a Will.[29] The impact of the rule was felt in Colorado in Wills interchangeably signed by spouses.[30] And in Virginia, the rule was used to give effect to an unsigned Will where reference can be made to another document which was signed by the named testator and contains means by which the testator is identified.[31]

Another uncertainty in the use of the harmless error rule is in the interpretations given to its provisions by the Court as a result of the exercise of its discretion. The cases of *Probate of Will and Codicil of Macool*[32] and *In re Estate of Ehrlich*[33] portray the uncertainty in the application of the rules. The testatrix in the former case had discussions with her counsel on the amendments to be effected in the draft of her Will. The changes were tape recorded by the counsel and given to his secretary to effect the changes in the draft Will earlier presented by the testatrix. The latter neither saw the amended Will nor signed it before she died. The Court of first instant did not admit the Will to probate because it reasoned that the harmless error rule did not apply to unsigned Wills so could not be used to cure the fundamental defect in the reviewed Will.[34] Although the appellate Court of New Jersey affirmed the fact that the Will was bad because of the non-inclusion of the testator's signature in the document, it gave a different reason for the position it took.[35] The Court held that the Will would have been approved if the testatrix read through the document and sanctioned its content.[36] Thus, if the aforementioned were the case, then the harmless error rule had no place in solving the problem created by the unnecessary attention given to technicalities during the Will making process.

In the latter case, the appellate Court took a different position.[37] In that case, the testator did not sign his Will at the foot of the document instead; his name appeared at the edge of every page of the Will. The Will was admitted to probate by a majority decision. In a dissenting opinion, Justice Skillman elucidated on the proper application of the harmless error rule to Wills not conveyed in line with statutory requirements. He explained that reference was made severally in the code to the

26 *Ibid*.
27 *Ibid*.
28 *Ibid*.
29 S. 6110. Cal. Prob. Code.
30 Colo. Rev. Stat. Ann. S. 15-11-503 (2).
31 Va. Code Ann. S 64.2-404 (B).
32 A 3d 1258. 1262 (N. J. Super. Ct. App. Div. 2010).
33 A 3d 12 16-17 (N. J. Super. Ct. App. Div. 2012).
34 *Probate of Will & Codicil of Macool. Supra* (n. 44).
35 *Ibid*.
36 *Ibid*.
37 *In re Estate of Ehrlich. Supra* (n. 45).

due execution of Wills.[38] He opined that the implication of the above is that the harmless error rule would only be invoked to cure Wills that were not signed by testators as specified in the Act.[39]

If the opinion of Justice Skillman were followed, then the harmless error rule may not have provided succour to the problems it sought to eliminate because the explanation offered for the application of the rule did not remove the stress placed on rules during the Will making process.[40] The Will in the latter case must have derived its validity from the testator's name written at the edge of every page of the Will which accidentally is not different from what the Act recommends. Although advocates of the rule have argued that the insistence on testators' signatures on their Wills adds credence to the aim of statutory requirements namely, to safeguard the testamentary intentions of testators, the non-inclusion of same at the time the testator makes his Will may not necessarily negate testators' consent in their Wills because Wills may be unsigned due to ill health.[41] The harmless error rule may have whittled down the rule on where a testator should sign his Will at the time he makes his Will; it did not cure Wills of the rule of writing testamentary wishes with pen on paper as well as that of the physical presence of witnesses at the same time with the testator during attestation. Therefore, the rule appears to be limited by its insistence on technicalities which impedes the theme of testamentary disposition.[42]

The substantial compliance theory anchored on the same need of promoting testators' intents is a far cry from being the sought after solution in ensuring that the wishes expressed by a testator in his Will are minimally challenged and where unavoidably challenged, the Will making process will erase doubts that may be raised about the Will.[43]

Exponents of the theory highlighted the unenviable position of the Court in trying to strike a balance between giving effect to testator's testamentary wishes and following statutory requirements which may be a hindrance to the former as was the case in *Re Grafeman*[44] where the testator's Will was denied probate because he failed to sign it even though the Court was convinced that the testator meant the document to operate as his Will and that the intentions contained therein were from him.[45] They added that the importance placed on formal requirements could be whittled down with an understanding from the Court that the formal regulations are tools not sword in the attainment of the goals of testamentary disposition.[46] Therefore, the Court may insist on high degree of formalism but with the understanding that each case must be treated differently and that where there is failure to comply with the requirements of statute but evidence exist that the testator meant the Will to serve its purpose, then, his intentions ought to be honoured without further consideration.[47]

One of the setbacks of this theory is that it did not specify the formal requirement emphasized during the Will making process that may be modified while making a Will and the level of its compliance that would be sufficient to qualify as substantial compliance to the requirement for a

38 Uniform Probate Code. (amended 2010 and used by States which adopted the harmless error rule)
39 The Wills Act specification is that the testator's signature shall be placed in a way to show that it governs the whole content of the document not some part thereof
40 The Wills Act 1837 and its subsequent amendments provide for signature on a Will for it to be deemed valid.
41 Horton (n. 5).
42 P Hall, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent' (2019) Vol. 20:1 Nevada Law Journal. p. 349.
43 Nelson (n. 8).
44 (1968) 1 WLR 733 CA.
45 *Ibid.*
46 Nelson (n. 8).
47 *Ibid*

valid Will.[48] The theory seems to suggest on the face that some technical rules are more important than others and if that were the case, then more confusion may result from the interpretations that may be provided by the Court based on the exercise of its discretion. So, both the substantial compliance theory and the harmless error rule may not be the solution to the manifest difficulties which reliance on technicalities during the Will making process can pose at the time the Will is made open after the demise of the testator.

Perhaps, obtaining Wills through modern technology for accurate and vivid representation of testators' wishes may be a better safeguard to testamentary intentions than the technical rules that underline the present Will making process or even the application of equitable remedies which use is selective and limited. Again, the use of the latter process which is based on substance will stand the test of time with the rapid advancement in technology across the world.[49]

Features of Wills made through Electronic Process.

The application of technological advancement to the Will making process may be described as an innovation judging from the number of jurisdictions that have accepted electronic Wills either as a form to complement the existing form of Wills or as alternative to statutory Wills.[50] Jurisdictions where Wills are generated electronically include Australia, India, Nevada (these States have Electronic Wills Statutes), Florida, New Hampshire and Washington DC. (The latter States have proposed bills for electronic Wills).[51]

In the above mentioned States, Wills made through electronic processes employ any of the computer devices.[52] Computer devices could be used to make the rough outline of testators' testamentary desires or employed to either communicate testators' final testamentary intentions or to serve as storage device to the expressed intentions.[53] Therefore, in jurisdictions where computer devices are engaged to obtain Wills, the usage is inclusive in those jurisdictions hence, electronic Wills are given wide description in the report made available by the various law reform commissions set up to evaluate Wills communicated through electronic medium.[54]

The Manitola Law Reform Commission defines Wills made through electronic process as Wills made and stored exclusively with the aid of an electronic device and can be reproduced in hardcopy.[55] An expansive definition of electronic Wills is contained in the report made available by the Law Reform Commission of Saskatchewan where electronically communicated Wills are defined as testamentary dispositions made by testators through electronic processes to:[56]

i convey testamentary intentions;
ii authenticate the testamentary intentions contained therein as that of the named testator;
iii store the electronic Will that is made.

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48 *Ibid*

49 M Kimberley 'Technology and Wills: The Dawn of a New Era Covid 19 Special Edition' (2020) <s.3.amazon naws.com.> (accessed 21 July 2021).

50 K O Mrabure, 'The Advent and Legality of Electronic Wills in United States: Need for a Legal Framework in Nigeria" (2019) IJOCLLEP (1) p. 183.

51 G W Beyer; K V Peters 'Signs on the [Electronic] Dotted Lines: The Rise of the Electronic Wills(2019) February Draft *Texas Tech. University Schoool of Law.*

52 Hall (n. 42).

53 Kimberley (n. 49).

54 Peters and Beyer (n. 51).

55 Manitola Law Reform Commission, Wills and Succession Legislation (Report 108, March 2003) 13. Cited in Kimberley (n. 30).

56 Law Reform Commission of Saskatchewan' Report on Electronic Wills (Report, October 2004). Cited in Na Crous, A Comparative Study of the Legal Status of Electronic Wills (Unpublished LLM Mini-dissertation; North West University, South Africa, 2019). p. 57.

The Nevada Statute on Wills and Estate of Deceased Persons[57] defines electronic Will as the Will of a testator that is:[58]

i made and saved with the aid of computer devices;
ii exist in one accurate original copy;
iii placed under the regulation of the testator alone or persons either natural or artificial named by him to carry out that task;
iv incapable of being altered without detection;
v easily differentiated from subsequent copies that could be reproduced from the original.

The features of Wills made through electronic process expressed in the Indiana Code have in addition to the Nevada provisions on electronic Wills, specific regulations on the use of electronic devices by the maker of the Will and the witnesses to subscribe to the Will. The code emphasizes that the various subscriptions should be properly dated.[59] The Arizona Statute on electronic Wills seems to label Wills as electronic only where they are made and stored with the help of electronic devices and with proof of the authenticity of the signature of the testator made through electronic means namely by biometric means and in the absence of the latter, the stamp of electronic notary public would do.[60]

The proposed bill on electronic Wills by the State of Florida welcome with approval remote means of attestation which is achievable with the aid of an audio video devise.[61] Electronic Wills in the Virgina House Bill are defined as Wills made and stored in electronic form with the dates properly written on the Will which must also include the signatures of any two or the three of the under listed persons visibly made in the forms approved for electronic signatures. The persons who must sign the electronic Will include:[62]

i the testator;
ii a notary public;
iii attesting witnesses.

The 2019 Uniform Electronic Wills Act by section 2 subsection (4) provides that an electronic Will must not only be stored on electronic medium but must also be one which could be retrieved in a form that can be seen or understood by individuals.[63]

The characteristics of electronic Wills which can be deduced from the meanings provided above include:[64]

i they are documents which exist in softcopy and can be reproduced in hardcopy;
ii since they exist in softcopy, they can be authenticated through electronic means which include the use of electronic signature by the maker of the Will and witnesses who can perform their statutory function from a location different from that of the maker but in his conscious presence;
iii the signature of an electronic notary public can be used to replace that of attesting witnesses;
vi biometric means of identification for the testator and date on the document are distinct features of electronic Wills which aid in the prove of their authenticity.

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57 Nevada Review Statute. Ann 133. 085 (2017)
58 *Ibid.*
59 India Code Ann. (29-1-21-3-10).
60 Arizona Review Statute Ann. 14-2518 (A).
61 Florida Senate Bill 1042 (NS).
62 1403 (NS).
63 G W Beyer, 'Electronic Wills: The Changing Future of Estate Practice (2021) *Texas Tech University Sch. Of Law.* p. 4.
64 Beyer and Peters (n. 51).

Section 5 of the 2019 Uniform Electronic Wills Act succinctly puts the formal requirements of electronic Wills to include:[65]

i they must be legible;
ii they must be signed either by the maker or by another authorized by the maker to do

The aforementioned seem to indicate that the use of electronic devices during the Will making process will erase and perhaps cure most of the issues bordering on suspicion that is raised about Wills. Wills communicated in electronic form will also save the Court from the herculean task of making a right guess at the wishes made by testators

Conclusion

Wills made through the process approved by the statute are not adequate for the purpose of proving whether testamentary wishes subjected to trial are genuine wishes of a named testator or not. Also, the decision reached by the Court in the determination of a challenged Will may be a far cry from what a testator intended to bequeath to his descendants. As a matter of fact, no testator whether in heaven or under the pit of hell fire would wish for his property to be uninhabited or not put into use by members of his family as a result of an order emanating from the Court. None would have wished that the assets which were meant to assist their family members financially would be their weapon of discord and disunity. Perhaps, if they had known that the Will making process adopted would not provide enough proof when doubts arise about their intentions; many would have devised other means of distributing their property while alive.

Hitherto, the technically based process without more may have served useful purpose as the guaranteed authentic proof of the content of documents but that was in the fifteen centuries when the application of technology to transactions was sparsely known in most countries, Nigeria inclusive.[66] It was also sufficient then to present a document and its content would not be queried because the crime of falsification was uncommon. The position has changed today. The use of electronic devices while processing documents is preferred to adherence to mere formal rules because the former process helps to retain the essential part of the transaction. Thus, it provides tangible and reliable proof to an activity that is characterized with uncertainties.

A substance based process is recommended for testamentary disposition because it will help to bring back to life, activities that were done in secrecy and preserved likewise. No other evidence can be as convincing as the replay of the Will making process showing a testator physically giving instructions about his Will or his tape recorded voice during the Will making process or a distinct feature of his including his mannerism been displayed to prove or disprove a queried Will.[67] Therefore, the rapid answer to challenge in Wills is the use of a Will making process that emphasizes substance not technicalities.

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65 Beyer (n. 63).

66 M N Banta, 'Electronic Wills and Digital Assets: Reassessing Formality in Digital Age' (2020) 71(3) *Baylor Law Review*. p. 888.

80 M Bender el ta, 'The Effect of Videotaped Testamony in Jury Trials: Studies on Juror Decision Making Information, Retention and Emotional Arousal" (1984) B. Y. U. L Review. p. 445.