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MINIMISING THE INCIDENCE OF LITIGATION ON WILLS IN NIGERIA.[1]

A Will is a document of distribution of private assets which takes effect upon the maker's death.

This article examines the basis on which a Will can be challenged before the commencement or conclusion of the grant of probate and certain factors which Testators and Solicitors alike should consider in order to eliminate or mitigate a prospective challenge to the validity of a Testator's Will.

The basis on which a Testator's Will can be challenged differs from Jurisdiction to Jurisdiction. However, there are certain fundamental grounds for challenging a Will and these include the following:

1) Lack of or absence of due execution
2) Lack of or insufficient attestation
3) Mental incapacity
4) Undue influence
5) Obliteration, interlineations or alterations

1. Lack of or the absence of due execution

A Will is deemed to be valid if the signature is placed at, after, following, under, beside, opposite, or to the end of the Will.

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Section 4(1) (b) of the Wills Law of Lagos State[2] provides that no Will shall be valid unless "It *is signed by the testator or signed in his name by some other person in his presence and by his direction, in such place on the Will so that it is apparent on the face of the Will that the testator intended to give effect by the signature to the writing signed as his Will".*

In the case of *Smee v. Bryer,*[3] probate was refused on a will which had no room for any mode of execution at the end of the page of the written will even though a signature was found in the middle of a blank page that followed the written will.

However, if this situation was to arise today and it is apparent that it was due to an honest omission or an oversight on the part of the Testator, the Laws of Lagos State under Order 55 Rule18 (1) High Court of Lagos State (Civil Procedure Rules)[4] provides a way to avoid a problem of this nature where a proving executor can provide "*an affidavit as to due execution from one or more of the attesting witnesses or if no attesting witness is conveniently available, from any other person who was present at the time the Will was executed."*. The recommended approach is that the affidavit as to due execution should be limited to the attesting witnesses only and it should preferably be at the point of attestation.

2. Lack of / Insufficient Attestation

Section 7 of The Wills Law of Lagos State[5] provides that *"if any person who shall attest the execution of a Will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof such Will shall not on that account be invalid"*.

The most common basis for the declaration of incompetency of an attesting witness will be that he or she was underage at the time of attestation[6] and this fact alone does not void the will.

However, it is generally accepted that the attesting witnesses must attest to and subscribe to the Testator's will in the presence of the testator.[7] Thus, it is presumed that witnesses need not sign in the presence of each other.

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2 Cap W2 LFN 2004.

3 (1884) 1 ROB; BEC 616 at 623.

4 C 144 2004.

5 CAP W2 2004.

6 T.O.G. Animashaun and A.B. Oyeneyin, *Law of Succession, Wills and Probate in Nigeria*, MIJ International Publishers Limited, 2002, p. 131.

7 Section 8, Wills Law of Lagos. [citation]

Where a Will contains no attestation clause, or the attestation clause is insufficient or where it appears that there is some doubt as to due execution, it can be a good ground for contesting the validity of the Will.

There are certain checks that should be put in place to ensure that the Will is infallible on this ground.

If a Will contains a sufficient attestation clause, the affidavit of attesting witnesses to the Will[8] may be dispensed with. However, where a Will contains no attestation clause, or the attestation clause is insufficient or where it is doubtful to the Registrar that there was due execution, he shall require an affidavit from at least one of the two subscribing witnesses before admitting the Will to Probate.

We also recommend that persons unfamiliar with the Testator in his lifetime or who otherwise have no benefit under the Will be attesting witnesses thereof. This can be inferred from the provision in section 8 of the Wills Law of Lagos State[9] which is to the effect that a person who signs/attests the execution of a Will shall not benefit from the Will and neither shall his or her spouse benefit from the Will except it is for the repayment or settlement of a debt.

It has also been propounded that where there is no evidence of who the attesting witnesses may have been, evidence of the applicants for Probate or the Executors named in the Will or the Solicitor who prepared the will may be required.[10].

3. Obliteration, interlineations or alterations

An apt description of this will be borrowed from Dr. Lushington in the case of *Greville v Tylee.*[11]

> "*It is not a mere difference of ink or handwriting, which would constitute any of the acts done according to the true meaning of statute. The mere circumstance of the amount or name of the legatee, inserted in a different ink, would not only constitute obliteration, interlineations or other alteration. Blanks may be supplied and in a different ink because the Will may very well be brought with blanks to the testator and then fill up; no presumption could arise in such a case against the Will having been executed as it appears. But the case is*

8 In form of appendix IV to the application forms for the Grant of Probate in the Probate Division of the Lagos State High Court.

9 Footnote 1 ante.

10 J. Ade Mosanya, Common Form Probate Business Mbeyi and Associates Publishers, 2007 p. 60.

11 (1851)7 MOO PC at p. 327.

different when there is an erasure apparent on the face of the Will, and when that erasure has been super-induced by other writing. In such a case, there is an obliteration and something more, which constitutes an alteration and then the question arises, whether this was done before the execution of the Will or not? We apprehend it to be now settled that whoever alleges such alteration to have been done before the execution of the Will is bound to take upon himself the Onus Probandi''

The general rule is that no obliteration, interlineations or alteration made in a Will after due execution by the Testator will be valid except the alteration is authenticated by the Testator and the subscribing witnesses by means of execution and attestation at the portion where the alteration is being done. Authentication in this mode simply refers to signing against the portion or margin or on some other part of the Will close to the alteration so that it is apparent on the face of the Will that the Testator intended to amend that portion of the Will.

However, to avoid the Executors' passing through the additional burden of proving the Testator's Will where there are evidence of errors, it is tidier to prepare a fresh copy of the Will in its place or to attach a Codicil[12] to the previous Will.

4. Undue Influence

A person who is close enough to the Testator especially at the time of death is regarded as more likely to influence the said Testator in order to overcome his independent will to write down his own wishes.

Where a person uses undue influence in obtaining a benefit under a Will, that gift automatically fails. Thus the provision of Section 8 of The Wills Law of Lagos State[13] which precludes a witness or his/her spouse from benefiting under the Will also reinforces the importance of the consideration of undue influence.

In any case, this point should not be confused with a Testator's show of benevolence, gratitude or extreme fondness towards a beneficiary because undue influence is *''pressure....so exerted to overpower the volition without convincing the judgement''*[14] and it is usually proved by facts on the balance of probabilities by the party alleging it to the satisfaction of the court.

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12 A codicil is simply a document showing alterations in a Will and executed in the same manner as a Will

13 See footnote 1 ante.

14 HALL v HALL [1886] LR 1 P and D 481.

5. Mental Incapacity

This has been said to be one of the most notorious means of challenging the validity of a Will. It is the general rule that for a person to make a valid Will, he must be of sound, mental capacity. A lunatic or a person who is considered to be mentally unstable is excluded from disposing of his estate through a Will. An exception occurs where a Testator who otherwise suffers from mental disorder and possesses a mind sufficiently active at the time of executing his Will to make him understand and appreciate his action.[15]

If a duly executed Will is rational on the face of it, the court will presume that the Testator had testamentary capacity. Also, expert medical evidence on the Testator's mental capacity is more likely to be given to assist the court in its decision as to whether or not there was sufficient Testamentary capacity at the time the Testator executed his Will.

The next question will be how does a Testator who was known to be mentally unhealthy or otherwise medically unfit for a certain period in his life rebut this presumption in order to forestall or discourage litigation premised on this point?

There have been real-life cases where it has been advised that the issuance of a medical certificate accompanied by an affidavit deposed to by an independent medical director in a government approved hospital would be adequate and appropriate in the circumstance. Such affidavit could be drafted as follows:

> **"*That I Dr. Ade, today examined and found that notwithstanding the Testator's medical condition, he has not suffered loss of memory, he has been alert and of full mental capacity in the execution of his last Will and Testament. All his faculties are unimpaired.''***

It is also recommended that more than one medical doctor may examine the Testator and each of them depose to an affidavit to this effect.

Also, an affidavit by the Testator confirming his due execution of the Will in the following terms may appended to the will:

> *"I must also state that i am not senile, nor is the balance of my mind impaired. Attached to this document which is my last Will and Testament are two affidavits signed by two doctors. These doctors were hitherto unknown to me before the date of the execution of this*

[15] P.A. Oluyede, *Nigerian Law of Conveyance*, Ibadan University Press, 1978 p. 67.

Will and are therefore uninterested parties. Two general practitioners and two psychiatrists examined me on the morning and afternoon of 17th March 2018, prior to this will being executed on the same date".

[The results of their examinations are contained in the affidavits and I confirm that I am in excellent condition and perfect health, that I am mentally stable, and that none of my faculties are impaired].

In conclusion, it is important that all individuals plan their Estates as a result of the impact usually created within the family circle in terms of inheritance in an environment such as ours after death occurs[16]. It is also important to note that planning your Estate and writing a proper Will does not occasion a reduction in the cost of probate, it however guarantees effectiveness, privacy and a reduction in the length of time expended in obtaining a letter of administration, where there is no Will.

For further information on this article and area of law, please contact **Adetola Ayanru** at:

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[16] Local peculiarities such as culture, tribe, religion, etc.