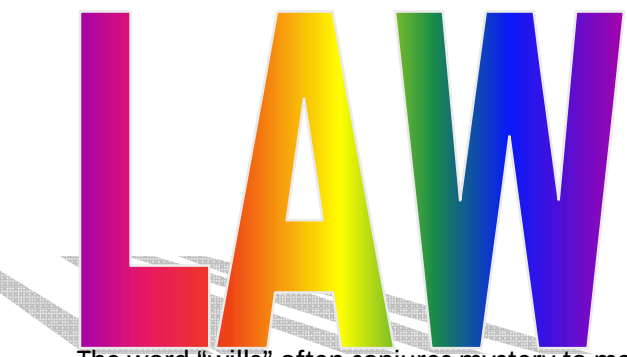

TESTAMENTARY DISPOSITION OF THE ESTATE OF THE DECEASED: A TWO WAY CHARACTERIZATION: THE COMMON LAW AND THE NATIVE CUSTOMARY LAW.

BY COMR NDUPU GODWIN. A

The word "wills" often conjures mystery to many a man presumably because it relates to the affairs of the dead. By definition, a will is a testamentary documentation voluntarily made and meant to be executed according to law by a testator with sound disposing mind, wherein he disposes his property, both real and personal, and wherein he gives other directives as he may deem fit, including directions for burial and funeral obsequies. Complete absence of undue influence is fundamental in the making of a will to avoid invalidation. A will because of its operational nature is described by law experts as being ambulatory, that is to say, it cannot take effect until the death of the testator. Thus, if a legatee dies before the testator, the gift lapses right away. Another nature of a will is that it is revocable or alterable by the testator by:

I) Subsequent will or codicil that expressly or impliedly revokes the earlier will.

ii) By outright destruction of the will with the intention to revoke same.

iii) By subsequent marriage (other than customary marriage).

CAPACITY TO MAKE A WILL

Does any and every person have the capacity to make a will? Generally speaking, every person, man or woman has the capacity to make a will, although law takes cognizance of the following:

- **LEGAL INFANT**: - A person under 21 years cannot make valid will unless in military service.
- **MENTALLY DISABLED PERSON**: - A will is not valid unless, at the time of making the will, the testator had a sound disposing mind and memory. In this respect, however, there is always a presumption, which presumption is irrefutable, that the testator had capacity.
- **BLIND PERSONS AND ILLITERATES**: - A blind person or an illiterate can make a will on the proviso that a special form of attestation clause known as **JURAT** is to be used to show that the will was read over to him in the presence of witnesses and he appeared perfectly to understand.
- **PRIVILEGED WILLS**: - In law, soldiers, sailors and airmen have special privileges while in actual military service, to make wills without complying with the strict requirements of the wills Act 1837 and the wills law of 1959.

WHY THE HULLABALOO ABOUT MAKING LAW

If a dead man left a will, law says he has died testate. If he made no will, he will be said to have died in testate. Now to the above quare, it is common in our society that when a man dies, a plethora of problems is ripped open in the matter of succession to the man's estate even if the estate is nothing to write home about. The incident is like opening a Pandora's box whose contents start operating immediately after death in any family irrespective of the status of the deceased, rich, middle-class or downright poor. It is worse in homes with flamboyant material acquirement where it can lead to further catastrophes including ritual killing. If there is any difference in the dynamics that follow, it is a difference in degree but not of essence.

In this deluge of the conflicting panorama, our source of refuge or our shelter is in the legal instruments called wills. A will therefore has the following advantages.

ADVANTAGES OF WILL

i) It excludes the rules of inheritance under the native law and custom. Picture a case where a man dies without a will and he is in good standing estate-wise. He is survived by six children, four boys and two girls. The first son, forty-five years of age at the time of the father's death, becomes the owner of the property by the rules of inheritance. During the 45 years of his life, he was a Casanova who was busy doing nothing and doing it very well. The fate of the property left by the deceased father is your guess as well as mine.

ii) It excludes statutory rules of inheritance, for if one fails to make a will, statute provides the modus of sharing the deceased property postmortem.

iii) A will properly drafted shall have reliable executors and trustees who will not only carry the injunctions of the will to the last letter but also to the spirit. The trustees/executors are people who do not care who gets what but will only ensure that each person gets what belongs to him. A testator, therefore, may use his will to show gratitude and affection to devise property to people who deserve them provided proper people are chosen as executors. Note that nothing precludes a testator for devising part of his property to his paramour (male or female lover, especially one to a married person).

iv) A will saves the circuitous, cumbersome and expensive issues of letters of administration, which no will involves.

v) An executor starts acting from the death of the testator and therefore, there is no break in the life of the estate of the deceased but in the case of administrators under intestacy, they must wait for the court to grant them the letters of administration before they start to administer the estate.

vi) A will can appoint a testamentary guardian for the infant children of the dead.

vii) A will can include directions for funeral.

viii) A testator who at the end of the day achieves the above has his mind put to rest because he feels he has done his part and he has chosen competent hands to manage his affairs in his absence.

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