



ELECTRONICALLY PRESERVED WILLS: A WARRANTY FOR CONFIDENTIAL AND TIMELESS FINAL WISHES*

Abstract

The power of a Will to serve its purpose depends on whether the testators' final wishes have been communicated in accordance with statutory provisions and whether the wishes have been preserved in substance and form to convey only the intentions of testators. The process of making a Will and that of preserving the said Will compliments one another and a neglect of the latter process may mar the actualization of the document containing a well communicated last wishes. The traditional preservation mechanism appears to impede some Wills from being operational, yet, the situation can be prevented. This article employs doctrinal research method in its analysis of the preservation of Wills and found that the use of electronic devices to preserve Wills will ensure that they remain confidential and ageless until when they are read. The article recommends newness in the safety and storage of Wills through electronic preservation by legislative amendments in the statutes on Wills. This article has established the need for Wills to join the modern method of storing information which excludes interferences to the document.

Keywords: Electronically Preserved Wills; Warranty; Timeless; Final Wishes; Testate Succession.

1. Introduction

Many seem to have perceived that the rules of testate succession have no comparison when used in the distribution of the property that is left behind by of the deceased.¹ The key to such distribution is the Will put together by the deceased before his death. A testator's Will contains inter alia instructions about his final wishes in respect of the distributions of his possessions to persons he so desires and in the quantum he deems right considering the peculiarities of each benefactor.² The Will personifies the living testator though he is non-existent in the physical world where his document controls the affairs of the living. Since, the Will speaks the mind of the testator, a near perfect devolution of property will result from its use and same cannot be said of the rules of intestate succession.³

The wishes expressed in a Will are amendable thus; the Will which represents the final desires of a testator is expected to accommodate the most recent happenings in the life of the maker before his death.⁴ The ability to adequately capture happenings in the life of a testator shortly before his demise may be found in the use of modern technological devices. The case of *In re Javier Castro*,⁵ shows how a testator can express his wishes in his Will at the last moments of his life. In that case, the testator knew he would die for rejecting blood transfusion while in the hospital. He took advantage of the brief healthy moment he had and used the electronic device of one of his relatives who visited him in the hospital to put down with the aid of a stylus pen his last wishes in softcopy. He died whilst still in the hospital but shortly after that visit which helped him to produce a Will. Perhaps, if the testator had waited a little longer to have access to physical materials to express his desires, his last wishes may have died with him. Again, if he had made a Will prior to his illness and nursed the intention of effecting changes to the Will as he lived on

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¹ RK Weisbord 'Wills for Everyone: Helping Individuals Opt Out of Intestacy' (2012) Vol. 53 *Boston College Law Review* p. 884

² OM Jamgbadi Law of Customary Inheritance in Edo State in A D Badaiki (ed) *Landmark in Legal Development* (Nobility Press Ltd, 2003) 293

³ Weisbord (n. 1)

⁴ WF Frank *The General Principles of English Law* (4th edn.; George G Harrap & Co. Ltd. 1969) 151

⁵ (2013) ES00140 (Lorain City Ohio Court of Common Pleas)



after his recovery, his hospitalization and subsequent death may have prevented him from reviewing his Will. The day to Day review of Wills is needed to capture testator's last life and last wishes. The above is achievable with the aid of an authentic and easily accessible electronic device. The advent of technology as well as the continuous development of its appliances has made electronic devices easily available and for use in bringing into existence, facts which persons may desire to be published and preserved in the state created by them.

A Will is not only required to be original in form but it is also presumed to remain ageless until it is unsealed.⁶ Thus, in the preservation of a Will are two major tasks namely; maintaining its confidentiality and ensuring that the document remains intact as made by the testator. The features of secrecy and completeness appear to have marked the Will a testator made and preserved in electronic form.⁷ The Will was made on 30/12/2012 and stored in a Samsung Galaxy Tablet that was locked with a password.⁸ The electronic device used was handed over to one of the testator's relatives who visited him in the hospital but it could not be opened because the password was unknown to others. The Will was accessed after the death of the testator when the password was made available.⁹ The authenticity of the Will was approved by the Court. It held *inter alia* thus;¹⁰

- (i) that there is no discrepancy in the document described as the testator's Will contained in both hard and soft copies and
- (ii) that the electronic device used in preserving the Will would not have allowed for any form of interference because it was well secured with a password.

The traditional method through which Wills are stored in probate registry may not guarantee the twin function of preservation which is necessary for the document to have a legal status. The method which is still in practice is also costly and clumsy. For example, huge amount of money is spent on yearly basis for the purchase of filing equipment needed to carry out the physical storage of Wills.¹¹ The space earmarked some years back for shelves and cabinets where Wills are kept needs to be expanded continually to accommodate the increasing number of Wills which are brought for safe custody at the probate registry.¹² Filing personnel are also recruited from time to time with regular training and retraining to ensure effective job delivery which at the long run may not be achieved. The money put into such method of storage can be saved where digital storage is used to preserve Wills.

In addition to the unnecessary waste of capital which characterizes physical and manual storage system, is the slow and hectic manner through which documents so stored are be retrieved. It may take minimal effort to retrieve one Will at time but where large number of Wills is needed at the same time and no proper filing system is put in place, it may take months if not years to get information about a Will. The above is a major handicap with the traditional filing system which the use of technological devices appears to eradicate. This article explores the use of electronic devices to preserve final wishes of testators while securing the basic features of Wills. The article sets its purpose in five parts. Part I contains the introduction. Part II contains the custody of Wills under the traditional mechanism. Part III examines the processes under digital management of

⁶ Weisbord (n. 1)

⁷ *In re Javier Castro* Supra (n. 5)

⁸ *ibid*

⁹ *ibid*

¹⁰ *ibid*

¹¹ S Shaheen 'Storing Wills: Digitalization in Modern Times' <<https://www.mills-reeve.com>> accessed 3/4/2024.

¹² *ibid*



Wills while Part IV discusses the demerits of electronic preservation of Wills and addresses available solutions to them. The conclusion to the article is stated in Part V.

2. Preservation of Wills

A Will takes effect after the death of the testator.¹³ Ironically, death which marks the end to a testator's life on earth is also what bestows life to the lifeless document made by him while alive. The same lifeless document gives him an opportunity to speak from the grave and be heard by the living who has no choice but to accord his wishes the utmost respect provided they were expressed in line with the requirements of statutory provisions on Wills.¹⁴

Before the death of a testator, his donative intents namely, his named beneficiaries as well as the quantum of his estate which would go to each of his beneficiaries is shielded against exposure. The element of surprise or disappointment which follows the unsealing or reading of a Will may be traceable to the fact that the information it contained is kept in utmost secrecy during the testator's lifetime. Perhaps, a testator draws inspiration from this element of confidentiality when he pours out his heart in his Will about his misgivings to those he believed wronged him or gratitude to those who showed him love while alive. The testator translates his feelings in the nature of gift each beneficiary gets and he does that without mincing words because he is sure that the information contained in his Will would be concealed from all until when it is publicly read.¹⁵ The secrecy of his Will seems guaranteed by the law and it becomes a paramount task as soon as testamentary intentions are expressed in accordance with the specifications of the law. After the Will is made, extra care is also taken to ensure that the content of the document is free from external input which the testator never solicited for.¹⁶ Hence statutory provisions are put in place to safeguard the custody of Wills whether under the traditional mechanism or through the use of modern technological devices.¹⁷ An effective mechanism will be one which promotes the intendments of statutory provisions.

2.1 Custody of Wills under the Traditional Mechanism

The probate registry is one of the places where a testator can deposit his Will for the purpose of preserving same. A good number of Wills is stored in the probate registry not just because it is traditional to do so but also because of the presumption (which is rebuttable) that the safety and validity of such Wills is guaranteed. Thus, once a Will or its amended form is signed by the maker and his witnesses which is an indication that the Will making process is completed; the Will is taken to the probate registry by many testators before their death or by their counsel who must give report on same with a good poof.¹⁸ The probate registry may be described as the last bus stop for Wills containing the final wishes of testators.

¹³ I Sagay, *Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries* (Malthouse Press Ltd, 2006) 126

¹⁴ *ibid*

¹⁵ *Federal Administrator-General v Oladipo Ajana Johnson & Anor.* (1960) LLR 290. The Will in that case was challenged because the testator distributed his estate between one of his children and his grandchildren born by his other children. The Court found no query on the testator's decision. It held that the action of the testator showed that he transferred the love and affection he once had on the children whose name were not mentioned in his Will to his grandchildren they had begotten. DHorton, 'Tomorrow's Inheritance; The Frontiers of Estate Planning Formalism' *Boston College Law Review*, (2017) Vol. 58:2, 548

¹⁷ Order 54, Rules 16 & 17 of Delta State High Court Rules (n. 50) provides among others that a Will lodged in probate registry shall be kept in probate vault with proper identification mark.

¹⁸ OB Idhugwe, 'A Seminar Paper on the Practice and Procedure of Registration of a Will in the Probate Registry' (2012) A *Publication of Probate Department Asaba* p. 1



A Will is accepted at the probate registry for preservation after it has been registered. The registration procedure entails the following:¹⁹

- (i) physical inspection of the Will to determine whether it has been duly executed and thus can constructively be called a Will;
- (ii) the High Court seal is placed on the envelope containing the Will as submitted by the testator or his counsel;
- (ii) candle-like substance is used to solidify the flap of the envelope containing the Will to prevent its content from being tampered with;
- (iv) an index number is assigned to the Will which is used for the retrieval of the Will when needed;
- (v) there is payment of fee;
- (vi) the details of the Will namely; the testator's name and address, the name of his counsel and address, the date the Will was registered and lodged, lodgment number, fees paid for lodgment, will be entered in a register that is created for such purpose.²⁰

In spite of the measures outlined above, the effectiveness of the system to keep Wills safe and intact as made by testators and reproduce same when the need arises have raised query in many instances. In *Amadi v Amadi & Anor.*,²¹ the testator's Will was challenged by a fraction of the testator's family because a search conducted by them shortly after the demise of their father at the probate registry, Owerri in Imo State of Nigeria showed that the deceased did not leave a Will, only for the same office to produce a Will that was ascribed to their late father much later.²² The Court denied probate to the Will not because the integrity of the Will was questioned but because those who laid claims to the existence of the Will failed to substantiate their claims as required by the provisions of section 133 of the Evidence Act, 2011 which is to the effect that the proof of existence of a document is the responsibility of the party who will suffer if the document were disregarded.²³

The storage and retrieval process of the Will under review created doubts which resulted in its query. First, the probate registry denied the existence of the Will when a search was conducted after the death of the testator but later admitted being in custody of same Will when it produced it for reading. The ineffectiveness of such system is glaring and that calls for an improvement.

In the case of *In re Estate of Ciaffoni*,²⁴ doubts were raised about the authenticity of the testamentary wishes expressed in all the pages of the Will retrieved from probate registry.²⁵ Those who contested the Will averred that some pages of the original document were removed and replaced with sheets which contained the wishes of some persons other than the maker of the Will.²⁶ The Court refused to admit the Will to probate because of the doubts raised on the document believed to have been safely secured in the probate registry. The question is, would it have been

¹⁹ *ibid*

²⁰ *ibid*

²¹ (2017) 7 NWLR (Pt. 1563) p. 108 SC

²² *ibid*

²³ *ibid*

²⁴ 446 A. 2d 225, 225-26 (Pa 1982)

²⁵ *ibid*

²⁶ *ibid*



possible for the Will in the probate registry to be tampered with if the two elements of preservation (safeguarding confidentiality and originality) were observed and given attention in the system used? The answer is no and that again shows the urgent need for a change from the old preservation mechanism to one which in line with modern reality namely; the use of modern technological devices to safeguard Wills.

3. Digital Management of Wills

In 2018, the government of Nigeria through one of her States, embraced digital management of Wills when it made automated probate registry a possibility for the preservation of Wills.²⁷ The government found the need to change from the physical storage system because of its numerous disadvantages one of which is the high level of corruption which the system encourages.²⁸ It outlined the merits of digital preservation of Wills to include:

- (i) a reduction in the volume of human errors that are preventable;²⁹
- (ii) a decrease in the incidence of fraudulent practices by staffers of the registry;
- (iii) an improved and easy service delivery mechanism.³⁰

Electronic storage of Wills have long started in some jurisdictions through the help of electronic devices such as notepads, tablets, iPhones, audiotape recorders, computer disc and so on.³¹ Each of the electronic devices mentioned above has in-built security system which when put into use denies persons other than the owner or those authorized by him access to the document that has been created and saved in it.³² In *MacDonald v. The Master*,³³ the testator was a senior information technology specialist at International Business Machines in New York. He made his Will electronically and stored it on his employer's hard drive computer. Before committing suicide, he left notes in his own handwriting indicating where his electronic Will was saved and the file name under which it was saved.³⁴ His Will was located with the above information and its content was unaltered.

It would have been difficult for persons other than the testator to know the content of the Will because his employer's hard drive computer provided a safe custody for the document. It is also possible that the computer in which the Will was stored would have been put into other uses but the Will remained secured and not tampered with because the password through which it could be accessed was known only to the testator who gave it out when he deemed it right to do so.³⁵ Furthermore, where modifications are made, the in-built facility in the electronic device used would reveal the date they were made,³⁶ help recover the information that may have been erased and retain the peculiar feature of the testator that would help to link him to the Will he made.³⁷

²⁷ Olasunkanmi, 'Lagos State Judiciary Automates Probate Registry' *Lagos State Government Official Website* (2018) accessed 4 April 2024

²⁸ *ibid*

²⁹ *ibid*

³⁰ *ibid*

³¹ KO Mrabure, 'The Advent and Legality of Electronic Wills in United States: Need for a Legal Framework in Nigeria' (2019) *IJOCLLEP* (1) 183

³² D Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' *Boston College Law Review*, (2017) Vol. 58:2, 548

³³ (2002) (5) S.A. 64 (4) South Africa

³⁴ *ibid*

³⁵ *ibid*

³⁶ *Alan Yazbek v Gosh Yazbek* (2012) NSWSC 594

³⁷ *ibid*



The case of *Mahlo v Hehir*³⁸ is another case relating to an electronically preserved will. The Will was saved with the full name of the testatrix.”³⁹ The computer was accessed through the password testatrix made available to her father two weeks before her death.⁴⁰ The softcopy of the Will was not admitted to probate as the testatrix’s Will not because doubts were raised about the proper custody of the electronic Will but because part of the testimony given during trial is that the testatrix showed her father a printed copy of the Microsoft word document on the day she divulged the information about her password but no paper copy was found after her death.

The Court recognized the Will made in Microsoft word and stored in a computer device to be a valid Will which can serve as an alternative to a statutory Will that is stored in any physical space be it the probate registry or any other confidential place. Thus, it held that there is a presumption of revocation of the Will made and stored in electronic form because the paper copy which was last seen with the testatrix could not be found after her death. The decision of the Court in that case appear to support the fact that a valid Will can be saved and stored in a computer device. Perhaps, the Court interpreted the soft copy as complimentary to the printed one hence; it held that the unavailability of the printed Will showed that the testatrix wanted it revoked and that same should apply to the soft copy that remained in her computer.⁴¹ The latter differ from the decision reached by the Court in a different jurisdiction where the inability to locate the printed copy of a testator’s Will was held insufficient to invoke the softcopy of the same Will which existed in a notepad.⁴²

Electronic storage can serve as a good alternative to physical storage mechanism and still preserve the confidentiality of testamentary intentions because a Will preserved in softcopy is readable at all times provided the information is continually downloaded and stored into a device that can be accessed at the time in question. The above alone may put many persons with ulterior motive off as much time and energy will be expended in order for them to achieve their goal.

The Court in Australia may have reasoned that the use of electronic devices to store Wills give better protection to the testamentary intentions contained therein than where same conveyed in paper form are kept in files which are easily accessible to persons with ulterior motives towards the wishes of a testator and through the connivance of some staffers of the probate registry could bring same to be. Therefore, the Court had to review its earlier decision in a latter case brought before it in the year 2000. The said case where the Court took a different decision presented similar facts as that considered in 1983 where it gave a strict interpretation to the statutory requirements for Wills and denied probate to the Will of a testator recorded in a tape and put in a signed and sealed envelope that was left in the testator’s home but had the instructions that the tape shall only be played after the death of the testator.⁴³ In its earlier judgment, the Court refused to approve the electronic means used in preserving the Will.

However, a better understanding of digital management of documents seems to have prevailed in the Court’s evaluation of the latter case. The facts in the case of *In Treacey & Ors. v Edwards; Estate of Edwards*⁴⁴ where the Court reviewed its decision are that the testator audiotaped his Will and lodged the audiotape and cassette player at probate registry for safe custody. The electronic Will that was stored through that medium was admitted to probate because the Court

³⁸ (2011) Qd R2 43 p. 1 (Austl)

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² *Alan Yazbek v Ghosn Yazbek supra* (n. 36)

⁴³ *In re Estate of Reeds* 672 p. 2d 829. 833. (Wyo. 1983)

⁴⁴ (2000) 49 NSWLR 739 (Australia)



held that the electronic devices employed offered good protection to the testamentary intentions contained in the Will and thus, preserved the integrity of the Will.⁴⁵

As knowledge in the application of the technological devices used in storing Wills keep improving day by day, more jurisdictions have begun to accept electronic storage as a valid preservation system made in accordance with enacted laws whether for statutory or electronic Wills.⁴⁶ There are also private firms which have created on-line platforms for would-be testators without legal background to make their Wills themselves unaided and have same stored for them electronically.⁴⁷ The testators would access the site of the firm of his choice; type appropriate information on the blank spaces provided and write their identification markers.⁴⁸ The space earmarked for signature and that of the witnesses would be printed out and emailed to the testator.⁴⁹ The latter would ensure that the relevant signatures are signed and thereafter, scan the document back to the firm through their site.⁵⁰ The site is created to produce electronic Wills that are properly executed and would subsequently be left in the safe custody of the firms for a fee.⁵¹

The legal status of Wills made through the above means has not been determined by the Court and so no authoritative statement which is within the purview of this paper can be made about them for now. One of such cases which would have provided judicial authority to Wills made in that form and stored by designated custodians was not signed by the testatrix and the witnesses to the Will before the testatrix passed on so, the integrity of the Will was not made an issue before the Court.⁵² If the query on the Will had been on the electronic devices employed and the way they were put into use, then there would have been a categorical statement from the Court on the status of Wills stored in electronic form.⁵³ The hint given by the Court in the case for the authentication of Wills made and stored in electronic form to be left for the legislation to handle seems to have been adopted in some jurisdictions where electronic Wills statutes have been enacted or bills on same are pending before the legislation.⁵⁴ The above safe ground has either been ignored or circumvented in some jurisdictions to meet the goal of present generation. Thus, Wills stored in electronic form have been pronounced valid by the Court relying on the proviso in the statutes on Wills which permits the extension of the legal recognition given to electronic storage of documents in other aspects of law to the use of same means for testators' final wishes.⁵⁵

The absence of electronic Wills statute has equally not operated as a bar in the creation and storage of electronic Wills in some jurisdictions.⁵⁶ In *re Estate of Javier Castro*,⁵⁷ the Ohio Court referenced the Nevada electronic Wills statute to pronounce as valid, the Will a testator

⁴⁵ *ibid*

⁴⁶ Australia, Arizona, Nevada and Indiana started with harmless error rule which excused minor defects in formal requirements and later electronic Wills statutes were enacted but before the statute, electronic Wills were made and admitted to probate in those jurisdictions.

¹¹⁰ C Larson, 'A Need for a Will? Often, There's an Online Way. Quicken & Legalzoom Firm' *New York Times* <<http://www.nytimes.com>> accessed 14 October 2019

⁴⁸ *ibid*

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ *ibid*

⁵² *Litevich v Probate Court* (2013) Conn. Super Lexis 1158; 2013 WL 2945055 (Super Court New Heaven District)

⁵³ Mrabure (n. 31)

⁵⁴ Indiana Electronic Wills Statute 2018; Arizona Electronic Will Statute, 2019; State of Florida Senate Bill 1042; Virginia House Bill 1403

⁵⁵ The electronically preserved Will in *Taylor v Holt* 134 S. W 3d 830 (Tenn. Ct. of App. 2003) was considered valid by the Court when it relied on the wide interpretation given in the statute on Wills for its preservation in the way other legal documents are stored through electronic means.

⁵⁶ Ohio; Michigan in United States

⁵⁷ *Re Estate of Javier Castro supra.* (n. 5)



made and stored in electronic form. The Court compared the relevant provisions contained in the electronic Wills statute with the provisions in Ohio statute on Wills to arrive at its decision.⁵⁸ The above shows that some states have refused to allow the provisions in their legislation on Wills to be a clog in the wheel of progress in the digital management of Horton,⁵⁹ the Michigan Court of Appeal admitted as a valid Will, a farewell note saved and stored on the testator's phone because according to the Court, the document contained the basic statutory requirements of a Will and its preservation method retained both substance and form of the testator's final wishes and both criteria are sufficient enough to pronounce the Will valid not minding the medium of communication employed by the testator.⁶⁰ The State Wills which seems to be in line with modern global practices.⁶¹ Also, In re Estate of Michigan is yet to enact an electronic Wills statute.

The foregoing seems to illustrate the urgent need for a change from the traditional Will making process to one which engages the devices of today's digital appliances used in other spheres of life to encourage the attitude of do it yourself and reduce the dependence on persons for private confidential matters such as the storage of Wills. With today's iPhone and other Android devices, testators can choose which application they wish to use for the preservation of their vital documents namely; Wills. The daily modifications in electronic devices have continued to increase digital literacy amongst the people whose high dependence and reliance on them may not be questioned in the near future.⁶² The time to join the revolution is now not when it becomes too late.

Different jurisdictions have demonstrated their eagerness to join the current digital trend in the preservation of Wills. In Re Yu,⁶³ the Supreme Court of Queensland granted probate to a Will made and stored on the testator's iPhone. The content of the Will was not tampered with just as the one stored on a video digital disk remained intact as created by the testator.⁶⁴ Perhaps, the uploading of video Wills to YouTube may be done sooner than imagined and that may be another electronic custody for Wills because documents stored in the cloud becomes inaccessible to others except as authorized by the owner of the document.⁶⁵ The experiences of Ricky and Diane Rush⁶⁶ and Peggy Bush⁶⁷ recounted below illustrate vividly how the element of confidentiality would be highly guaranteed in Wills if stored in the cloud through the services of internet providers.

Ricky and Diane were the parents of Eric. The circumstances surrounding Eric's death was difficult for his parents and even the police to understand although autopsy report linked the cause of his death to injuries sustained when the gun he triggered exploded. His parents followed the police advice and sought from one of the internet providers, access to their son's social media account after they failed to access same without the owner's password.⁶⁸ The deceased parents'

⁵⁸ K B Gee, 'Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators' (2015) *Bar Journal Features*. Appendix A.<<http://lawreformcommission.sk.ca/electwills>> accessed 18 August 2020

⁵⁹ (2018) No. 339737, WL 3443383

⁶⁰ *ibid*

⁶¹ M Kimberley, 'Technology and Wills: The Dawn of a New Era Covid 19 Special Edition' (2020) <[s.3.amazonaws.com](https://s3.amazonaws.com/)> accessed 21 July 2021

⁶² GW Beyer and CG Hargrove, 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?' *Ohio Northern University Law Review*, (2007) 867

⁶³ (2013) QSC 322

⁶⁴ *Mellino v Wnuk & Ors* (2013) SQC 336

⁶⁵ D Geere, 'Death 2.0: The Future of Digital Wills, Wired' <<http://www.wired.co.uk/article/death-20-the-future-of-digital-wills>><<https://perma.cc/D2LM-HB78>> accessed 11 February 2020; 1: 30am

⁶⁶ F Kunle, 'Virginia Family, Seeking Clues to Son's Suicide- Wants Easier Access to Facebook'. *Wash Post* (17 Feb. 2013). Cited in D Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalities' *Boston College Law Review*, (2017) Vol. 58:2, 548

⁶⁷ C Matyszezyk, 'Widow Says Apple Told Her to Get Court Order to Secure Dead Husband's Password' *CNET* (18 Jan. 2016)

⁶⁸ Kunle (n. 66)



request was turned down because the agreement between the deceased and the particular internet provider was exclusive to the parties and could not be divulge to a third party no matter the relationship which exists between the latter and the deceased.⁶⁹

The above sets electronic medium apart as the ideal means for the preservation of confidentiality in Wills. Access to Eric's document stored in the internet was later allowed only to messages he received shortly before his death and that was after much pressure was mounted on Facebook.

Peggy's experience seems to have left a more authoritative procedure to follow where there is the need to access and perhaps recover a document that is stored in the cloud.⁷⁰ The story goes thus: Peggy and David Bush lived happily until the death of David. The widow wanted to fill the vacuum created by the demise of her husband-David and so applied to Apple for update on the couple's iPad, the card game she often played with the deceased but Apple refused. The latter maintained that the application would only be honoured when there is a court order instructing the internet service provider to act as ordered.⁷¹

The law regulating the operations of these service providers is the basis for the anti-externality feature which documents preserved through such means enjoy and if that were the case, then, Wills that are stored electronically would fit well into the goal of testamentary disposition which is to protect the intentions of testators from the inputs of others.⁷² The Stored Communication Act can be domesticated in countries yet to embrace electronic preservation of Wills with modifications made to accommodate their peculiar circumstances where necessary. For example, there may be need to include in the law that a testator who wished to engage the services of internet service providers would name one or two trusted persons who will be allowed access to his page in certain circumstances that would be equally listed in the agreement.

A remarkable feature of the aforementioned cases on Wills stored electronically is that none was queried over distortions in the final wishes communicated by testators before their death. Thus, the confidentiality of Wills stored through electronic medium appears not to be an issue yet fears are entertained on how effective electronic preservation of Wills can be particularly as the life span of a Will cannot be determined at the time it was stored. The above and other criticisms seem to withhold the change from the traditional storage mechanism for Wills to the electronic preservation system despite the impediments with the former system.⁷³

4. Criticisms against Electronic Preservation of Wills and Remedies

Change in any form has always been fought against from generation to generation.⁷⁴ The change may be long overdue and of great benefit to majority of the populace yet, there will still be antagonism against it. The numerous attacks which precedes the introduction of an innovation and which seems to say, the status quo is preferred to the way it could be; may be linked to fear of the unknown. So, reasons of various kinds both plausible and imaginary ones may be adduced to fight against the change.

However, most identified setbacks in a new concept appear to have been envisaged before its introduction with possible solutions put in place as remedies. The room for remedies does not close for more solutions are worked out as the concept is put into use. Thus, the criticisms

⁶⁹ *ibid*

⁷⁰ Matyszezyk (n. 67)

⁷¹ *ibid*

⁷² Stored Communication Act, 18 US C sections 2701-2712 (2012)

⁷³ AJ Hirsh, 'Technology Adrift: In Search of a Role for Electronic Wills' *Boston College Law Review*, (2020) Vol. 61:3, 870

⁷⁴ Kimberley (n. 59)



highlighted against electronically preserved Wills are surmountable and will continue to be. Therefore, even where there are setbacks in the use of technological devices to preserve Wills, its demerits are defeatable with the application of other devices provided through same means which is an advantage peculiar only to digital management of documents.⁷⁵

4.1 Highlight of Criticisms against Electronic Preservation of Wills

Anti-electronic Wills advocates have maintained that documents stored in electronic form are predisposed to vices associated with electronic communication, one of which is unguided distortion of information and facts and thus; such medium would not be good for Wills which content is jealously guarded by the law.⁷⁶ They stressed that Wills stored in a computer can be assessed and manipulated in various ways by persons other than the makers of the Wills.⁷⁷ First, the content of the Will can be hacked into such that the confidentiality of the testamentary intentions contained therein is lost and the Will becomes susceptible to various kinds of arrangements namely the inclusion of wishes not conceived by the testator or the exclusion of the original wishes expressed by the maker.⁷⁸

In addition to the above is the fact that the storage device employed to preserve a Will could render the document inaccessible at the time of its unsealing because the device could become disabled or may have gone into disuse.⁷⁹ In the former case, two scenarios among others may occur. First, large volumes of email or irrelevant materials may be directed to the site where the Will is stored to cause the host computer to crash so that information contained therein will be lost.⁸⁰ The computer containing the Will could also be rendered non-functional which will make the Will unavailable at the time of reading due to the presence of worms and viruses in the system.⁸¹

The occurrence of the latter situation could be attributed to the daily advancement in computer technology and the passage of time.⁸² The computer device in which the Will is stored could become obsolete at the time the maker of Will dies and the Will is ready to be unsealed. For example, floppy disk was a good storage device employed by many for the storage of electronic documents many years back. Today, that device has been replaced with flash drive and in some instances preference is made to the storage of important documents in the cloud.⁸³ Therefore, a Will that was made some twenty years ago and stored in a floppy disk may, if the testator dies in 2054 become inaccessible if Microsoft word is replaced by another computer programme used for the reading of information stored in softcopy.⁸⁴

Another argument against digital storage of Wills is that information in electronic form can be edited severally to achieve a purpose different from that contemplated by the maker of the Will where his intentions are stored electronically.⁸⁵ Again, the computer can be used to continually harass and torment an innocent testator where his electronic Will is hacked into and the content becomes a source of blackmail to persons who may have interest in the assets of the testator but

⁷⁵ *ibid*

⁷⁶ Hirsh (n. 73)

⁷⁷ BE Oladipo, 'Cybercrime: Cyber Jurisdiction' (2012) *ICT Lecture Series of Delta State Ministry of Justice*

⁷⁸ *ibid*

⁷⁹ Kimberley (n. 59)

⁸⁰ BE Oladipo, 'Cybercrime: Cyber Jurisdiction' (2012) *ICT Lecture Series of Delta State Ministry of Justices Asaba*

⁸¹ *ibid*

⁸² *ibid*

⁸³ *ibid*

⁸⁴ Kimberley (n. 59)

⁸⁵ Hirsh (n. 68)



were not accommodated in his Will.⁸⁶ Older and naïve testators could become easy victims of such incessant harassment. They may have to part with a lot of money and in some extreme cases lives may be lost.⁸⁷

There is also the complaint that when computer devices are used to store Wills, it is often difficult to locate the said Wills after the death of their makers because they are privately stored in testators' technological devices kept in individual homes with little or no information left behind on how they could be located or on how the information in the devices could be accessed.⁸⁸ In one of the electronic Will cases determined by the Court, the password used to access the Will the testator made and stored in the computer he left at home was guessed at by one who was knowledgeable in the operation of the computer.⁸⁹ If the guess had failed, the Will would have been lost. The same fate may befall Wills which testators deposit with private firms that act as registered electronic Wills custodians in jurisdictions where such is allowed.⁹⁰ Where information about the firms and Wills are kept away from family members, the firms may wind up and the Will would be lost just as the news of the demise of the testators may never be communicated to the firms because facts about the Wills were not disclosed during the testators' life time.⁹¹

4.2 Remedies to Criticisms against Electronic Preservation of Wills

The highlighted challenges in the use of electronic Wills can be overcome with the application of some of the innovations which technology has put in place to the Wills communicated in electronic form.⁹² For example, to avoid the loss of information where a system crashes, there should be a back-up to the information contained in the computer or saved in the cloud in another device such as a flash drive with same submitted at probate registry for safe keep.⁹³ It is also possible to use different computer devices to store a Will at different times so that where one device is being faced out; the information contained therein can be transferred to the newest device created by technological innovation.⁹⁴ In that way, a Will can always be retrieved when the need for it to be read arises.

The query on whether the testamentary intentions expressed by a testator and stored in an electronic medium would not be tampered with has remained a major ground for the challenge of Wills even before the advent of the use of electronic devices in storing Wills.⁹⁵ If testators' final wishes stored in approved probate registry could be questioned on grounds of undue influence, then, it may be improper to reject the use of electronic Wills because of such fears. Electronically preserved Wills may get into wrong hands as Wills stored through the traditional mechanism but unlike the latter, electronic devices have inbuilt mechanisms through which frauds can be detected easily. For example, traditional storage mechanism has no replica of metadata information that will reveal when a Will was accessed, different times changes were made on the document and persons who accessed the document. Therefore, once a Will is preserved electronically, every subsequent access to it is documented and becomes a proof to its originality when the need arises.

⁸⁶ Oladipo (n. 80)

⁸⁷ *ibid*

⁸⁸ Hirsh (n. 73)

⁸⁹ *Alan Yazbek v GhosnYazbek supra* (n. 36)

⁹⁰ Hirsh (n. 73)

⁹¹ *ibid*

⁹² Kimberley (n. 59)

⁹³ *ibid*

⁹⁴ Hirsh (n. 68)

⁹⁵ LA Frolik, 'The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators of Overriding Individual Preferences?' *International Journal of Law and Psychiatry*, (2001), 253-260



Although, it may be correct to hold that the softcopy of a document may be hacked into because of its nature but early detection of that act would help redeem the situation. Moreover, there are daily discoveries and improvements on how frauds in electronic transactions can be detected, controlled and checkmated to some extent as seen in the improvements over the years on the use of automated teller machines (ATM) for banking services whereby the machine now captures the photograph of the user once it is put into use.⁹⁶ That additional characteristic of the machine namely the inclusion of the close circuit television device (CCTV) was absent in the machine when it was first introduced but it is helpful in the same way as bank verification number (BVN) is in tracking down fraudsters and could scare others from engaging in crimes with electronic undertone.⁹⁷

In spite of the criticisms expressed against the use of electronic medium for preserving Wills, digital storage remains the appropriate preservation mechanism for Will.⁹⁸ Moreover, the perceived weaknesses of a new product have never been a bar to its introduction and use especially when such usage has been accepted across the globe in Wills and in other activities.⁹⁹

5 Conclusion and Recommendations

Technology has brought ease to activities in the world. It has also improved the integrity of information communicated and stored for different purposes. Wills fall into the category of information that deserve a change in the integrity given to the document. Technology appears to be the light that is needed to give Wills a face lift. Electronically preserved Wills make use of technological advancement to keep proper custody of Wills in order to achieve the intendments of testate succession law which is to ensure that the final wishes of testators are secretly safeguarded while they are alive and thereafter

The above calls for a review of the legislation on Wills so that there will be room for the use of modern means in the preservation of Wills. A proactive judiciary could help speed up the process where the importance of electronic storage means is continually hinted in judgments given on Will cases. The paper has established the need for Wills to be stored electronically.

⁹⁶ Oladipo (n. 80)

⁹⁷ *ibid*

⁹⁸ Beyer and Hargrove (n. 62)

⁹⁹ K Eke, 'Central Bank Postpones the Launch of E-naira' *Bridge Radio News* (2 October 2021). 7am. E-naira was subsequently launched by the apex bank on 25 October 2021. *Bridge Radio News* (25 October 2021). 1 : 00pm