COMPARATIVE ANALYSIS OF THE REQUIREMENTS OF WILLS UNDER ISLAMIC AND STATUTORY LAWS IN NIGERIA

BY

Asma'u Mohammed HASSAN
LLM/LAW/102692/2014-2015

DEPARTMENT OF ISLAMIC LAW,
FACULTY OF LAW.
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DECLARATION

I declare that the work in this dissertation entitled ***"Comparative analysis of the requirement of wills under Islamic and Statutory laws in Nigeria"*** has been carried out by me in the department of Islamic Law. The information derived from the literature has been duly acknowledged in the text and list of references provided. No part of this work dissertation was previously presented for another degree or diploma at this or any other institution.

Asma'u Mohammed Hassan **Date**
LLM/LAW/102692/2014-2015

CERTIFICATION

This dissertation entitled ***"Comparative Analysis of the requirement of wills under Islamic and Statutory Laws in Nigeria"*** by Asma'u Mohammed HASSAN meets the regulations governing the award of the degree of Masters of laws LLM of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

Dr. U. S. Mohammed **Chairman, Supervisory Committee**	**Date**
Dr. A. M. Madaki **Member, Supervisory Committee**	**Date**
Prof. Sani Idris **Head, Department of Islamic Law**	**Date**
Prof. S. Z. Abubakar **Dean, School of Postgraduate Studies**	**Date**

DEDICATION

For my late mother who died fighting cancer, who was my greatest support and strength in life,

May *Aljannah firdausi* be your abode.Amin.

ACKNOWLEDGEMENTS

All thanks and glorification is for Allah, the lord of the worlds for seeing me through this work. *Alhamdulillah*.

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ABBREVIATIONS

A.C	-	Appeal Cases
ALL.E.R	-	All English Report
ALL N.L.R	-	All Nigerian Law Reports
ALL F.W.L.R	-	All Federation Weekly Law Reports
A.W.L.R	-	All Weekly Law Reports
Ch.	-	Chancery
Ch.D	-	Chancery Division
E.R	-	English Reports
F.W.L.R	-	Federal Weekly Law Reports
N.L.R	-	Nigerian Law Reports
N.N.L.R	-	Northern Nigerian Law Reports
N.M.L.R	-	Nigerian Monthly Law Reports
N.W.L.R	-	Nigerian weekly Law Reports
Q.B	-	Queen's Bench
S.C	-	Supreme Court
S.C.N.J	-	Supreme Court Of Nigerian Judgment
W.A.C.A	-	West African Court of Appeal

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ABSTRACT

This research entitled "Comparative analysis of the requirements of wills under Islamic and statutory laws in Nigeria" has examined the essentials of wills under both Islamic and Statutory laws. The research is predicated on the problem arising on the actual personal law of testators in Nigeria which is mainly depending on his religion and where he resides in Nigeria. Legal pluralism and conflict of laws which is manifest in the Nigerian legal system affect uniform policy on wills in Nigeria and has also pose a challenge to courts in determining what law apply to a testator in Nigeria. And especially in southern states where Islamic law is not recognized in the wills law and for states where the wills law is silent, it has become difficult and unfair to determine the personal law of a Muslim testator living in such areas. The main objective of this work is to compare the requirements of wills under both Islamic law and statutory law stressing out their similarities as well as their differences with a view to exposing the perfection and simplicity of Islamic law of wills as compared to statutory law on wills and to find out why the courts have been reluctant on the application of Islamic law on the estate of Muslim testators. To also find out the extent of the powers vested on a testator and the extent of the operation of the wills law, customary law and Islamic law with a view to finding the appropriate personal law of testators in Nigeria.. To achieve this doctrinal method of research has been adopted. The research covers the Nigerian laws relevant to wills. While the wills law makes it mandatory for wills to be officially documented, Islamic law acknowledges an oral will so long as the intention of the testator is made manifest and there is clarity of expression, in this regard there is a need for wasiyya to be officially documented ie no bequest shall be prove in a court of law with out it being officially written, signed or thump printed by the testator. Also the old norm under statutory law which gives a testator the absolute freedom to dispose all his estates as he wishes is no longer tenable under statutory law, now a testator has been restricted by the statute, his religion and a custom to which he was subject to. While some states in Nigeria have adopted the tripartite restrictions, some states deliberately ignore the restriction on religion especially in the southern part of the country, all the same some states are yet to enact their own wills law thereby adding up to the confusion.. All states in Nigeria must endeavor to enact the wills law and adopt the three restrictions in other to provide a solution for the unfairness inherent in the old wills Act of 1837.And for the states that the majority are muslims, instead of enacting a statutory law and then exempt its application from majority muslims, it is better that a shariah civil code for succession and wills be enacted. There is also a need for lawyers as experts to be well acquainted with the applicable laws on wills to be able to guide there potential clients to avoid controversy.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Research

As a fact of history, man as a social animal has two distinct types of right, the most fundamental being his moral or natural rights that he has as a human being which differentiate him from other animals, due to the fact that he is rational and moral, such rights are inalienable and cannot be denied without grave affront to justice.[1]These are rights which a man has possess as an individual in his natural state without support or intervention from the society, which the state is mandated to protect and implement by the operation of the law.

The second type of rights is the right to acquire and own property which is also recognized and guaranteed under all legal systems of the world, regarding which applicability and enforceability may vary from one society to another. This right is so fundamental that the law recognize and equate it to law of self defence which also include protection of ones property.A person is permitted to resort to self help even if it will result in the death of the transgressor (with limitations though) in the defence of his life or property.[2]Every organized society as a matter of fact recognizes these rights through its various legislations with certain qualifications and modifications for the betterment of everyone.[3]

The right to acquire and own property is said to also have as one of its integral incidents the right to also alienate or otherwise dispose of ones property by way of gift, transfer, sale or will.

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[1] Ezejiofor,G.(1964) *Protection of Human Rights Under the Law,* Butterworths London,p.3.
[2] See Aguda, A and Okagbue, I(1990) *The principles of Criminal Liability in Nigerian Law,* Heinemann Educational Books Nig,plc, Ibadan,2nd Edition, pp 304-305.
[3] See Chapter IV of the Constitution of the Federal Republic of Nigeria 1999, African Charter on Human and Peoples Right (Ratification and Enforcement)Act,CAP A9 LFN,2004, and Universal Declaration of Human Rights,1945.

As human beings progressed in age and acquire investments and properties, the thought of what happens after their death has become increasingly important. One method that evolved over the years to deal with the wishes and intentions of an individual after his death has been the act of making wills.

A will or *wasiyya* (according to Islamic law) is an instrument which declares or contains the intention of the owner of the property as to how his property is to be disposed of (distributed) after his death. The will takes effect on the death of the person making it.[4]

Wills have been defined by the black's law dictionary as the legal expression of an individual's wishes about the disposition of his or her property after death, especially a document by which a person directs his or her estate to be distributed upon death.[5]

This definition of wills does not represent the notion of what wills represent under Nigerian legal system but what is restrictive to the idea of wills under the wills law alone[6],as too much emphasis is being placed on wills being a document forgetting about nuncupative or oral wills which is recognized by other sources of Nigerian law i.e Islamic and customary law. Too much emphasis has also been placed on a will being a means of distribution of estates. However, under Islamic law will is not for disposition of estate alone *perse*, i.e Wills under Islamic law includes legacies, instructions ,admonishments, and assignment of rights. In making a will a Muslim is guided by the strict rules of the *shariah*[7].

[4] Khan, Kamaludeen (2009); *Law of wills in Muslim Law, Muslims Testamentary Succession*, Submitted 20th February. Retrieved from http://twocircles.net/legal_circle/law_wills_muslims_law_muslim_testamentary_succession_kamaludeen_khan.html|\VIDfeclbqA.

[5] Garner,B.A (2009) *Black's Law Dictionary* West A.Thompson,Reuters, Bussiness,U.S.A 5th Ed.p.1735.

[6] Wills Law of Various States i.e Bauchi State Will Edict Cap 168,1990.Kaduna State Wills Law, Cao 163,1991,Kwara State Wills Law,cap k58,2006,Lagos State Wills Law, Cap W2,2004 etc.

[7] Orire, A; (2007) *Shariah :A Misunderstood Legal System*. Sankore Educational Publishers ,Zaria. pp 251-262.

Wills under Islamic law can be written or oral, it can also be by gesture or signs provided the intention of the testator is very clear. What is important is that there should be two witnesses to attest to the making of such will. Thus any expression which signifies the intention of the testator is sufficient for the purpose of constituting a bequest[8]. Statutory law makes it a *sine quo non* for a will to be in writing and signed. It also requires the attestation of two witnesses in the presence of whom the will be signed.

Wills under Islamic Law can also be used to provide for orphan grand children, Christian widow or poor relatives and dependents (e.g. friends, loyal servants, staffs, maintenance of Mosque, orphanages, graveyards, schools, clinics, religious organizations and scheme for the poor and needy) this are some form of *sadaqatul-jariyah* (i.e a charity in preparation for the Hereafter). A wealthy testator and his family have nothing to loose and this is something his heirs might not remember to do after his demise.

The concept of wills have been recognized by all Nigerian legal systems, though with variations, in terms of scope, nature and enforceability. For instance except for the common law which gives the testator absolute right of disposal of his property according to his own volition without any hindrance[9], the laws of various states in Nigeria have placed certain restrictions on the powers of a testator in view to giving recognition to Islamic law and customary law. For instance the Wills Law imposed some restrictions on testamentary freedom of a testator, i.e the testator must make reasonable financial provision for family and dependants, a testator also has no power to dispose property subject to customary law. Moreover, the application of the Wills

[8] Gurin, A.M,(1998) *Introduction to Islamic Law of Succession*, Jodda Press Ltd, Zaria p 87

[9] Section 3 Will Act of 1837.

law does not extend to a person whom before his death was subject to Islamic law.[10] Under Islamic law a Muslim is restricted or limited to bequeath one third of his estate and the rest goes to the legal heirs, moreover he is not allowed to make bequeast to a legal heir[11].In essence a Muslim can only make a bequest in strict compliance with Islamic law.

Both statutory and Islamic law agreed that not every person is qualified to make a will, thus disqualification might be as a result of the testator not attaining the requisite age as required by the law or that of insanity, the Wills Law makes it specific that a testator must be 18 years or above and he must be sane[12]. Under Islamic law the requirement is that the testator must be an adult (*balig*) [13] and sane.

Under Wills law where a person dies leaving a will, his estate will be shared among his heirs according to the rule of testamentary succession i.e. as per the contents of his will, thus giving himself the opportunity to dispose of his property to those he deems fit to inherit him, thereby including charitable works or strangers he deems qualified to get his estate, or appointment of a guardian for any minor children or dependants[14]. On the other hand if a person dies leaving no will, the rule of intestate succession govern the distribution of the property among his heirs.

Under customary law, creation of wills becomes necessary than the application of certain rigid native laws and customs within Nigeria, e.g the property of a *Yoruba* man automatically

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[10] see Section 4(1) (a)&(b) of Kwara State Wills Law Cap k58,2006,Section 5 of kaduna state Wills Law Cap 163,1991, Section 4 & 5 of Bauchi State Wills Edict,Cap 168 Laws of Bauchi State 1991. alsoSee *Ajibaiye v Ajibaiye(2007)ALL FWLR (pt 359)1321*.

[11] Hussain, A. (2005), *The Islamic Law of Succession,* Makhtaba Darussalam, Riyadh, Kingdom of Saudi Arabia. p 387

[12] Section 3 and 4 of Wills Law of Lagos State cap.W2 2004. (except for privilege wills).See S.5 of the Wills Law of Southern Region,No28,1959,See S.6 of Bauchi State Wills Edict and S.6 of Kaduna State Wills Law.

[13] Gurin,A.M (1998) opcit p 386

[14] http://Lawpadi.com/everything-need-know-making-will-nigeria,10:45 am

becomes family property if he dies intestate through the *ori-ojori* or *idi igi* system[15] unless he marries under the Act.[16]If the deceased is *Igbo* then perhaps the *'okpala'* '*Diokpa'* '*olio-ekpe','idegbe' or 'Nrachi'* or other custom of similar magnitude applies[17] but if the deceased is a polygamous man with several sons from different wives then the eldest son from each of the wives may take part in sharing of the estate.[18] Also a wife and a daughter in *Igbo* land have no share in the estate of the deceased, [19]. In some customs in Africa, a wife is infact a property to be inherited.[20]Also under *Bini* customary law, the popular *igiogbe* applies since it is not permissible to circumvent the *Bini* custom[21].Thus through the instrument of wills provision can be made to such blood relations, thereby curtailing such hardships and barbaric customs by the testator to take effect after his death.

1.2 Statement of the Problem

The reluctance of our superior courts in the application of Islamic Law of Wills[22], treating it with disdain[23] and giving preference to Customary Law[24], is one major effect of colonialism and

[15] Where all estates belongs to male heirs or first born in the family. See *Dawodu v Danmole (1962)* ALL NLR 702
[16] Section 36 of Marriage Act, Cap. M6 LFN, 2004. Cole v. Cole (1898)1 NLR 15, See also Section 149 of the Administration of Estate Law, Lagos State.
[17] Yusuf, A and Sheriff E.E.O,(2011); *Succession Under Islamic Law*, Malthouse Press Limited, Lagos. pp 139-140.
[18] See Choji Ruth, *Why wills are hardly effective in Nigeria*, Leadership March 30,2014 retrieved from http://Leadership.ng/features/360889/wills_hardly_effective_nigeria.
[19] See Mojekwu and others v Ejikeme and others(2000)5 NWLR; Mojekwu v. Mojekwu (1997)7 NWLR,pt512 pg 283;Mojekwu v Iwuchukwu (2004) ALL FWLR pt 211 pg1406; Uke v. Iro (2002)FWLR (129)1453 etc.
[20] See Coker, C.B.A (1958) *Family Property among the Yorubas*, Sweet And Maxwell Ltd, London pp 180-5.Eweluka,U.U (2002) *Post Colonisation, Gender, Customary Injustice: Widow in African Societies*, In: Journal of Human Rights,Quartely,vol.24 p 438;Gwako,E.L.M;(2002)*Widow Inheritance Among The Maragoli of Western Kenya.* In: Journal of Anthropological Research Vol.1, p173; Struensee, V (2004) Widows. Aids, Health, and Human Rights in Africa, Retrieved from;;http://www.crisisstates.com/download/forum/Hiv/901widowsaid.pdf.;Fenrich, J. and Higgins, T.E (2001) *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana.* In: Fourdham International Law Journal.vol 25,p 259,Retrieved From:http://www.leitnerlaw.com/Files/doc-8789.pdf.
[21] Yusuf, A and Sheriff E.E.O, (2011) Opcit p 140.
[22]The case of *Ajibaiye vs Ajibaiye* was the first reported case of where Islamic law was applied after the amendment of the wills law and has met a lot of criticisms, see *Yunusa vs Adesubokan* (1971) All NLR.52.*Apatira vs Akanke*(1944)8 WACA 39. see also the criticism of this case in; Abbo Jimeta U.S and Mafa, U.M (2002)' *Bequest*

westernization, as even the ignorant muslims make Wills without regard to the provision of the *shariah*[25], there is a need to bring out the perfection and justice of Islamic law of wills.

The plurality of laws on wills under the Nigerian legal system often generate confusion and complexity in the determination of the appropriate personal law of a particular testator as between the state Wills Law,[26]Customary Law and Islamic Law. For instance, the enactment of various States Wills Law led to multiplicity of laws, adding up to the dilemma of courts[27]in determining the extent of testamentary power exercisable by the testator and the validity of a will of a given testator[28].

The received English law itself which is a statute of General application[29] has been repealed[30], but till date many are under the wrong impression that the Wills Act of 1837 (which is a statute of general application) is still applicable in some states[31], hence there is a need to appraise the relevant laws with a view to putting the legal position in the right perspective, and ultimately

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(Wills):The Islamic Perspective and Development in Nigeria'. In: *University of Maiduguri Law Journal*, vol 5 p153-157..see also Oba, A.A;(2008)' *Can a person subject to Islamic law make a will in Nigeria? Ajibaiye v. Ajibaiye and Mr. Dadem's wild Goose chase*' In: *CALS Review of Nigerian Law and Practice*,Vol.2 p 135

[23] See Oba,A.A;(2008) "*Can a person subject to Islamic law make a will in Nigeria?Ajibaiye V.Ajibaiye and Mr Dadem's wild Goose chase*"In:*CALS Review of Nigerian Law and Practice*,Vol..2 pg 136 in reply to the article of Dadem i.e Dadem Y,Y,D (2008) "*Can a person subject to Islamic law make a will in Nigeria?Ajibaiye V Ajibaiye reviewed"*..in: *CALS Review of Nigerian Law and Practice*,Vol.2(1) pg 53-61 ,see also Oniekoro,F.J (2007)*Wills And Probate Practice and Administration of Estates in Nigeria.*Chenglo Ltd Enugu,p 52..

[24] See *Ogiemen vs. Ogiemen* (1967) NMLR 245,*Arase vs. Arase* (1981) 5 SC 33,*Idehen vs. Idehen*(1991)7 SCNJ 196,*Eghareba vs. Oruonghae*(2001)1 NWLR pt 734 p.318,*Ogbahon vs. Registered Trustee of Christ Chosen Church of God* (2001)FWLR pt 801 pg 496,; *Lawal Osula vs. Lawal Osula*,(1995)10 SCNJ 84 and the recent case of *Giwa Osagie vs Giwa Osagie* (2011)ALL FWLR pt 555 pg 363.

[25] See the cases of:*Giwa Osagie vs.Giwa Osagie*(2011) ALL FWLR Pt 555 p 363;*Apatira vs. Akanke* (1944) 17 NLR 149;*Lawal Osula vs Lawal Osula* (supra); *Hajia Lami vs. Madam Goshi and others* ,suit No. 133/87 Area court grade 1,Lokoja (unreported)

[26] See Section 4(1) (a)&(b),Section 5 of Kaduna state Wills Law Cap 163,1991 which is the same with Section 4 & 5 of Bauchi State Wills Edict, Cap 168 Laws of Bauchi State 1991.See *Ajibaiye v Ajibaiye*..

[27] This fact has been confirmed in the Nigerian case of *Adesubokan v. Yunusa* (1971) All NLR . 52; *Lawal Osula v. Lawal Osula and ors* (1995)10 SCNJ84; *Ajibaiye v, Ajibaiye* (2007)ALL FWLR(pt 359)1321.

[28] See Dadem,Y.Y,D (2009) *Property Law and Practice in Nigeria,* Jos University Press Limited, Jos, Plateau. p 254; see also Madaki, A.M (2011) "*A Critique of the Restrictions on Testamentary Freedom under the Kaduna State Wills law".* In; *Bayero University Journal of Public law,* A.B.U Press Ltd, pp *229.*

[29] See Section 28 of the High court Laws of Northern Region,No:8 of 1955 as amended.

[30] See section 1 of the Laws of the Federation,1990.

[31] Like kano.

attempt to answer the following questions. (i) To what extent is Islamic Law of *Wasiyya* different (in terms of essential requirements) from Statutory Law of Wills? (ii) To what extent can a testator exercise his testamentary power in view of some amendments to the various State Wills Law in Nigeria? (iii) Which particular law (between Islamic, Statutory or even Customary Law) applies to a particular testator and to what extent can he exercise his testamentary power under each of the sources of Nigerian Law? (iv) How do we resolve the confusion, caused by restrictive provisions in the Wills Law , in the determination of the appropriate personal Law of a testator? (v) How do we revive the concept of wasiyya which has been abandoned by the muslim *ummah*, and also one major cause of conflict of laws in the application of Wills Law in Nigerian Courts?

1.4 Aim and Objectives of the Research

The aim of this research is to compare the essential requirements of wills under Islamic law and the Statutes in Nigeria. However, objectives of this research are being highlighted as follows:

1 To compare and contrast the concept of wills and its basic requirements under Islamic Law and the Wills Law.

2 To discuss the essential requirements of wills and testamentary capacity under the Nigerian laws in such a way that the restrictions are clearly spelt out..

3 To clearly show the extent of the operation of the states Wills Law, Islamic Law and Customary law with a view to determining the appropriate personal Law of testators in Nigeria.

4 To recommend solutions on the problems identified for the proper application of *Wasiyya* in Nigeria.

1.5 Scope of the Research

Wills and testamentary disposition in Nigeria are matters neither included in the exclusive nor concurrent legislative list under the 1999 constitution,[32]and since the legislative list are silent it falls within the armbit of residual list reserve for the state House of Assembly[33].Thus the National Assembly is only competent to make laws on this issue for the Federal Capital Territory.[34]

Because of that most states of the Federation have enacted their own Wills Law (which resulted in multiplicity of laws) replacing the Wills Act of 1837. These laws largely replicate the Wills Act though with some qualification and modifications.[35]

Moreover, the Nigerian Legal system is also reputed with multiple sources of Law from the statutory laws, Islamic ,Customary Law ,case Law and Statutes etc. Thus, it will be extremely difficult to do a thorough analysis of the topic without limiting the scope. To this end, since no single legislation regulates the law of succession in Nigeria resort has been made to the various state enactments in Nigeria.[36] States like Bauchi, Kwara, Kaduna, Abia, Oyo, Lagos and western

[32] See Section 4(7) of 1999 CFRN.
[33] *See A.G Ondo State vs. A.G. Federation & Ors* (2002) FWLR (pt 111)1972 at 2204-2205 paras F-D and *A.G Abia State & ors vs.A.G Federation* (2002) FWLR (pt 101) 1419 at 1539-1540 para E,
[34] Note however the National Assembly can still legislate on an item that is not included in the exclusive or concurrent legislative list if such item is that which is directly incidental or supplementary to any of the items listed in the exclusive list. See dictum of *ogwuegbu JSC in A.G Abia 7ors v. A.G Fedearion* (supra) at 1569 para f.
[35] For instance Section 1,3 and 11 of the Old wills Act is similar to Section 1,3 and 11 of the Lagos State Wills Law.
[36] There are states that enacted Wills Law to accommodate Customary Law and Islamic Law and ,there are states that accommodate customary Law alone and there are also States yet to enact their own wills Law.

region of Nigeria[37] are being perused in this research. The reason is because the Wills Law are substantially similar.

The nature of the restriction on testamentary capacity is basically three: i.e. divides based on Custom, religion and family dependants, while the trio are being recognized in the northern Nigeria, religion is excluded in the South(with the exception of Oyo and Bayelsa) which is also the same with those in the north.

Also primary sources of Islamic law i.e the *Qur'an* and *Hadith* are also considered in discussing this topic. This is because principle of Islamic law contained in the primary sources are of universal application regardless of race, creed or nationality, etc, Besides it has been held that Islamic Law is independent and distinct from customary law.[38] So it is the same Law that is generally applicable to every person subject to Islamic Law in Nigeria whether he is from the North or South.

.1.6 Justification of the research.

Being that State Wills Law now govern the concept of wills under Nigerian Law, and that some provisos have now been introduced which regulate the unrestricted rights enjoyed by the testators as provided by the Wills Act of 1837, i.e by including the three system of laws i.e Islamic, customary and statutory law as separate personal laws of testators , there is need to understand the new legal order. Many at times wills fail wholly or partly due to ignorance of the specific personal law applicable to a particular testator and the extent of his testamentary power exercisable thereof..

[37] Applicable to Ogun, Ekiti, and Osun.
[38] See Alkamawa vs Bello(1998)6 SCNJ p128

Knowledge of these personal laws and limitations will assist in minimizing conflict that will arise during establishment of wills after demise of the testator and ultimately promote peace and tranquility in the family and society at large. For instance in the case of *Giwa Osagie vs. Giwa Osagie*[39] the testator apart from being subject to *bini* native law and custom was also a Muslim, in this instance which law is supposed to apply? This work will help in finding solutions to the area of controversy caused by legal pluralism in Nigeria. It will also contribute to finding answers to everyone who stand to benefit or suffer ill fate (especially supposed beneficiaries of a will) as a result of the operation of the provisos of the Wills law.

This research work will also be very beneficial to legal luminaries like lawyers (engage in probate practice), judges, law lecturers and students, as well as other stake holders involve in probate practice and administration of estate.

1.7 Research Methodology

The method adopted in this research is doctrinal i.e thorough perusal of existing literatures on the subject matter, such as authoritative primary sources i.e *Qur'an* and *Sunnah*, statutory provisions, case Law as well as secondary sources such as textbooks, articles in law journals, conference, unpublished works, seminar papers website and internet.

1.8 Literature Review

Existing works from authors and academicians who discuss Wills and or Succession on each of the three main sources of Nigerian law under reference and Judicial authorities have been helpful. Even though the researcher was faced with the challenge of little literature on a comparative basis between Islamic and statutory law, most authors only restrict their work to one sources i.e Islamic, Statutory or Customary Laws.

[39] (2011)ALL FWLR pt 555 p.363

Sabiq[40] dedicates a chapter under which he discusses the principles and fundamentals of wills in Islamic Law making reference to the *Qur'an* and *Sunnah,* different opinion of Islamic school of jurisprudence was also pondered on bequest where explanations was given on when bequest becomes obligatory, recommended or undesirable, stating the benefits and divine reward for making wills.

Al-Jaza'i'ry[41] also provides a chapter on Wills, stating the definition and the rulings on wills under Islamic Law, he also gave a brief account of the conditions that guides bequest, and also the regulations guiding wills.

Doi,[42] gives a brief account of the pre-Islamic era- practices of wills discusses the general nature and conditions of a will under Islamic Law. He also focuses attention on what he termed obligatory bequest as obtained in the laws of some muslim countries like Egypt, Syria, Pakistan and India.

Hussain[43] the author critically discussed the various aspects of bequest under Islamic law, stating the various types of bequest as well as the execution of bequest, he also incorporate the views of various school of jurisprudence and recent developments on wills in some countries in their effort to encode the rules into law.

Ambali[44]discusses the four principles of *wasiyya*, stating the legal implication of a Muslim contracting marriage under Marriage Act which ousted the jurisdiction of Islamic Law on the succession of such Muslims[45]he also discussed the origin of *wasiyyah.*

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[40] Sabiq,S (1998) *Fiqhus-Sunnah*,Darul-Turath,Cairo,Vol3,pp 296 -334.
[41] Al-Jaza'iry,A.J (2001) *Minhaj Al-Muslim,Darussalam,Riyadh,Saudi Arabia,Vol 2*.pp 301-308.
[42] Doi,A.I (1971) *Shariah: The Islamic Law,* Sweet and Maxwell,London,4th Edition, pp.296-335.
[43] Hussain, A: Op.cit pp 384-405
[44] Ambali, M.A 1998: *The Practice of Family Law in Nigeria,* Tamaza Publishing Co Ltd, 1st ed,pp 84-391.
[45] Section 36(1) of the Marriage Ordinance,Cap115,*Laws of the federation of Nigeria,1958.*

Mannan[46] states out persons capable of making a will under Islamic Laws and the form a will should take under Islamic Law, he also discussed the limit of testamentary power under the *Shariah*, revocation as well as execution of wills under Islamic law. *Majlisul Ulama* of South Africa[47] had a detailed discussion on the essentials of wills under Islamic law.

Orire[48] discusses the basic principles of wills under Islamic Law, the origins of wasiyya and the implication of a Muslim contracting marriage under the Act.

Yusuf and Sheriff[49] have a detailed and extensive discussion of the term Wasiyya and its application in Nigeria, the advantages of *wasiyya* under Islamic law, the difference between wasiyya and gift, the sanctity of *wasiyya*, the forms of *wasiyya*, the concept of absolute testacy, capacity of testator, qualification of a legatee under Islamic law etc, this work has been very helpful because the author makes it important to make reference to Nigerian statutory law and customary law.

The work of Gurin;[50] also touched briefly some parts of law of bequest, stating its limitations, when a bequest becomes mandatory and when it is optional to a Muslim. He also discussed those who cannot be beneficiaries of bequest under Islamic law, stating out the limits imposed by the *Shari'ah*.

Dadem[51] also discussed the meaning and nature of wills, essential requirements of a will, testamentary capacity and freedom, execution of a will under Statutory Laws. He tries to compare the limits of operation of Islamic law ,Statutory and Customary law in Nigeria.

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[46] Mannan; M.A. (1977);*Mulla principles of Mohammadan Law*, Law Publishing Company, Lahore, Pakistan pp 122-132.
[47] *The Book of Inheritance* (*Kitabul-meerath*) compiled by Majilisul Ulama of South Africa,Al-wasilat Publishers, Somolu Lagos, pp 40-53.
[48]Orire, A (;2007) Op.cit Pp 250-267.
[49] Yusuf, A and Sheriff E.E.O,(2011) Op.cit .pp 133-213.
[50] Gurin, A.M,(1998) *Introduction to Islamic Law of Succession*, Jodda Press Ltd, Zaria pp 86-98.
[51] Dadem ,Y.Y.D.(2009) Opcit pp 227-273.

Imhanobe,[52]gave an insight as to definition of wills, applicable Laws, advantages of making a will, essential requirements of a valid will as well as execution of wills under statutory Laws.

Keffi,[53]gives brief historical accounts of the development of the rules relating to wills under English Law as well as Islamic Law. He discusses the general requisites of a valid will under Islamic Law. He discusses the general requisites of a valid will under Islamic law and makes comparison of the purports of wills under the two legal systems.

Oniekoro[54] discusses the constitutionality or otherwise of the various restrictive provisions on the powers of the testator as contained in our states wills laws. Thus while he sees sense in the restrictions under the states wills laws. He however criticizes the restriction relating to 1/3 quantum under Islamic law and those relating to customary law submitting that they are discriminatory and a violations of the testator's constitutional right.

Abubakar[55] discussed *wasiyya* /bequest under Islamic law, highlighting the modes and limitations of distribution. The book had been very helpful and some fundamental aspect of the subject matter had been derived from these source.

Dadem [56] in an article also examines and criticises the provision of Section 4(1)(b) of Kwara State Wills Law[57] which the Court of Appeal interpreted and applied in the case of

[52] Imhanobe, S.O (2007);*Legal Drafting and Conveyancing,* Sylvester Imhanobe Legal Research Ltd, Maitama Abuja,2nd Edition, pp 411-472.
[53] Keffi,S.U.D(ND) *An Introduction to Islamic Law of Bequest.*(unpublished) Centre For Islamic Legal Studies, Institute of Administration, Ahmadu Bello University, Zaria. Pp 1-35.
[54] Oniekoro,F.J (2007) *Wills And Probate Practice and Administration of Estates in Nigeria.* Chenglo Ltd Enugu, pp 1-165.
[55] Abubakar, M.S; (1990) *Islamic Law of Wasiyyah/Bequest: Its Application in the Northern States of Nigeria*, (unpublished LLM thesis) Faculty of Law, A.B.U Zaria.
[56] Dadem Y.Y.D (2008) *Can a person subject to Islamic law make a will in Nigeria? Ajibaiye v. Ajibaiye reviewed.*.in: CALS Review of Nigerian Law and Practice,Vol.2(1) pp 53-61
[57] Cap 168 Laws of Kwara state 1990.

Ajibaiye vs Ajibaiye[58] suggesting that the provision of the law be amended, Oba[59] in responding to the issues raised by Dadem, also analyses the provision of Section 4(1)(b) of Kwara State Wills Law as it was applied in the case of *Ajibaiye vs. Ajibaiye*, thus both Articles were narrowed down to the restriction on testamentary power and the decision in the case of *Ajibaiye vs Ajibaiye*.

Madaki[60] in his literature discusses the restrictions placed on the testamentary power under the Kaduna State Wills Law, the work covered both Islamic, Statutory as well as Customary laws. However his work has been helpful, but it is narrowed down to the understanding of the limitations placed on the testator's right to disposition of his property.

Sandabe[61] in her article also discussed the testamentary capacity of the testator distinguishing it with testamentary power under Islamic Law and Statutory Laws, the writer only succeeded in discussing only one among the many essential requirements of a valid will.

Idris,[62] also discusses the testamentary limitation and the calculation of fractional shares of beneficiaries depending on whether it is based on the bequetable third or where it is *ultavires* to which consent of legal heirs is needed. However he also restrict himself to only Islamic law, statutory Law concept is completely absent.

[58] Op.cit p 4.
[59] Oba,A.A;(2008) *Can a person subject to Islamic law make a will in Nigeria? Ajibaiye v. Ajibaiye and Mr. Dadem's wild Goose chase* In: CALS Review of Nigerian Law and Practice,Vol.2 pp 131- 145.
[60]Madaki, A.M (2011) "*A Critique of the Restrictions on Testamentary Freedom under the Kaduna State Wills law".* In; *Bayero University Journal of Public law*, A.B.U Press Ltd, *pp* 229-245.
[61] Sandabe, A.K (2015); "*A comparative Analysis of Testamentary Capacity under Statutory Law and Shariah",* in:*Journal of Private and Comparative Law* (JPCL) Ahmadu Bello University, Zaria vol.8 pp 186-203
[62] Idris, S. I. (2002) *Limits to Testamentary Power under Islamic Law*, In: Journal of Islamic and Comparative Law, Ahmadu Bello University, Vol. 23, pp.58-68

Abbo and Mafa[63] in their article discuss the essentials of wills under Islamic Law as well as the limit to testamentary disposition under Islamic law.

Articles retrieved from the internet include Hussain[64] who talks about the importance of wills, describing the form to which a will takes under Islamic Law, its essential requirements, the testator, the legatee, and the executor of a will under Islamic law.

Harasani[65] discusses the concept of testate succession, the form wills take, the testator, beneficiary and the subject matter of will under Islamic Law.

Sokombaa[66] in discussing wills under Statutory Law describes the nature and features of a formal will, essentials of Wills, appointment of executor, the benefits of a will. Stacey[67] discusses Islamic law emphasizing on its features, its basic elements and execution of wasiyya.

1.9 Organisational Layout

This work has been arranged in five chapters:

Chapter one is an introduction of the whole research, it encompasses the statement of the problem , the aims and objectives of the research, it also include scope of the study, justification of the research,research methodology and litereature review.

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[63] Abbo, U. S. and Mafa, U. M. (2002) *Bequest (Wills): The Islamic Perspective and Development in Nigeria*, Vol. 5, University of Maiduguri Law Journal, p.155

[64]Hussain, A. *The Islamic law of wills.* Retrieved from http:// www.islam101.com/sociology/wills.htm ,20th Nov,2015, 10:00 am.

[65]Harasani ,H. *Islamic Law of wills; An Overview* retrieved from http:// www.academia.edu/4517602/islamic-law_of_wills_An_overview. 20th Nov,2015 11:30 am.

[66] Sokombaa Alolade, *The rules and laws of drafting wills* in: The lawyers chronicle-magazine for the African lawyer. Retrieved from http://Thelawyerschronicle.com/ the-rules -and-laws-of-drafting-wills .20th Nov.2015.1.30 pm

[67]Stacey, A,(2012) *Islamic law of inheritance: Islamic wills(unknown author) retrieved from http://www.islamreligion.com/articles/5217/viewall/islamic_inheritance_and_wills_name_goback_part_1_of_2 20th Nov,2015 2:30pm.*

In chapter two a detailed discussion on Islamic Law on wills is provided, proper definition of wills under Islamic law, stressing the basic essentials of a will under Islamic law, as well as pre and post Islamic testamentary disposition has been discussed.

Chapter three deals with wills under Statutory Law, definitions and the essential requirements of wills under Statutory Law, the limitations as well as the position maintained under the English Statute.

Chapter four is a comparative analysis of the requirements of wills under both Islamic Law and Statutory Laws as discussed in chapter two and three, thereby identifying their area of similarities and difference, it also considers the three celebrated cases on wills in Nigria.

Chapter five which is the conclusion is the summary of the whole research work, the findings and as well as the recommendations.

CHAPTER TWO

WILLS UNDER ISLAMIC LAW

2.1 Introduction

The nature of wills in the pre-Islamic days was synonymous with wills under the wills Act of 1837 where all property can be disposed by will.[68] The Arabs had absolute testamentary power over their property, to dispose in any manner and to any one, either in whole or in part. Their property can be willed out to their pets (animals) depriving their rightful heirs, anything be it lawful or unlawful e.g. alcohol, pigs, usurious loans etc can also be willed. Such bequest even though without considering the interest of heirs, cannot be challenged by Kinsmen neither can they claim any right to the property so disposed[69].

With the coming of Islam, it alleviates these series of injustices and unfairness occasioned by such disposition of property by way of will. It provides a different manner of disposing property in such a way that the testator's heirs would not be deprived of their respective shares in the property of the testator.

Islam brought about radical changes regarding the quantum of the property to be bequeathed, the class of beneficiaries and the subject matter of the bequest. For instance Will was mentioned eight times in the Qur'an and one of such places is Qur'an 2:180 which provides thus:"It is prescribed for you, when death approaches any one of you, and he is leaving behind much wealth, that he makes a bequests to parents and the next of kin, according to reasonable usage…"[70] .

[6]8 Ambali, M. A. (1998) Op.cit p 388.
[69] Abubakar, M. S. (1990) Op.cit p 1.
[70] See Yusuf, A.A(1983) *The Holy Qur'an, Translation and Commentary,* Revised Edition, Amana Corp, St. Brentwood, Maryland , U.S.A. p 71.

Many jurist feel that the verses of inheritance[71] have repealed the earlier verses of bequest as they have made provision to parents and near relatives such as spouse, parents, children and siblings which is compulsory relying on the prophetic tradition thus: "Allah has certainly given every heir his due right (from inheritance) there is (therefore) no bequest to an heir"[72]This is also the opinion of *Shafi'i* and *Ibn Abbas*. However some scholars have insisted that the verses of inheritance have not restrained the application of the verses of *wasiyya* infact it has strengthened them.[73]

They regard inheritance as a gift from Allah and bequest a gift from the testator, thus, if the verse of inheritance was intended to abrogate the verses of wasiyyah, it should have been clearly indicated. Under Islamic law there are numerous authorities in both *Qur'an* and *Sunnah* that makes provision for making wills to the extent that some scholars hold that it is mandatory[74] . Narrated by *Abdullahi Ibn Umar*, R. A., The Messenger of Allah (SAW) said "It is the duty of a Muslim who has anything to bequeth not to let two nights pass without writing a will about it"[75] *Ibn Umar* concluded by saying ,"…that it has never passed me , a night since I have heard the holy prophet having said such, except beside me ,my will is written"

Thus writing a will becomes obligatory if there is a risk that any dues to others or to Allah (SWT) may not be fulfilled without clear instruction in a will e.g. debt, deferred dowry, unpaid *diyya*, *zakkat* (due before death) *Kaffarah* (expiation) left accomplished etc, or returning *Amanah* (trust) to its rightful owner. *Wasiyyah* also becomes obligatory if the testator left behind

[71] Q 4:11,12 and 176 in: Yusuf, A.A(1983) Opcit. pp 181,182,235-236.
[72] As quoted by in :Sabiq, S. (1971) *fiqhus Sunnah*, vol. 3, Darul Bayan,, Kuwait. p 595,; Malik, J. (1971) *Muwatta Malik* , trans.Aisha Abdarrahman at-tarjumana, and Yaqub Johnson, Diwan Press London.,
[73] Quoted by Tabari, J.(1907) *Tafsirul Tabari* ,Darul Ma'arif Misra, vol3,Egyp,p 384.
[74] Gurin, A.M,(1998) Opcit p. 86
[75] see *Book of Wasaya in:* Khan, M. M. (1997) *The Translation of the meanings of Sahih Al-Bukhari Arabic-English, Hadith no 2738,Vol.4,*Darrussalam Publishers and Distributors, Riyadh, Saudi- Arabia p 15 -43.

his parents and near relatives who would not be able to inherit from his estate due to difference of religion, territory or other circumstances.[76]

Wasiyya becomes recommended (*mandub*) where these conditions do not exist or in respect of a person with abundance of wealth to give to the poor or charity, it becomes *makruh* (detestable) if the wealth is not much and it becomes (unlawful) if done in excess of one-third[77] or done in favour of an heir, which is capable of causing harm to others.

2.2 Definition of Wills under Islamic Law

The word bequest or will under Islamic law is termed *Wasiyyah*, which means to convey. "It is a contractual transaction which gives legatee a right in the testator's one-third and becomes binding after the death of the testator.[78]

Wasiyya is a gift which may be in form of cash, claims of debt or any other benefit, in which the transfer of the right from the benefactor to the beneficiary becomes effective only after the death of the testator.[79]

wasiyya is a vow (promise) to do or to waive… it is a disposition, which necessarily creates for a particular beneficiary, a beneficial interest, from what is being left behind by the testator.[80]

Thus *Wasiyyah* is a gift which could be a property beneficial in the eyes of Islamic law, to the beneficiary or legatee, it could be a right or usufruct, the benefit of which takes effect only after the death of the testator, and which can be made only on one-third of the entire estate of the testator.

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[76] Yusuf, A and Sheriff E.E.O,(2011) Opcit .p 136.
[77] Baba-Ahmad, N,(2008) Op.cit, p 15,
[78] Dasuki, M, C,(ND), *Hashiyat-Dasuki,* Darul Fikr,vol4,Beirut,Lebanon p 422.
[79] Ambali, M. A. (1998) Opcit p 297.
[80] Nasir, J. J. (1990) *The Islamic Personal Status*, 2nd ed, p .26

These definitions all have three things in common. Firstly it is a gift emanating from a testator, to take effect upon his death and it cannot exceed one third of the testator's property. *Wasiyya* covers any instruction by a person that certain obligations in respect of certain outstanding duties against him, which he did not carry out before he died. It may be an order that a debt he owed be paid to his creditor or the *zakkat* outstanding against his wealth. It may also be that a property entrusted to him be handed over to the rightful owners or a portion of the property he left behind to be utilized for charitable deeds in favour of an individual or organization[81].Thus the statement of Allah (SWT) in Qur'an 4 verse 33 "…to those also with whom you have made a pledge (brotherhood), give them their due portion(by wasiyya)…"[82]

Thus a muslim through the instrumentality of *wasiyya* can to rectify his wrong doings, settle his debts and finish off all his outstanding obligations and make provision for hereafter.

As narrated by Mu'az ibn Jabal,Prophet *Muhammad* (SAW) said "Allah (SWT) has made available one-third of your property to be disposed as *sadaqa* by you at the time of your death in order to increase your reward".[83]

He (SAW) also said.

> The soul of a believer is determined by his debts and by Allah (SWT) in whose hand is my soul, even if a man who had outstanding debts were killed in the way of Allah (SWT) *Fisabilillah* (i.e. *Jihad*), then were raised from the dead to be killed again in the way Allah (SWT), then raised from the dead to be killed again, he still would not enter paradise until his debts are fully repaid[84]

[81] Ambali, M.A.(1990) opcit p.384..
[82] Khan, M.M and Al-Hilali, M.T (2002) *The Noble Qur'an: Transliteration in Roman Script with Arabic Text and English Translation*,,Darrussalam,Publishers and Distributors, Riyadh, Saudi Arabia p94..
[83] Abubakar, M.S; (1990) Opcit .p 12.
[84] Baba-Ahmad,N.(2008) Opcit p 19.

2.3 Essential Requirements of Wills under Islamic Law

Although there is no specific wording necessary for making a will under Islamic law. *Wasiyya* can take any form. It may be oral or written (though writing is preferable).[85] Thus any expression be it written or oral which signifies the intention of the testator that the bequest be executed after his death is sufficient to constitute a bequest.[86]

It may also be deduced from the conduct, signs or gesture of the testator, so long as the intentions of *wasiyya* are sufficiently expressed.[87] This is to give room for the sick, deaf and dump to be able to make a bequest.

A bequest is preferable to be in writing and witness called to witness it. A purely oral attestation of a bequest is also in order. But the burden of establishing an oral *wasiyya* is often very heavy since the content, circumstances and time of making the *wasiyya* must be proved with utmost precision. The court must be made certain that it knows what the speaker said and must from the circumstances and statement be able to infer that testamentary effect was intended, in addition to being satisfied with the contents of the direction given.[88]

But even though a bequest may be made orally, ideally as a general rule it has to be proved by the testimony of witnesses, usually two male adult Muslims, who were present at its oral declaration. The *Maliki* and *Hambali* Schools recognize the validity of a written bequest, in the known handwriting or under the known signature of the testator, where there are no witnesses

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[85] Baba-Ahmad, N, (2008) *Op.cit, p 18.*

[86] See Coulson, N. J. (1971) *Succession in the Muslim Family law.* Cambridge University Press, London, page 215; Keffi, S. U. D. (ND) *An Introduction to Islamic Law of Bequest.*(unpublished) Centre For Islamic Legal Studies, Institute of Administration, Ahmadu Bello University, Zaria. Pp 32-33; Baba-Ahmad, N,(2008) *The Islamic Will (Wasiyyah) ,An Obligation Abandoned by the Ummah.* Merchant Yeomon International Limited, Kaduna, pp 18*;* Yusuf, A and Sheriff E.E.O,(2011); *Succession Under Islamic Law,* Malthouse Press Limited, Lagos. p155.

[87] Yusuf, A. and Sheriff E.E.O. (2011);*Opcit.* P 154.

[88] Mannan; MA.(1977) Opcit p 123.

to any oral declaration or where witnesses are called to verify the fact that the document constituted a bequest by the testator but were ignorant of its content.[89]

Most Muslim countries have made it mandatory for bequest to be proved by documentary evidence. For instance in Egypt Section 2 of Egyptian Law of Testamentary Disposition 1946 which is similar with Syrian Law of personal Status, 1953 and Article 176 of the Tunisian code of Personal Status, 1956 provides that no disputed claim of a bequest will be entertained by the courts unless it is supported by official documents, written and signed by the testator bearing the officially authenticated signature of the testator. Also Article 65(i), Iraqi Law of Personal Status, 1959 recognised stamp, with seal or thumb-print by the testator, and depending on the value of the property (moveable or immoveable) a notary public might also be required. In addition a bequest may be established by oral testimony where there exists a substantial obstacle to prevent the production of a documentary evidence e.g. where an illiterate testator is on his death bed and no one to write the will could be found in time ,or where a written will had been destroyed by fire or other unforeseen event.[90]

Thus even though Islamic law does not categorically emphasize on documentary evidence in will, but going by Qur'an 2:282 states "O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing, let a scribe write down faithfully as between the parties…" and the Prophetic tradition "one should have his will and testament written and ready always" .(*Bukhari* and *Muslim*)[91] Making it more formal by inclusion of signature, stamp or thumb print or any other usage that is peculiar to the testator, will aid the establishment of the will in a court of law. Thus, whether it is said by word of mouth,

[89] Coulson, N. J. (1971) *Succession in the Muslim Family law.* Cambridge University Press, London p 215.
[90] Ibid.
[91] Quoted In: Khan,M.M. (1997) *The Translation of the meanings of Sahih Al-Bukhari Arabic-English,* Vol.IV, Darrussalam Publishers and Distributors, Riyadh, Saudi- Arabia p1..

handwritten, or typed, a will has a special sanctity that must be observed and executed unless it contains certain violations of Islamic principles.[92]

2.4 Essential Elements of Wills under Islamic Law

There are five elements for making a valid *Wasiyyah*. Any will made according to Islamic law that fails to satisfy one of these essentials is invalid.The essentials are:

a) Testator/legator (*al-muusi*)

b) Legatee/Beneficiary (*al-muusa lahu)*

c) Subject matter of bequest (*al-musa bihi)*

d) Executor (*al-muusa ilaihi*)

e) The formula (*seeghah*)

2.4.1 Testator/Legator (al-muusi)

This is the person making the bequest. A testator must be an adult Muslim or a free non-Muslim living in the Islamic state. He must also be a freeman not a slave.

The testator must have legal capacity to dispose of whatever he bequests at the time the will is to take effect (after his death) The testator must have had a title to the property, (i.e. the subject matter of the *wasiyyah*) otherwise the *Wasiyyah* is invalid because a person cannot give what he does not have. In other words he must be the owner of what he bequeaths.

2.4.1.1 Capacity of a Testator

Islamic law prescribe a qualification on the testator, a testator should be a person who has attained the age of majority or adulthood. He must be sane and of sound and discerning mind. He must not be under any form of intoxication, duress or mistake. And he must not be bankrupt i.e he must own the object of his bounty.

[92] Yusuf, A and Sheriff, E.E.O(2011) Opcit p.154.

2.4.1.1.a Factors affecting Capacity.

For a will to become valid, the testator must be a *Mukhallaf* (he must be a person of complete legal capacity meaning he is sane and also attain majority) i.e. a person who is capable of distinguishing between right and wrong. Every adult Muslim with reasoning ability has the legal capacity to make a will. Thus an infant, lunatic or sleeping person are a;; incompetent to make a will, the muslim jurist rely on the prophetic tradition in which the Prophet (SAW) was reported to have said "The pen has been lifted from three (the recording of sins against) three persons: An insane person whose intellect is impaired until he is cured; a sleeping person until he wakes up; and a child until he reaches the age of puberty;(*Ahmad* and *Abu Dawud*) "[93]

(a) Adulthood:

An adult for this purpose is someone who has reached puberty, evidence of puberty is menstruation in girls and wet dreams for a male, majority can also be detected by presence of pubic hairs or pregnancy and in the absence of evidence, puberty is presumed at the completion of 15 years.[94] This is according to some scholars like *Maliki, Hambali and Shafi'i*.[95]

Hannafi takes it to 17 years for boys, they regard an infant who has not attained puberty as waiting in reasoning and comprehension, and therefore refuse him the capacity of making a valid will. *Hambali* and *Malik* also consider the will of a young person who has not reach puberty as valid i.e when a minor shows enough signs of understanding his religious obligations and possess the strength to shoulder them.[96]

Imam *Malik* related from *Yahya ibn Sa'id* from *Abdullahi ibn Abi Bakr ibn Hazm*

[93] Al-Jaza'i'ry,A.J (2001) opcit .p 297
[94] Hussain, A. (2005), *Op.cit*, p 386
[95] Sabiq, S. (1971) Op.cit. p 576,
[96] Hussain,A (2005) Opcit p 386.

that an adolescent boy who has not reached puberty, from the tribe of *Ghassan* whose heir was in Sham (Syria), was staying in *Madina* with his paternal uncle. When *Umar ibn Khattab* was asked whether this boy could make a will in favour of his paternal uncle's daughter, Umar said "yes". So he bequeathed to her his property called the "well of *Jusham*" which was later on sold for 30,000 *Dirhams*. *Yahya ibn Sa'id* said that Abubakar had said' he was a boy of ten or twelve. And the daughter of the paternal uncle to whom he willed it was the mother of *Amir Ibn Sulaym Az-Zuraqa. Yahya* also said that he heard *Malik* say :

> The generally agreed on way of doing things is that a simpleton, an idiot, or a lunatic who recovers at times, can make wills if they have enough of their wits about them to recognise what they will. Someone who has not enough wits to recognise what he wills , and is overcome in his intellect, cannot make a bequest.[97]

According to *Maliki,*a woman does not acquire legal capacity to deal with her property until she has consummated her marriage and two qualified witnesses have testified that she is a prudent person capable of managing her own affairs,Thus Yahya related from malik that ;"A virgin has no right over her property until she enters the house and her state (competence, maturity etc) is known for sure"[98].

(b) Sanity:

The testator must also be of sound mind. Thus sanity means a person who understands what he speaks and gives rational answers to the questions put to him[99].

Thus a person of unsound mind cannot make a valid will, since he might not know the implication of his act. Classes of persons subject to such interdiction include minors, lunatics,

[97] Malik, J. (1971) *Muwatta Malik* , trans. Aisha Abdarrahman at-tarjumana,and Yaqub Johnson,Diwan press London., Book 37,Hadith 1459 and 1460 p 356
[98] ibid Book 28,Hadith 1099 p 356
[99] *Anwarullah; (2004) Principle of Evidence in Islam, 2nd ed, Kuala Lumpur, p 5.*

simpletons, prodigals and idiots who by carelessness tend to squander their property immoderately and for no good purpose.[100]

Under the *Shariah* a full legal capacity to dispose of property belongs to those who have quality of prudent judgement (*Rushd).* A person who lacks this quality cannot be described as *Rushd,* because immaturity, irresponsibility or mental deficiency is said to be under interdiction (*hajr).* The original idea of proving Rushd of the young and prodigal before validating their actions was initiated by the text of the Holy Qur'an, chapter 4 verse 5 and 6 thus:

> And give not to the foolish your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice. And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them, consume it not wastefully and hastily, fearing that they should grow up…. [101]

(c) Intoxication:

A bequest made during the time of intoxication is also ineffective for an intoxicated person is insane temporarily and in a state of natural mental infirmity. This also include drugged persons[102].

Qur'an 4:443 states "Approach not prayers with a mind befogged, until ye can understand all that ye say"[103].In another verse *Qur'an* 5:90 "Verily *Al-Khamr* (intoxicants), and gambling, and *Al-Ansa,and Al-Azlam* (arrows for seeking luck or decision) are an abomination of satan's handiwork. So avoid (strictly) that (abomination)". Many traditions of the Prophet also prohibits intoxicants. For instance He Says:

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[100] *Malik, J. (1971) Opcit.,p 355*
[101] Khan,M.M and Al-Hilali, M.T (2002) *The Noble Qur'an:Transliteration in Roman Script With \arabic Text and Englis Translation*, Darussalam Publishers and Distributors,Riyadh, Saudi Arabia,p 89.
[102] Ibid p 190
[103] Yusuf, A. A. (1983) Opcit p 193.

> Allah has cursed intoxicants, the one who drinks them, the one who serves them, the one who sells them, the one who buys them, the one who presses them (i.e their fruit), the one who seeks to get them pressed, the one who carries (transports) them, the one to whom they are carried and the one who devours (i.e makes use of it) their price.(*Abu Dawud* and *Al-Hakim,* and it chain of narration is authentic.)[104]

The Prophet (SAW) also said "An intoxicant is a mother of all vices. Whosoever drinks it, his prayers (*salat*) will not be accepted (by Allah) for forty days. If he died and there is wine in his stomach, he has died the death of *jahilliyya* (period before the advent of Islam).[105] In another narration of *Nana Aisha* (R.A) From the Prophet (SAW) that; "all drinks that produce intoxicants are *haram". Jabir ibn Abdullahi* also narrated that he heard from Prophet(SAW) that 'if a large amount of anything causes intoxication, a small amount of it is prohibited'[106]

(**d) Duress and Mistake:**

A testator must also bequest out of his own volition and free will, unaffected and uninfluenced by fraud or compulsion[107] and he must understand the nature and effect of his testamentary act.

An act made under duress, coercion and mistake is presumed to have been made involuntarily, and thus a nullity. This is due to the Prophet's (SAW) saying. "Mistakes and forgetfulness have been lifted (i.e it is not counted as sinful) from my *ummah* (nation, followers) and (also) that which they have been compelled to do (unwillingly).(*At- Tabarani* with *sahih* chain of narration) "[108]

(**e) Bankruptcy:**

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[104] Al-Jaza'iry,A.J (2001) *Minhaj Al-Muslim,Darussalam,Riyadh,Saudi Arabia,Vol 2*. p 476-477
[105] Doi, A.(2007) *Shariah: The Islamic Law,* Noordeen, Kuala Lumpur,p.263
[106] Khan, M. M. (1997) *The Translation of the meanings of Sahih Al-Bukhari Arabic-English, Hadith no* 1243,*Vol.4*,Darrussalam Publishers and Distributors, Riyadh, Saudi- Arabia p 15 -43.
[107] Abubakar, M. S. (1990) Opcit p 24.
[108] Al-Jaza'iry,A.J (2001) *opcit* .p 508

A testator should also not be an interdicted person i.e. a person debarred from direct dealing with his property on account of insolvency. A will by such person should not be implemented unless the debts of the deceased have been paid .Prophet (Saw) said "Whoever finds his possession wit a person who has gone bankrupt, he has the most right to it" (*Al-Bukhari* and *Muslim*)[109]. In another instance the Messsenger of Allah directed the creditors of one of the debtors from the companions, saying: "Take what you can find , and you have no right to anything other than that"(*Muslim*).[110] Also '*Ali ibn Abu Talib'* narrated that " The messenger of Allah (SAW) ruled that the debts (of the deceased) be paid before implementing the Will".(At-Tirmithi). This is because repaying the debt is obligatory, while a bequethal is a supererogatory act of giving, and the obligatory things are giving precedence over voluntary things.[111]

Thus, no will by a testator whose estate is exhausted with debt shall be effective unless creditors allows it, being that debt have more priority than *wasiyya*.[112] This is what prompted the decision in the Nigerian case of *Baka vs. Dandare*.[113]The Court of Appeal held that "The subject matter of succession begins with the preliminary payment of funeral expenses, debts and other outgoings to which must be made from the estate of the deceased".

However, three set of people are also barred from direct dealings with their property i.e a dying person during his final illness, a heavily pregnant woman and a person about to go on *jihad*. Although such persons may in terms of sanity and prudent judgement be perfectly

[109] Ibid 299
[110] Ibid 300
[111] Al-Jaza'iry,A.J (2001) *opcit* .p 305
[112] Keffi, S.U. D. (2015) *Priority In Settlement of Claims According to Hannafi, Shafi'I and Hanbali Schools of Islamic Jurisprudence,* In: *Ahmadu Bello University Journal of Private and Comparative Law, JPCL* vol.8 A.B.U Zaria, p 74. Abba, U.S. and Mafa, U. (2004) *The Tradition of Reservation of Property for Heir's Common Use in Nigeria*: In: *University of Maiduguri Law Journal*, Vol. 7, University of Maiduguri, p.6;
[113] (1997)4 NWLR pt 492 pg 244 at 250

competent to engage in transactions, they are placed under interdiction in order to protect the interest of heirs and creditors, to the extent that any transaction which offends their interest will be effective only if they ratify it. Hence preparation of a will should not be delayed until the onset of the final signs of death. Narrated by *Abu Huraira* (R.A). "A man asked the Prophet (SAW)" ;

> Allah's Messenger! What kind of charity is the best? He replied, "to give in charity when you are healthy and greedy, hoping to be wealthy and afraid of becoming poor. Don't delay giving charity till the time comes when you are on your death bed, then you say 'Give so much to so-and-so and so much to so-and-so', and at that time the property is not yours but it belongs to so-and-so (i.e your inheritors).[114]

Thus any will made by a person who is mentally sound and fully conscious during his death sickness is treated as a valid will but such a person is only allowed to dispose one-third of his estate. The final illness from which a person does not recover is called *mard-al-maut.* Moreover a heavily pregnant woman (i.e after six months of conception) and a person about to go on a battle are also under the same indictment. *Yahya* said he heard from *Malik* that;

> the best of what I have heard of a pregnant woman and about what settlement she is permitted in her property is that the pregnant woman is like the sick person. When the illness is light , and one does not fear for the sick person, he does with his property what he likes. If the illness is such that his life is feared he can only dispose of a third of his estate…when six months has passed for the pregnant woman from the day she conceived,she is only permitted to dispose of a third of her property…. A man who is advancing in the row for battle , can only dispose of a third of his property. He is in the same position with a pregnant woman or an ill person who is feared for, as long as he is in that position.[115]

2.4.2 Beneficiary/Legatee (*Al-muusa lahu).*

Al muusa lahu is the one in whose favour the will is made. He must be existing or capable of existing whether sane or insane, adult or minor. If he is not capable of receiving the

[114] Khan, M.M (1996) *Summarized Sahih Al-Bukhari Arabic-English* ,Darussalam Publishers and Distributors,Riyadh,Saudi Arabia, Chapter 2, Book 52, Hadith No;1197,p.576.
[115] Malik, J. (1971) Op cit Book 37,Hadith 4 p 356

subject matter of the will, (like minor or insane),the property can be accepted by his guardian on his behalf.

A legatee maybe specific (a named individual or group of persons) or general like the poor; the sick, orphans[116]. He must be capable of owning the bequest. Thus a bequest made in favour of any legal heir already entitled to a share is invalid unless consented by other legal heirs. This is because will is not allowed to be made to an heir, Prophet (SAW) was reported to have said: "Allah Almighty has ordained for every person his right so there is no will in favour of heirs".[117] However, an acknowledgement of debt in favour of a legal heir is valid[118].

A beneficiary can also be a person excluded from inheriting due to some impediments (e.g. a Jewish or Christian wife) or to an orphaned grandchild, thus in the case of *Ahmad vs. Umaru*[119]relying on the above mentioned hadith, it was held that a son is not entitled to inherit from a father he predeceased but an orphaned grandchild can benefit by way of bequest or *waqf* or gift from the grand father. This is the position of Islamic law designed through *ijma* to ease the suffering of such orphaned grandchildren.[120]

The time of death of a testator determines whether or not a relative is an heir or not. Thus if a person in whose favors a bequest is made is not an heir at the time the bequest is made but becomes a legal heir at the time of the death of the testator, the bequest becomes invalid. Similarly if a bequest is made in favour of an individual who is an heir at the time when the

[116] Hussain,A (2005) Opcit p 387.
[117] see Orire,A(;2007) *Shariah :A Misunderstood Legal System*. Sankore Educational Publishers ,Zaria. P 265.
[118] Ambali, M.A 1998: *The Practice of Family Law in Nigeria*, Tamaza Publishing Co Ltd, 1st ed,p 386; Idris, S. I. (2002) *Limits to Testamentary Power under Islamic Law*, In: *Journal of Islamic and Comparative Law*, Ahmadu Bello University, Vol. 23, p.58
[119] (1997)5 NWLR (503) 103 C.A.
[120] Yusuf, A. and Sheriff E.E.O. (2011); Op.cit, p 133-213.

bequest is made but becomes disentitled subsequently at the time of the death of the testator, the will becomes valid[121].

A bequest made in favour of a relative will go to those from the paternal side but when such relatives do not exist or are already inheriting the bequest should go to those from the maternal side. This is in accordance with the principle of succession that the stronger the blood ties a person has with the deceased, the greater the shares he receives. Thus according to a narration by *Abu- Huraira* (RA) the Prophet(Pbuh) said ;

> I am closer to the believers than their own selves in this world and in the hereafter, and if you like you can read Allah's statement, 'the Prophet is closer to the believers than their own selves' (V33:6) so, if a true believer dies and leaves behind some property, it will be for his inheritor's (from the father's side), and if he leaves behind some debt to be paid or needy offspring, then they should come to me as I am the guardian of the deceased.[122]

Ya'aqub Ibn Ali reported from *Ayub* who reported from *Muhammad* that he heard *Abdullahi Ibn Umar* saying "Whoever mentioned a specific person (in his bequest) we execute it in accordance with what he mentioned and whoever does not specify any person, but instead requires the bequest to be placed in accordance with divine injunction, we give to his next of kin".[123]

Where a testator makes a bequest to neighbours generally, without specifying a particular person, such bequest made in favour of neighbours will include all neighbours living in houses from all directions within the neighbourhood, who are present and existing at the time of execution of the bequest. Thus relying on a Prophetic tradition reported by *Aliyu Ibn Abu Talib,* Prophet (SAW) said " Listen,o you people: neighbourhood is forty houses. And he will not enter

[121] Hussain,A.(2005) Opcit p 388.
[122] Khan, M.M. (1996) Op cit .Hadith 42, Book of Loans,p521.
[123] As quoted by author of Tafsirul Tabari in:Tabari, J.(1907) *Tafsirul Tabari* ,Darul Ma'arif Misra, vol3,Egypt, p 380.

paradise, who does not spare his neighbour from his evils." Thus in every neighbourhood the husband and the wife will benefit but does not include children living under the care and maintenance of their parents, but it includes divorcees even if they are living together with their parents, since their parents are not under religious obligation to maintain them[124].

A bequest can be made in favour of a religious or public institution like mosque e.g what is bequeathed may be expended in purchasing brooms, lamp, mats, candles or for payment of those engaged in maintaining the mosque.[125].

A bequest can also be made in favour of both Muslims and non-Muslims alike, and especially *Zimmi* (a non Muslim living in an Islamic state and enjoying its protection) is valid. The Holy Qur'an 33 :6 says "Blood relations among each other have closer personal ties in the decrees of Allah than (the brotherhood of) believer and Muhajir. Nevertheless, do ye what is just to your closest friends.[126] *Zimmis* here refers to friends from among the Jews and Christians. And because giving alms to a *Zimmis* is permissible, bequest to them is also permissible.

A bequest on behalf of an apostate is allowed by some jurists and rejected by others. According to *Abu Musa Al'ashariy* since an apostate is regarded a dead person in Islam who loses his ownership over his own property, vesting him with ownership of another's property through bequest is an exercise in futility. But according to *Ibn Khattab* it is permissible.[127]

[124] Dasuki,M.C.(N.D) Opcit p 420.
[125] Ibid
[126] Q 33 verse 6 in:Yusuf, A. A. (1983) *The Holy Qur'an, Translation and Commentary,* Revised Edition, Amana Corp, St. Brentwood, Maryland ,U.S.A p 1104.
[127] Salman, A. A. (1981) *As'ila wa Ajwibatul Fiqhiyya,* vol3 ,Matba'at Madina, Faisal Street, Riyadh, p 76.

A bequest can also be made in favour of an animal e.g. for the maintenance and feeding of such animal but upon the death of such animal it reverts back to the heirs. It can also be made in favour of a book (i.e. the maintenance of such books) like the Quran, Hadith etc[128].

A testator can also bequest money to a particular person for the purpose of performing Hajj on his behalf or to fulfill a particular task or duty. If the legatee agrees to undertake the journey, he will be given the money but he will not be liable for the money if it gets lost. If the money remains after the performance of *hajj*, he will return it to the heirs, where he discontinues the journey or fails to undertake it, he should refund the money[129].

The death of the beneficiary before execution of a will has no effect on the validity of a will, as his heirs can step into his shoes and claim his share. Infact the *Maliki* school acknowledges a *wasiyyah* in favour of a dead person, if the person doing so knows that the person is actually dead (e.g. to pay off his debt or to give charity on his behalf)[130].

This position of *Imam Malik* was well reiterated in the case of *Usman vs. Kareem*,[131]where the Supreme Court observe thus:

> If the testator is aware of the demise of the legatee the gift in the will is permissible and valid. The heirs of the legatee can claim and enforce the legacy on the death of the donor after the payment of the latter's proven debts and other legacies. The purpose of making a will in favour of a known dead person by the testator is to pass its benefit to the deceased notwithstanding his death. They compared this with a situation where the legatee is alive.

But generally, the legatee must be in existence at the time of death of the testator for the bequest to be valid except in the case of general and continuing legatees (e.g. the poor, the

[128] Abubakar, M. S. (1990) Op.cit p 30.
[129] Ibid p 32.
[130] Doi,A.I.(1971) Opcit p 505.
[131] (1995)2 NWLR (pt 379) 557 at 549

orphans). All the *Sunni* schools agrees that if a legatee dies before the testator, the bequest is invalid since it can only be accepted after the death of the testator, where both testator and legatee die together, such as in accident or crash and there is uncertainty as to who dies first, the bequest is invalid according to *Maliki*, *Hannafi* and *Shafi'I* but according of *Hambali*, the bequest devolves upon the legatees heirs who may accept or reject it.[132] If there is uncertainty as to whether or not the legatee survived the testator, such as a missing legatee, the bequest is invalid because it can only be accepted after the death of the testator[133].

A bequest in favour of an unborn child is valid if the child is born within the minimum period of gestation of six lunar month from the time of bequest. Where the testator acknowledges the existence of the unborn child, then the bequest is valid if the child is born within the maximum period of gestation allowed under all the four school of jurisprudence i.e (*Maliki,Hambali,Hannafi* and *shafi'i*), from the death of the testator. The under lying principle here is that a legatee must be in existence at the time of death of the testator[134]. This position is what influence the decision of the court in the case of *Rabiu vs Amodu*[135] it was held that the right of an infant child to any bequest becomes established upon the birth of the child and may not be exercised by representation on his behalf (not even by his mother).Thus foetus must be born alive to be entitled to succeed the property or money subject of the legacy bequeathed to him or her.[136] Where there is no sign of life when the child is born the bequest becomes void. Thus it reverts back to the heirs, but where the child is born alive even for a slightest moment

[132] Hussain, A. (2005), Op.cit, p 391
[133] ibid
[134] Ibid p 392.
[135] (2003)5 NWLR 813,343 C.A.
[136] *Ahmad vs. Umaru op.cit* p 31

before it dies, then bequest made in its favour becomes lawful, thus such property will devolve on the child's legal heirs.[137]

The *Maliki* school allows a bequest in favour of a child not yet in existence, one that is yet to be conceived e.g. a bequest in favor of "any future son/child of my sister". Where bequest is made in favour of a fetus and twins are born they share equally, if it is in favour of a group of individuals or for different purpose, they also share equally but where it is for performance of a religious duty like (*Hajj*) it takes precedence. If the bequest exceed the bequetable one-third of the estate, all bequest will be abetted to the proportional one-third, including performance of religious duties.[138].

2.4.3 Subject Matter of Wills under Islamic Law (*Al-Muusa Bihi*)

The subject matter of bequest must be anything capable of being lawfully owned and possessed in Islam, it maybe movable property or its usufruct. Thus it includes all types of property which can be legally owned under the *Shariah*.[139]Subject matter is not restricted to money or property, but it could be moral or adjuration.

If the subject matter is a property, muslim Jurists have classified property into beneficial or inviolable property *Malun Mutaqawwam* and non beneficial or violable *Malun Gayru Mutaqawwam*. Inviolable property refers to things whose usage or benefit is permitted in the Shariah e.g. lawful items fixed or movable e.g. fishes in the ocean, birds in the sky or mineral resources beneath the earth.

The non-beneficial or non-valuable property connotes things that are not yet possessed or things not permitted to be used and owned under the Shariah e.g. Alcohol, pork, naturally dead

[137] Yusuf, A. and Sheriff E.E.O,(2011); Opcit, p 185
[138] Hussain, A. (2005), Opcit, p 392
[139] Sabiq, S. (1971) Opcit, p 597

animals, and animals not slaughtered according to the tenets of Islam. These are considered non beneficial property hence cannot be subject matter of will[140].

Thus, it shall be noted in as much as bequest can be made to books, animals, slaves etc, they can also be a subject matter of bequest. Further, the subject matter must be testators exclusive property. Thus, if what is bequeathed no longer exist at the time of death of the testator, the bequest fails (he cannot bequeth what he does not have)[141]. He can however bequest a portion of property which he shares with another person, thus the equivalent value of his own share will be estimated to go to the legatee.

No bequest can be made of something which is non existence at the time of bequest. The only exception to this rule is something which is definitely coming into existence, e.g. fruits, foetus of animals in the womb[142] etc.

A usufructory bequest (*manfa'ah*) is a bequest whereby the legatee has the right to use and enjoy the fruits or profits of an estate or some thing which he does not own e.g. rent of flats, milk of a diary herd, fruits of an orchard. A property in which usufructory bequest is made, should be in existence at the time of death of the testator.[143]

According to *Hannafi*, a usufructory bequest in favour of a specific legatee cannot be inherited, as it lapses at the death of the legatee or when the term expires. But according to the other three *Sunni* school (i.e *Maliki, Hambali* and *Shafi'i* school of jurisprudence), the usufructory right can be inherited by the legatee's heirs until the term of bequest expires, but such specific legatee should be in existence at the time of death of the testator[144].

[140] Zaid, A. M. Opcit p 88.
[141] *Ige vs.Dobi* (1999)3 NWLR (pt 596) 550.
[142] Abubakar, M. S, (1990) Opcit p 33.
[143] Hussain, A. (2005) Opcit p 398.
[144] Ibid

Maliki accepts a bequest in favour of a legatee not in existence at the time of death of the testator i.e. something undetermined or outside the control of the testator at the time of death.[145] If the subject matter is encumbered with debt, the debt is payable before the will is executed[146].

2.4.4 Executor (*Musa Ilaihi*)

An executor is a person appointed by the testator giving him the mandate to administer the (testators) property or undertake the responsibility of seeing that his wishes as expressed in the bequest are effectively executed after his death. He is a representative/manager of the estate appointed by the testator. An executor is one of the backbones of bequest, as a bequest which lacks an executor may either be difficult to execute or may not be executed at all[147].

It is also reported that *Abu Ubaida* has bequethed to *Umar ibn. Khattab* the administration of his estate. Also five companions of the Holy Prophet (SAW) i.e. *Uthman Ibn Affan, Abdullahi Ibn Mas'ud, Abdulrahman Ibn Awf, Migdad* and *Muti* had bequeathed to *Zubair Ibn Awwam,* the administration of their properties. *Abdullahi Ibn Umar* is also said to have appointed his son *Jabir* to execute his will regarding the payment of his debts.[148] In view of the popularity of this practice among the companions, there is an *Ijma* (consensus) as to its permissibility[149].

An executor should be a Muslim, of sound mind, matured and righteous. Thus a person who is requested in a will to look after something should satisfy these criteria, because there is no guarantee that someone without these qualities will not be careless with that which they are

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[145] Saleh, N. A. (1992) *Unlawful Gain and Legitimate Profit in Islamic Law,* 2nd ed, Cambridge University Press.
[146] Abba, U.S. and Mafa, U. (2004) *The Tradition of Reservation of Property for Heir's Common Use in Nigeria*: In: *University of Maiduguri Law Journal*, Vol. 7, University of Maiduguri, p.6; Keffi,S. U. D. (2015) *Priority In Settlement of Claims According to Hannafi, Shafi'I and Hanbali Schools of Islamic Jurisprudence,* In: *Ahmadu Bello University Journal of Private and Comparative Law,* JPCL vol.8 A.B.U Zaria, p 74.
[147] Keffi,S.U.D(ND) *Opcit* p 44.
[148] Ibid
[149] Salman, A. A. (1981) *Opcit* ,p 196.

left in charge of. For example fulfilling the rights of others or looking after children[150]. Thus a non-Muslim is incompetent to administer a Muslims bequest. This is derived by way of analogy from the Qur'an,chapter 3 verse 118 which states as follows:

> ….take not as (your) *bitanah* (advisors,consultants, protectors, helpers,friends)those outside your religion(pagans, Jews, Christians and hypocrites),since they will not fail to do their best to corrupt you. They desire to harm you severely; Hatred has already appeared from their mouths, but what thet heart conceal in their heart is far worse, indeed we have made plain for you the ayats(proofs,evidence), if you undersatnd.".[151]

A slave can also be an executor due to the Tradition of the Prophet (SAW) "A slave is responsible for the property of his master". All the qualities must be possessed by the executor at the time of the testator's death, thus if he happens to lose one of them at the time of death of the testator, and does not regain it, before his own death, he cannot act as an executor.[152]

Also all the jurist agree that the executor should be trustworthy and truthful.[153]The above qualities must be possesses by the executor at the time of the testator's death. When the bequest takes effect. It will not matter whether he possessed them at the time when the bequest was made. If the executor loses one of these qualities after the death of the testator, and does not regains it before his own death , he cannot act as an executor.[154]

Two or more persons may be appointed to act jointly as executors, thus one cannot act independently of the other, unless the testator has given each an independent executory power or one of them dies (as such the survivor can go ahead with the execution of the bequest[155].

An executor has the right to withdraw from being an executor but according to *Hannafi* he/she must inform the testator and do so before the death of the testator.[156]A judge may replace

[150] Al-Jaza'iry,A.J (2001) *opcit* .p 303.
[151] In: Khan, M.M and Al-Hilali, M.T (2002) Op cit p.76.
[152] Salman, A. A. (1981) *Opcit* ,p 196.
[153] Hussain, A. (2005) Op.cit, p 400
[154] Salman, A. A. (1981) *Opcit* ,p 196
[155] ibid

an executor who dies or disappears. An executor should know the nature of the bequest, because he is not expected to execute what he does not know. He must also not substitute the original bequest with another e.g. if the purpose of the bequest is for publication of religious books, he cannot substitute it with maintenance of mosque etc.[157]

An executor will not be liable to a claimant against the property of the testator who comes after the bequest has been executed, also where the executor fails to identify a particular legatee and in consultation with a judge he expended the bequest to charity, he cannot be held liable upon the appearance of the legatee later on.[158]

If the content of the will empowers the executor to administer a portion according to his wishes or to give in charity to whoever he desire, it is in order if he takes among others beneficiaries.[159]

2.5 Limits to Testamentary Power

The power of the testator under Islamic law is limited in two ways: Firstly, he cannot bequest more than 1/3 of his net estate unless the other heirs consent to the bequest or there are no legal heirs at all or the only legal heir is a spouse who gets his/her legal share and the residue can be bequethed[160]. As narrated by *Sa'ad Ibn Abi waqqas* that:

> I was stricken by an ailment that led me to the verge of death. The prophet came to pay me a visit, I said "oh Allah's Apostle. I have much property and no heir except my single daughter. Should I give two-thirds of my wealth away in charity?" The Prophet said "No" I said "Then , O messenger of Allah?" He replied "No" I said "Then a third?" he said "a third, and a third is a lot. Verily it is better if you leave your inheritors wealthy than if you leave them

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156 Hussain, A. (2005), Op.cit, p 391
157 Salman, A. A. (1981) Op.cit, p 196.
158 ibid
159 Ibid.
160 Hussain, A. (2005) Opcit, p 387

> poor and with their palms out begging from the people"(*Al-Bukhari* and *Muslim*) …[161]

Secondly, the testator cannot make a bequest in favour of a legal heir, Thus Prophet (SAW) said: "Allah appointed for everyone who has a right what is due to him, therefore, there is no bequetthal to an heir unless the other heirs wish so (*At-Tirmithi* , who graded it *Sahih*)"[162]. This two hadiths was what influence the courts in the case of *Song vs Song*[163] and *Garba vs Abdu* [164] where it was held that "a will is only limited to one-third of the Muslim's estate and is not applicable to an heir".

According to *maliki,* 'the established *sunna* with us ,in which there is no dispute is that, it is not permitted for a testator to make a bequest (in addition to the fixed share) in favour of an heir, unless the other heirs permit him. If some permit and others refuse, he is allowed to diminish the share of those who have given him their permission. Those who refuse should take their full share from the inheritance.[165]

The essence of limitations placed on the testamentary power of the testator is to avoid arbitrary usage of bequest. Thus categories of persons, such as: bankrupt persons, persons suffering from a fatal illness, heavily pregnant woman, a person about go to the battlefield etc are being placed on interdiction to protect the interest of inheritors and creditors of the testator to the extent that any transaction which offends their interest will be effective only if they ratify it. That is why the Prophet (SAW) said "Allah has given everyone who has a right what is due to him. Therefore, there is no bequeathal to an heir unless the heir wish so (*At-Tirmizi*, who graded it *Sahih*)"

Likewise, whoever owns a lot of wealth, and whose inheritors are wealthy can will one-third or less of his wealth to his relatives who are not inheritors, or to any good cause. Thus by

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[161]Khan, M.M.(1997)*The Translation of the meanings of Sahih Al-Bukhari Arabic-English,* Darrussalam Publishers and Distributors, Riyadh, Saudi- Arabia hadth2742 pp 16. See also Al-Jaza'i'ry,A.J (2001) *Minhaj Al-Muslim,Darussalam,Riyadh,Saudi Arabia,Vol 2*.p 304

[162] Al-Jaza'iry,A.J (2001) *opcit* p 304.

[163] (2001)FWLR 44,447.

[164] (2002) FWLR (94) 185 C.A.

[165] Malik, J. (1971) opcit Book 37,Hadith 4.

permitting one-third as *Sadaqa*. Allah in his infinite mercy has given an opportunity for people to make provision for their hereafter. The Prophet (SAW) is reported to have said:

"Allah the exalted says",

> O son of Adam! There are two things that you do not possess a single one of them (in this life).I made for you a portion of your wealth, for when I seize you by your throats (upon the soul leaving the body), so that I could cleanse you and purify you with it .And the prayer of my servants over you after your time has expired. (*Abd bin Humayd* in his *musnad* with a *sahih* chain of narration).[166]

2.6 Formalities of *Wasiyyah*

For a *wasiyya* to come into being, certain formalities has to be fulfilled i.e there must be an offer and acceptance, there must be witness who attest to such offer and acceptance and the execution of such a *wasiyya*.

2.6.1 Offer:

There must be offer from the legator, the offer should be out of the free will of the legator. There is no fixed formula for making an offer. Offer is an expression of willingness of the legator, to transfer to legatee the ownership or part of his estate[167].

An offer can be made by orally or in writing, it can be done by gesture or sign, as long as it signifies the intention of the testator , to transfer his estate, willingly to the legatee after his death.

Thus a testator has the option of withdrawing his offer while he is still alive, as the binding nature of the bequest depends on two things, death of the legator without withdrawing, then acceptance by the legatee. Thus withdrawal itself can be express, written or by conduct (i.e. by consuming, destroying, changing or transferring the item to another person).[168]

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[166] Al-Jaza'iry,A.J (2001) *Opcit* .p 302.
[167] Keffi,S.U,D (ND) Opcit p 31.
[168] Ibid 32-33.

2.6.2 Acceptance:

There must be acceptance by legatee (*al-Muusa-lahu*). An acceptance is the expression of the legatee's willingness, desires or wishes to take ownership of property (*mal*) in respect of which the offer was made[169].

Acceptance or rejection of a bequest by the legatee is only relevant after the death of the testator and not before.[170]So if the legatee dies in the lifetime of the testator, the bequest becomes void, unless the testator is aware of the legatees death, then his heirs can accept on his behalf.

A specific legatee needs to accept a bequest personally (if he is sane and adult) otherwise it should be accepted by his guardian (who must not reject a bequest in favour of his ward).[171]

Where the bequest is a general bequest e.g. in favour of the poor and the needy, for institutions or organization it need not be accepted unless they have a legal representative (which is not mandatory).

According to *Hannafi* school if the legatee dies without accepting or rejecting the bequest, it automatically becomes part of his estate, *Hannafi* also allows a child who reaches 7 years to accept a bequest, and a bequest on behalf of an unborn child is effective without any acceptance[172].

Generally, once a legatee has accepted or rejected a bequest h cannot change his mind subsequently. An offer can be accepted by a person of full legal capacity or of incomplete capacity (where a legatee is incapable of accepting the offer due to tender age or immaturity, it can be accepted on his behalf). Offer can also be made to public institutions or many people, where offer is made to a public institution or to a mosque, hospital, schools, members of

[169] Ibid 36
[170] Hussain, A. (2005) Op.cit, p 390
[171] Ibid 390
[172] ibid

vigilante group etc. The offer may be accepted by a Muslim leader or anyone appointed as his representative.[173]

2.6.3 Witness

Islamic law recommends that bequest should be made in writing, in the presence of two credible witnesses or to be made in writing and read to the two witnesses who are under oath to state the truth and validity of the will.[174] Thus the Holy Qur'an Chapter 5 verse 106 says:

> O ye who believe! When death approaches any of you and you make a bequest (then take) the testimony of two just men of your own folk or (if you don't find), two others from outside, while you are traveling through the land and death befalls on you.[175]

Also the hadith narrated by *Ibn Abbas* (R.A) and *Imam Malik* thus; *Malik* related to me from *Sa'id Ibn Amr Ibn Shurahbil ibn Sa'id ibn Sa'ad Ibn Ubada* from his father that his father said " *Sa'ad ibn Ubada* went out with the Prophet(Pbuh) in one of his raids and his mother was dying in *Madina*. Some one said to her 'leave a testament' , she said, 'In what shall I leave a testament? The property is *Sa'ad's* Property!' Then she died before *Sa'ad Ibn Ubada* returned, that was mentioned to him. *Sa'ad* said 'oh Messenger of Allah! Will it help her if I give a *sadaqa* for her?' The Prophet (Pbuh) said 'yes', Sa'ad said; I make you my witness that I give my garden *Al-Mikraf* (the fruitful) in charity on her behalf."[176]

Thus relying on Qur'an 5 verse 106, the witnesses required for this purpose should be Muslims especially in view of the law that non-Muslims are not required to subscribe to Islamic

[173] Keffi,S.U.D (ND) Opcit p 37-38.
[174] ibid
[175] In: Yusuf, A.A (1983) Opcit p 276.
[176] Khan, M. M. (1997) *The Translation of the meanings of Sahih Al-Bukhari Arabic-English,* Darrussalam Publishers and Distributors, Riyadh, Saudi- Arabia hadith 2762 p31. See also Malik, J. (1971) *Muwatta Malik,* trans.Aisha Abdarrahman at-tarjumana, and Yaqub Johnson, Book 36,Hadith 1455.Diwan Press London.,

oaths under the Nigerian law. But where necessity makes them unavailable then the testimony of non-Muslims may be obtained for such purposes.[177]

It is recommended to select young people as witnesses, who have reached the age of puberty, and are not likely to move far away, so that they may be around if needed, at the time of execution of the will.[178]

Preferably witnesses should not be closely related to the testator such as spouses, parents, and siblings, close relations are generally not competent to testify for each other under Islamic law. This is aimed at guarding against biasness, evidence of beneficiary (ies) is also suspicious and may not be admissible, parties are generally not competent to testify in their own cases.[179] Witnessing a will is not a mere formality. It is one of the strictest requirements for the authenticity and validity of a will. Thus, any adult who can see and testify to the fact of execution by the testator himself or by other person in his presence and direction or by acknowledgement of his signature can be a witness. In *Maigari vs. Bida,*[180] the court relying on *Qur'an* 5 verse 106, ruled that it would amount to testamentary wisdom not to appoint anyone that has been previously declared a *fasiq*, i.e transgressor or a liar or one who is known for indulgence in alcoholic consumption or an adulterer as a witness to a will. That is to say ,a witness should be a person of high moral standing ,who is known to avoid great sin and shun minor sins. He has to be just, fair, equitable and independent person who could not be influenced by anything.[181]

[177] Ango vs Awawa (1998)1 NWLR 532,146..
[178] Baba-Ahmad, N. (2008) *Op.cit, p.18.*
[179] See *Danja vs. Danja* (1998)5 NWLR (550)467;*Shittu vs, Biu* (1961-1989)SLRN 59 at 61;*Soda vs. Kuringa* (1992)8 NWLR(261) 632.
[180] (2002) FWLR (88) 917.
[181] Yusuf, A. and Sheriff E.E.O. (2011); Op.cit p 209.

While two just witnesses are required, it is not a condition that the two witnesses must be present simultaneously. However, if a will is made orally, by sign or gesture, it should be made in the presence of joint witnesses, to avoid incidence of hearsay arising, which will make the testimony weak and unreliable. But where the will is written, the witnesses need not be jointly present at the same time, as the document can be attested and subscribed to at different times and occasions by the witnesses. Thus, there is no particular manner of attestation required, since it is not mandatory under Islamic law. It is however suggested that attestation clause be inserted where the will is in writing.[182]

In Nigerian case of *Danbaba vs Saleh* [183] it was held that judicial proof in all questions of property under the Shariah may only be established completely by evidence of: two male witnesses, or one witness plus the claimants oath, or one male and two female witnesses, or two female witnesses plus oath by the claimant, the defendants admission etc.[184]

2.6.4 Execution

A testator can make a bequest at anytime in his lifetime, but it can only be effective upon his death after funeral expenses and debt have been settled from his estate[185].

A bequest will be executed so long as the rights of the legal heirs have not been tempered with, i.e. it does not exceed the equitable one third or made to a legal heir. If not it has to be approved by the adults heirs. Note approval of minor heirs is not valid.[186] Thus, excess can only be paid from the shares of only adult consenting heirs.

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[182] Amin,A (2014) Opcit p 40.
[183] (2004)FWLR (233)1915 CA.
[184] Qur'an 5 verse 106 In: Yusuf, A.A (1983) Opcit p 276.
[185] Abba, U.S. and Mafa, U. (2004) *The Tradition of Reservation of Property for Heir's Common Use in Nigeria*: In: *University of Maiduguri Law Journal*, Vol. 7, University of Maiduguri, p.6; Keffi,S. U. D. (2015) *Priority In Settlement of Claims According to Hannafi, Shafi'I and Hanbali Schools of Islamic Jurisprudence,* In: *Ahmadu Bello University Journal of Private and Comparative Law*, JPCL vol.8 A.B.U Zaria, p 74.
[186] *The Book of Inheritance* (Kitabul-meerath) compiled by Majilisul Ulama of South Africa p 46

CHAPTER THREE

WILLS UNDER STATUTORY LAW

3.1 Introduction

In Nigeria, formal Wills was first introduced by the provisions of the Wills Act of 1837 and its amendment in 1852 (which is a statute of general application[187] reflecting the values of the English society with their prescriptions of Christian religion.[188]) and later amended as wills law of various states. Under the Wills Act of 1837, a testator can freely dispose his property and make his will without any hindrance prescribed by statute, custom or religion.[189] He can bequeath his property to any person he desires or wishes (even his pets), and may also deprive his blood relations of his property without any question being asked.[190]

Over the years, however it was felt that this absolute right to dispose all property to any beneficiary occasioned hardships on the relatives of the testator and also on those who might have depended for support on the testator. This made the restriction on the right of a testator to freely dispose of his estate necessary, hence many state modified and enacted their own wills law limiting the powers of the testator to dispose of his entire estate. Thus there are still States that have not enacted or modified their wills law and the implication is that they left a *lacunae*, as it is not certain what law applies to such states. Because the Wills Act being a statute of general application ceased to exist by virtue of Section 1 of Laws of the Federation [191] which provides:

> 1 It shall not be necessary for the Law Revision Committee to include in the Revised Edition of the Laws of the Federation of Nigeria the following, that is to say-

[187] By virtue of Section 28 of the High Court Laws of Northern Region No 28 laws of northern Nigeria.
[188] The religious sentiment in England in historical terms as far as the development of common law is concern appear to be largely Christian, *Lord Sumnar* in the case of *Bowman vs. Secular Societies(*1917)A.C 465 where it was stated that 'Ours is, and always has been, a Christian state. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law".
[189] *Banks vs Goodfellow* (1870) LR 5 QB 549
[190] Ibid
[191] No.21 Laws of the Federation of Nigeria,Decree 1990

(a) all imperial enactments or statutes or subsidiary matters appertaining to them which are no longer relevant to Nigeria ….

(b) All Laws, enactments, legislations and subsidiary enactments or any part thereof….

Surprisingly, even in England the Wills Act of !837 is no longer applicable because as far back as 1938 and later 1975, the parliament had introduced some restrictions on the disposing power of the testator. E.g. Section 1(1) of the Inheritance Provisions for Family and Dependence Act, emphasizes the court to make provisions in this regard for the wife or husband who has not remarried, child of the deceased, a person (not being a child of the deceased) who in this case of any marriage to which the deceased was at any time a party was treated by the deceased as a child in relation to that marriage, any other person who immediately before the death of the deceased, was being maintained either wholly or partly by the deceased.

3.2 Definition of Wills under the Statute

The Supreme Court defines will as "a document by which a person makes a disposition on his property to take effect after his death". It is ambulatory and revocable at anytime during the lifetime of the testator[192].The Wills Law of Bauchi State defines " 'will' includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power."[193].

Dadem defines a will as simply the intention and wishes of a person carried out after his death[194]. A will is also define as a legal declaration of a man's intention as to his estate after his

[192] *Okelola vs Boyle* [192] (1998)2 NWLR pt 539 pg 533

[193] .see also Section 2 of Bauchi State Edict, Cap 168, Laws of Bauchi state 1991, Section 2 of Kwara State Wills Law.

[194] Dadem ,Y.Y.D.(2009) Opcit p 228.

death, a written instrument by which someone declares his desires for the distribution of his property"[195]

Imhanobe defines a will as an instrument by which a person makes a disposition of his real and personal property, to take effect after his death (until such death, the will is only a mere declaration of his intention), and which by its own nature is ambulatory and revocable.[196]

According to Abayomi:[197] A will is a testamentary and revocable document voluntarily made, executed and witnessed according to law by a testator with sound disposing mind wherein he disposes of his property subject to any limitations imposed by law and wherein he gives such other directives as he may deem fit to his personal representative otherwise known as his executors, who administer his estate in accordance with the wishes manifested in the will.

Thus among the main features of statutory will is that, it is testamentary i.e. (it takes effect after the death of the testator) and it is ambulatory so that it can be changed and revoked during the lifetime of the testator, it is also voluntary so that it must be made independently and freely without pressure or undue influence from others, it must also be signed and witnessed according to law, it must also identify the property and the name of the beneficiaries of the gifts in the will.[198]

A will under the statute is formal and therefore cannot be nuncupative, thus unlike under Customary and Islamic Law, a verbal declaration (oral will) is not accepted under Wills law. There must also be an intention by the testator to dispose his properties. Where a will complies with all the formalities but there is no intention, then it is not a will. If it complies with all the

[195] *The New International Webster's Comprehensive Dictionary of English Language,*(2010) Deluxe Encyclopedia Edition, Typhoon Media Corporation, U.S.A.
[196] Imhanobe, S. O. (2007) Opcit p 411
[197] Abayomi, K.(2004) *Wills Law and Probate*, Mbeyi Press Ltd, Lagos, p 6
[198] Dadem, Y.Y,D (2009) p229..

requirements and there is intention but it does not describe itself as such, it will still be held as a will.[199]

3.2.1 Advantages of Making a Will

1. To avoid the problem of intestacy where no will is written, under the statute or customary law.
2. A testator has the opportunity to make a positive display or demonstration of his wishes and desires e.g. he may desire to give to charity, to give to his friends or mistress, or to say how and where he should be buried.
3. A testator can select and appoint guardians to look after his children if he so desires.
4. To have the choice of appointing personal representatives (executors) to administer his estate. By this, he can choose persons whom he trust and who have his interest to carry out his wishes after his death. This contrast with a situation where he dies intestate and the courts may appoint administrators of his estate without the deceased having any choice in their appointment.
5. It may give peace of mind to the testator because he has wound up his affairs and hopes his wishes will be carried out after he is no more[200].

3.3 Requirements of a Valid Will

Statutory Law makes it mandatory for a will to be formal, i.e it has to be written and signed by the testator, Section 7 of the Bauchi State Wills Law[201] states the requirement of wills as follows.

[199] ibid

[200] Dadem, Y.Y.D (2009) Opcit pp 232-233.

[201] Cap 168,Laws of Bauchi State similar to Section 4(1) of wills Law of Lagos State, Cap W2 Laws of Lagos State 2004, S.7 of Wills Law of Kaduna State Cap 163 Laws of Kaduna State 1991,S.7 Kwara State Wills law Cap k.58

> 7. (1) No will shall be valid unless— (a) it is in writing; (b) 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; (c)the testator makes or acknowledge the signature in the presence of at least two witnesses present at the same time; (d) the witnesses attest and subscribe the will in the presence of the testator but no form of attestation or publication shall be necessary. (2) No signature under this section or under any other provision of this Law shall be operative to give effect to any disposition or direction which is underneath or follows it nor shall it give effect to any disposition or direction inserted after the signature shall be made.

In the case of *Ize-Iyamu vs. Alonge*[202] the Court of Appeal stated that for a will to be valid, it must comply with the following factors: it must be in writing, signed by the testator, attested and subscribed by witnesses. These requirements will be considered in details:

3.3.1 Writing

No particular form of writing is required, it may however be handwritten (holograph), typed, printed or any combination of these. So long as it expresses the wishes and intentions of the testator. The language need not be English, as a will written in French language was held to be valid[203].

The requirement of writing is one of the finest distinguishing characteristic between a will and customary directives of a dying person[204]implying that an oral declaration is not recognized under the statute and thus it is invalid.[205]

3.3.2 Execution

Laws of Kwara State 2006, S.6 of Wills Law of Abia State Cap 37 Laws of Abia State1991-2000 and S.6 of Wills Edict of Oyo State

[202] *(2007) All FWLR Part 371, pg. 1570*

[203] *Whiting v. Turner (1903) 89 LT 71*

[204] Dadem , Y.Y.D.(2009); *Op.cit* ,p 243.

[205] S.7 of Bauchi State Wills Edict, Cap 168,Laws of Bauchi State,1991, S.7 Kwara State Wills Law,S.6 Wills Law of Western Region,S.4 Wills law of Lagos State,S.6 Wills Law of Oyo State,S.6(1) Wills Law of Jigawa State.

Signature may be an initial, a cross, rubber stamp, a name or signature or full name, a mark, thumb print. Signature has a wide connotation, representing any written indication of the testator which serves as his mark or means of identification[206].

The signature must be what the testator intended and it must be complete. Signature does not include seal[207]. But in the case of *Goods* of *Emerson* [208]sealing coupled with initials on the seal was held as signing.

Thus the testator must sign himself in the presence of at least two witnesses present at the same time who must attest the will or he might sign in their absence but will have to acknowledge his signature in the presence of witnesses, to the effect that the writing on the document appearing as his signature was made by him [209].

The testator may request and direct another person to sign for him, and he acknowledges the signature in the presence of at least two witnesses present at the same time, who must then attest to the will.[210]The signature must be complete. But signature which satisfy the court that it represents the wishes of the testator is valid. In the cause of Chalcraft v. Giles[211], the testator signed as 'E.chal' instead of 'E. Chalcraft' it was accepted to be a valid signature.

Where the testator is illiterate or is blind, a jurat should be inserted for illiterate or blind persons indicating that the contents of the will were first read and interpreted to them in the language they understood before affixing their signature, mark or thumb impression[212].

A testator may sign at such other place on the will so long as it is apparent on the face of the will that he intended to give effect by the signature to the writing signed as his wills[213]. Thus

[206] Dadem, Y.Y.D (2009) Opcit p 243
[207] Ellis vs Smith (1754) ER 667
[208] (1882) 9 LR IR 443
[209] Dadem , Y. Y. D. (2009) *Op.cit* p 244.
[210] Imhanobe, S.O(2007) Opcit p.431.
[211] (1948) 1 A.C. 700
[212] *Estate of Randle-Nelson vs. Akofiranmi* (1948) 1 AC 700

in the case of *Goods of Osborne*[214] probate was granted to a will in which the signature was made at the side of the margin. But in all cases, the testator must sign before the witnesses sign. In order to prevent fraud, any disposition or direction which is underneath or follows it or is after it (signature) is void[215]

In the case of *Hunt vs. Hunt*[216], a will ended in the middle of a third page of a sheet of foolscap paper, the lower half of the page being left blank and the attestation clause and signature being written on the top of the fourth page, it was held that the will was well executed under the Wills Amendment Act, 1852.

In *Margar vs. Robinson,*[217] signature of the testator appeared in the middle of the will, and the witnesses put their signature at the back, it was held that it was not signed at the "foot and end" within the meaning of the statute and was therefore not duly executed and not entitled to probate.

Where the will is contained in more than one page, it is not necessary that each page is signed, the signature on the last page is presumed to refer to the whole will[218]. In *Ewen vs. Franklin*[219], the testator and two witnesses in the margin of the first four pages signed a will drawn by a solicitor, but the fifth and last page contained the signature of the testator alone. It was held that the witnesses had not subscribed the will.

3.3.3 Proof of Due Execution of Will

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[213] See Section 7 (1)(b) of Bauchi State Wills Law & Section 4(1) Wills Law Lagos State
[214] (1909) 25 TLR
[215]See Section 7(2) of Bauchi State Wills Law,4(2) Lagos State Wills Law,6(2) Abia State Wills Law, 7(2) Kaduna State Wills Law
[216] (1866)L.R I P & D 209
[217] 57 L.T 281
[218] Imhanobe, S. O. (2007); *Opcit* ,p 434
[219] 164 E.R 485.

This involves strict compliance with the formalities for executing a will. The requirement for execution is that the Will must be signed by the testator in the presence of witnesses.

Where a will appears on its face to be ex-facie regular, it is presumed that the formal requirements for its validity where complied with.[220]

This principle is stated in the maxim *omnia preasumutur rita esse acta*. Thus a will is said to be regular where it complies with Wills Law[221]. Thus in *Ize-Iyamu vs. Alonge*[222] regular or *prima facie* seems to have been explained by the trial court thus:

(i) Has the name of the testator

(ii) Is properly witnessed by two witnesses and

(iii)It is signed by the testator and dated

The presumption of regularity would be ascribed to the document, more so if the will was deposited in the probate registry and is admitted as the only will of the testator[223].As long as it is clear what the intentions and wishes of the testator are, the court will not save in few cases allow formalities to frustrate those intentions, presumptions will be made in favour of wills which on their faces appear regular even where the witnesses are unable to recollect the circumstance of the execution of the will. In *Foot vs. Stanton*[224] a will was attested by two persons and neither of them recollected the circumstances, although they recognized their signatures. The will was presumed duly executed.

The presumption of due execution applies depending on the circumstances of each case, thus if the form is irregular and unusual, the presumption will not apply. Thus the guiding

[220] Section 150 (1) Evidence Act
[221] See Section 7 of the Wills Law of Bauchi State.
[222] Op.cit p 55.
[223] Dadem ,Y.Y.D.(2009) Opcit p 248.
[224](1856) 164 E.R. 489

principle is the whole circumstance of the case as held in the case of *In the Estate of Randle (Nelson vs. Akofiranmi)*[225] there was a contradictory evidence by the witnesses to the will in respect of the order of execution of the will, whether the testator or the witnesses first signed the will. The court applied the presumption to admit the will to probate, even though the testator only put his thumb-impression, since the will had an attestation clause, it was presumed as duly executed.

However, presumption may be displaced by clear and reliable evidence which shows that the will was not duly executed where there is dispute on the validity of a will; the primary onus of proof is on the party who propounds it to show clearly that *prima facie* it is duly executed. Once the primary onus is discharged, the secondary onus of proof of the allegation that the will is not properly executed or that it is tainted with fraud or forgery shift to the party challenging its proper execution to substantiate his allegations *Adamu vs*. *Ikharo*[226] Providing due execution of wills may be in the reversed order in the courts. This is because in civil cases, the party who asserts must prove, but the rule operates in reverse in probate cases. Thus the person propounding a will in addition to the onus of proving due execution must also prove testamentary capacity.

The onus always lies on the propounder of a will to satisfy the court that the document is the last will of a free and capable testator[227]. In *Amadi vs*. *Amadi*[228], it was held by per *Dongban-Mensem JCA*:

> The primary burden always rest with the party who initiates the dispute. With wills, the party who propounds the will, is known as the proponent (propounder) of the will, while the one who

[225] (1962) AWLR 130
[226](1988) 4 NWLR Pt. 89, 478
[227]Dadem ,Y.Y.D.(2009) *Opcit* p 249.
[228](2007) All FWLR Pt. 368, 1142

> questions the existence of the will is the opponent (impunger). While the proponent ordinarily will have the uphill task to establish the allegation against the will, the proponent has the initial burden to establish the existence of the will and as in this case, due execution.

However the burden of proof never remains static but shifts.[229]Once the propounders of the will have prima facie satisfied the court on the question of due execution and the testator being free and capable, the burden of proving the evidence is then casted on the persons alleging the instrument.[230]

3.3.4 Attestation and Witnesses

The signature of the testator must be made or acknowledged by him in the presence of at least two witnesses who must be present at the time. The minimum number of witness is two but there is no limit to the maximum e.g. four witnesses attest to a will and it was held to be valid[231]The court held that the attestation clause in a will is where the witnesses to the will certify that the will has been executed before them and state the manner of the execution of same. "Presence" here means visual presence, hence a blind person cannot witness a will.[232]The witness must actually see or have the opportunity of seeing the act of signing or acknowledgment. It is not necessary that the witness should know the detail of the will.[233]

It is not sufficient that one of the witnesses was present and it is worse if neither of them was present when the testator signed or acknowledged his signature. The witness must sign after,

[229] Dadem ,Y.Y.D.(2009) *Opcit* p 249.
[230] ibid
[231] *Ize-Iyamu vs Alonge* op.cit p 53.
[232] *Estate of Gibson* (1949) 2 All E.R. 90
[233] ibid

not before the testator's signature. The witnesses need not sign in the presence of one another, but they must sign in the presence of the testator.[234]

The witness may sign by his mark, initials or his hand may be guided to the document, but unlike the testator, he cannot acknowledge his signature. A witness cannot sign for the other nor can a third person sign for him, he must sign the will himself[235]. The signature of the witness need not be in any particular part of the will, but it must be made *animo testandi*[236], ideally the signature of the witness should appear on the same page as that of the testator.[237] Where a will appears on its face to be properly executed, it may be admitted to probate despite adverse evidence of attesting witnesses, but the propounder of the will may have the call evidence in rebuttal of the adverse evidence of the witness.

Therefore it is necessary that the witnesses are credible and independent persons. Though where a beneficiary or his spouse witnesses the will, subject to limited exceptions, a gift to the witness or his spouse is void though the will is valid [238].

No definite or precise words are needed to acknowledge the signature, words are also not necessary at all. Thus to amount to a valid acknowledgement a will must be

(a) Signed before the acknowledgement

(b) The signature must be visible to the witnesses at the time of acknowledgement i.e. no obstacles preventing them from seeing the signature.

(c) It must be acknowledged by words or conduct.

[234] *Shires v. Glascock* 91 E.R. 584;*Chodwick v. Palmer* (1851) 164 E.R. 483
[235] *Goods of Cope* 163 E.R. 1337
[236] i.e. the capacity, free will and or intention to make dispositions.
[237] Imhanobe, S. O. (2007); *Opcit* p 435
[238] Ibid

In acknowledging a will, the witnesses must be there in person and at the same time. They must be in the line of sight of the testator when he signs or acknowledges his signature.

Any person may be a witness, but it is advisable to have persons who are credible and independent. Younger than the testator and who are in good health condition because of the likelihood that they may live longer to proffer evidence of due execution of the will. A witness must sign by his own hand and cannot direct another to sign on his behalf (as a witness), unlike the situation we saw for the testator who can direct another person to sign on his behalf.[239]

3.4 Witnesses as Beneficiaries to a Will

A witness who benefit under a will, loses any property or benefit taken, the same rule applies to the spouse of a witness (a spouse at the time of attesting the will)[240].This does not apply to one who marries a witness after attesting the will. However, a witness who benefits is not prevented from testifying to prove the execution of such a will or its validity.

A solicitor owes his client the duty to explain the preceding rule on a beneficiary under a will. In the case of *Ross vs*. *Counters*,[241] the court held that where a solicitor fails to explain to a testator that a beneficiary or his spouse cannot be a witness to a will, he will be held liable for professional negligence on the basis that he owed a duty of care to the beneficiary to have explained the position to the testator, so that the testator can look for an independent witness.

There are other exceptions to the general rule that a witness cannot benefit under a will, thus:

[239] *Chodwick v*. *Palmer* (1851) 164 E.R. 483
[240] Section 11 of Bauchi State Wills Edict, Section 15 of Wills Act, Section 8 of Wills Law of Lagos state.
[241] (1980) Ch. 297

(a) Privileged Wills .wills that do not require witnesses i.e. will that is valid notwithstanding its non-compliance with the requirement of execution and attestation e.g. soldiers in actual military service[242].

(b) Where a beneficiary marries a witness after executing the will.

(c) Where the gift in the will is confirmed by another will or codicil which is not attested to by the beneficiary.

(d) Where the person present merely signs that he agrees with the contents of the will, not as witness.

(e) Where gifts are given to persons in their capacity as trustees and not as beneficiaries.

3.5 Essential Requirements of Wills under Statutory Law

For a testator to be qualified to make a will under the statute, he must satisfy the requirement of statutory age and mental capacity.

3.5.1 Statutory Age

Any person of full legal capacity can make a will. Thus since various laws prescribe the age for which a person can make a will, the testator must be of age approved by the relevant law, the Wills Act[243] prescribe the legal age to make a will at 21 years, the wills law of various states in Nigeria sets the legal age at eighteen years, hence no will made by a person under the age of eighteen years shall be valid.[244] Thus a will made by a testator without attaining the requisite age is invalid unless he ratifies it upon attaining majority.

The only exception to this requirement of age is for seamen or mariners (not being a member of the Nigerian Navy) being at sea, crew of Commercial Airlines being in the

[242] Section 9 of Bauchi State Wills Edict, Cap 168,Laws of Bauchi State 1991.
[243] Section 7 of Will Act of 1837 and also S.5 of Wills Law of Western Region No 28 1959.
[244] Section 6 of Bauchi State Wills Edict;S.3, (Wills Law of Lagos State), S.6 (Wills Law of Kaduna State), section 5 (Wills Law of of Abia State), S.5 (Wills Edict of Oyo State), etc

air.[245]However there seem to be no justification for these sections now as recruitment of such under aged is now an offence of child labour, child abuse and child soldiering under the military.[246]

3.5.2 Mental Capacity

A testator must have the required mental capacity to make a will. He must have a sound mind and understand the nature of the acts of making a will and its effects, he must understand the extent of the property he is disposing. He must understand, appreciate and recollect the persons who are the objects of his bounty (beneficiaries) and the manner the property is to be shared between them[247], thus Onu JSC in the case of *Okelola vs. Boyle*[248] observed that:

> No person is capable of making a will who is not of sound mind, memory and understanding. The testator's mind must be sound to be capable of forming the testamentary intentions in the will; his memory must be sound to recall the several persons who ought to be considered as his possible beneficiaries".

The test to determine whether a testator had sound mind was laid in the case of *Banks vs. Good Fellow*[249] where *Cockburn C.J* held thus:

> It is essential that a testator shall understand the nature of the act and its effect, shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect. No disorder of mind shall affect his affections, prevent his sense of right, or prevent the exercise of his natural faculties. That no insane delusions shall influence his will in disposing of his property and bring about a

[245] See Section 9 of Bauchi State Wills Edict, 6 Of Wills Law Lagos State, S.9(1)&(2) of Wills Law of Kaduna State,S.9(1) of Wills Law of Western Region and S.11 of Wills Act of 1837.
[246] See S.28 Of Child Rights Act, Cap C,211 Laws of Federal Territory Abuja,Vol.1 2007,see also Article 2 of the Optional Protocol to the Convention on Human Rights of Children on the involvement in Armed Conflict.
[247] Dadem ,Y.Y.D.(2009); *Opcit* ,p 235.
[248] (1998)2 NWLR pt 539 pg533
[249] Op.cit p 49.

> disposal of it which, if the mind had been sound, would not have been made.

The material time or period at which a testator is required to have sound mind or mental capacity are the time he is giving out the instructions and the time he is executing the will. If the instructions are given at a time when the testator had mental capacity and the will was prepared according to those instructions the will is valid even though the testator was unable to recollect the instructions previously given.[250]However, caution must be exercised if the instructions had previously been given to a lay intermediary who repeats them to a solicitor[251]

3.5.3 Delusion affecting Mental Capacity

Delusion is a belief which no rational person could hold but which reasoning with the testator cannot eradicate from his mind and which is capable of influencing the provisions of his will[252].It is not every general delusion that affects the capacity of the testator to make a will where the testator is suffering from a delusion but within hard moments he makes a will, the will is valid. Insane delusion is therefore a question of fact to be proven on the circumstances of each case. Delusion that affects will is such that must be serious to taint the provisions of the will.

Delusions are a common symptom of several mood and personally related illnesses. These may include schizophrenia, shared psychotic disorder, mental depressive disorders and bipolar disorders. Delusions are also common amongst substance abusers of amphetamines, cocaine and hallucinogen. Delusional disorders are a form of psychosis in which a person has paranoid delusion, often long lasting with no obvious physical or medical basis for the delusion[253].

[250] *Parker vs Felgate* (1883)8 PD 73
[251] *Singh vs Amirchand (1948)1 ALL ERP. 152*
[252] Ibid 238
[253] Sandabe, A. K. (2015) Opcit p 199

In *Re Bohrmann,*[254] it was said that: "…The law recognizes that a man may make a perfectly good will so long as the delusion from which he suffers has no relation to any testamentary capacity…" The delusion, in order to void the probate of the will must be such as would have influence on the making of the will. The delusion must be relevant to the testamentary disposition[255]

In the case of *Banks vs. Good fellow*[256]:

> The existence of the delusion compatible with the retention of the general power and faculties of the mind will not be sufficient to overthrow a will unless, it were such as was calculated to influence the testator in making it, which was produced by the obsession rather than by the testator's free and unhampered will.

3.5.4 Undue Influence

To make a good will, a man must be a free agent.[257] Any action or influence exerted on the testator that overthrows the free will of the testator will constitute undue influence[258].Undue influence refers to manipulation, deception, intimidation or coercion resulting in impairment of the ability of the testator to make free choices in distribution of his estate[259].

In determining undue influence, the evaluator should distinguish between encouragement of a relative or a friend for a testator to remember him or her in his will from deceptive, manipulative and coercive actions. The key element in undue influence is "coercion" without which the influence applied does not amount to undue influence. Coercion may be of the grossest form such as actual confinement or violence. The issue of undue influence is closely related to

[254] (1938) 1,ALL E.R 271
[255] Sandabe, A. K. (2015) *Opcit* p 199
[256] Op.cit p 65
[257] *Hall vs Hall* (1868) LRI P & D 481
[258] Dadem ,Y.Y.D.(2009) *Opcit* ,p 239.
[259] Sandabe, A . K. (2015); *Opcit* p 200.

the issue of mental capacity as it will often be necessary that the testator's mental capacity was diminished at the time the will was signed, thereby making him susceptible to the influence of others.

There are two forms of undue influence. In *Allcard vs. Skinnder*[260] the two forms were explained as actual undue influence and presumed undue influence. In the case of actual undue influence something was done to twist the mind of the donor and in the case of presumed undue influence, the influence derives from the relationship between two persons where one has acquired some degree of influence over the other. Or is coerced into making a will (or part of a will) which he does not want to make.

An immoral influence exercised over the testator does not constitute undue influence in the absence of force[261]. In *Johnson vs Maja*[262] it was held that the will to his mistress was valid since there was no evidence to show that the mistress was instrumental in drawing up the will.

Thus undue influence can be summarized as follows:

(a) Any action that subdues the will of the testator to freely make a will such as violence, threat and intimidation.

(b) These actions may be exerted on the fears or hopes or any emotions of the testator so as to drive him to make the will in a particular form.

(c) Any threat which the testator has no courage to resist.

(d) Any moral command asserted and yielded for the sake of peace and quiet, or of escaping from distress of mind or social discomfort carried to a degree in which the free play of

[260] (1885)36 CHD 145
[261] *Johnson vs Maja* (1951)4 WACA 290
[262] ibid

the testator's judgment, discretion or wishes is overborne even if no force is either used or threatened[263].

Influences that only appeal to affections or ties of kindred, to sentiment of gratitude for past services or pity for future destitution or the like, are not regarded as excessive or undue and these are justified[264].

In *Money Penny vs. Brown*[265], the testator made his will on his death bed with his wife telling him what to do and guiding his hand in making his signature. The court held this to constitute undue influence.

In *Myn vs. Robinson,*[266] the testatrix made a will in a weak state of health nine days before her death, appointing her husband the sole beneficiary and executor which contrasted with her former will, the court set aside the will on the ground of undue influence.

Undue influence is a matter of fact that is required to be proved. The person alleging undue influence must lead evidence to establish it. Once it has been proven that a will was executed with due solemnization by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it[267].

Mere affinity or closeness with the testator is not undue influence. Similarly, the fact that a person has a generally over-bearing influence or personality is no sufficient to establish undue

[263] Dadem,Y.Y.D(2009) Opcit p 240.
[264] id
[265] (1711)22 E.R 651
[266] (1828)1 62 E.R 823
[267] *Amadi vs. Amadi (2007) ALL FWLR Part 368, p. 1142*

influence. Such influence must be exerted to over-power the will of the testator[268]. Even if undue influence is proved, it is not enough to vitiate the whole will. The will is only void in respect of parts that are affected by the undue influence, while gifts made to other persons will be saved[269].

A blind person can make a will,[270] but it must be shown that the will was read over to him and he perfectly appeared to understand the contents affixing his hands to it. A blind person cannot attest a will, because his disability makes it impossible for him to see the signature of the testator and the act of signing the document.

Order 49, rule 23 of the High Court of the Federal Capital territory, Abuja requires that where a testator is blind or illiterate, a court shall not grant administration with the will annexed unless the court is satisfied by proof or by what appears on the face of the will that the will was read over to the deceased before its execution or that he had at that time knowledge of its contents. Accordingly, a special form of attestation (at times referred to as a blind person's jurat) is inserted as the attestation clause of the will as evidence that the will was read to such person and that he understood its contents.

3.6 Circumstances that Impinges on the Capacity

There are circumstances that affects on the capacity to make a will, these are as follows:

3.6.1 Lack of Knowledge

The testator must know and approve the contents of the will at the time of execution[271].It is always presumed that the testator knew and approved of the contents of the will so long as he

[268] *Baudais vs Richardson* (1966)A.C 169
[269] Dadem ,Y.Y.D.(2009) *Opcit*, p 241.
[270] *Insitful vs. Christian, 1951) 13 WACA 345*
[271] *Okelola vs. Boyle op.cit* p 51.

is of full capacity and had read or the documents had been read to him; unless he is blind or illiterate (and as such this presumption does not arise)[272].

Unless the attestation clause of the will is so worded as to constitute *prima-facie* evidence for the probate registry that the testator knew and approve the contents. The presumption will also not arise where the instructions of the will were given by a lay intermediary unless the instructions are given at the time the testator had mental capacity and the will was prepared according to such instructions and the testator believed at the time of executing the will that it was prepared according to his instructions, the will is valid even though the testator was unable to recollect the instructions previously given[273].

A beneficiary trying to show that a will was prepared with the knowledge and approval of the testator has a very heavy burden to discharge. In *Wintle vs. Nye*[274] the court warned itself on the need to be vigilante and jealous where a will is found to be prepared by a person who benefited from it.

The time at which knowledge and approval are required is the time of execution of the will. However, knowledge and approval are established if the testator knew and approved instruction given to a solicitor to draw up a will[275].

Lack of knowledge and approval can be deduced where there is absence of legal advice, the subsequent statement of the testator is inconsistent with the terms of the will; the testator is suffering from language, vision or hearing problems; the will is radically different from previous

[272] Dadem ,Y.Y.D.(2009); *Opcit*, p 242.
[273] *Parker vs Felgate op.cit* p 63.
[274] (1959)1 WLR 284
[275] *Parker vs Felgate* op.cit p 68.

wills,[276] a larger pattern of manipulative behavior by the primary beneficiary; and the complexity of the will[277].

3.6.2 Suspicious Circumstances

There are circumstances which arises to raise suspicion and query in the mind of the court that the will was not the free act and independent expression of the wishes of the testator e.g. a substantial gift made to a solicitor which prepares a will raises serious suspicion, and the burden of displacing the suspicion is heavy on the propounder of the will[278].

In *Barry vs. Butlin*[279] where the court said if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought really to excite the suspicions of the court. Suspicious circumstances does not necessarily invalidate a will. It only requires the court to be cautious and wary in pronouncing in favour of the will. If no evidence is given to clear the suspicion, no presumption of regularity will be made in favour of the will.

3.6.3 Mistake and Fraud

Mistake occur where the testator is completely mistaken about the document so that the contents do not represent his will or that he used words which had completely different meanings in law or he was completely mistaken of the contents of the will. Depending on the degree of mistake, the will may fail or the court can amend and rectify it[280].

[276] *Okelola vs Boyle* op.cit p 68.
[277] ;Sandabe, A. K. (2015);*opcit* p 196.
[278] *Wintle vs. Nye* (1959)1 WLR 284,*Thomas vs. James (1928) Ch, 126*
[279] 12, E.R 1090.
[280] Dadem ,Y.Y.D.(2009) *Opcit* ,p 243.

Fraud may also vitiate a will, because in both mistake and fraud there is absence of intention, hence to establish mistake or fraud, positive and cogent evidence would have to be led to rebut the presumption.[281]

3.7 Privileged Will

One of the exceptions to the requirement of due execution is also a will made by a person under service law. A will made by a person under service law does not require the presence of two witnesses, thus one witness suffices, and the witness must either be an officer of the armed forces or any government medical officer.[282]

However, such a will must satisfy the following requirements:

(i) Testator must have a sound mind;

(ii) The will must be his act, the exercise of his free will;

(iii) The will must be in writing; and

(iv) The testator must sign or acknowledge the will.

3.8 Limits to Testamentary Capacity

Under the Wills Act[283], a testator can freely dispose of his properties and makes his will without any hindrances prescribed by statute, custom or religion. The court affirmed these right of testamentary freedom and held that, a person at all times has the right to make a will and give his properties to any person he desires, he may also deprive his blood relations without any question being asked[284].

[281] ibid
[282] S.276(1) Armed Forces Act, Cap A20 LFN 2004 *Shroder & Co vs. Major & Co. Ltd* (2002) FLWR, Pt. 128, 1304 at 1316
[283] 1837
[284] *Banks vs. Goodfellow (1870) L.R 5 QB* 549

In Nigeria, however, restriction on these absolute testamentary powers becomes necessary because it causes a lot of hardship to the relatives of the testator, hence; testamentary freedom has been restricted by either preventing a person from disposing of his property entirely as he wishes on his death or by making it possible for his disposition to be altered after his death. Thus, testamentary power under the statute has been restricted in three ways in Nigeria.

3.8.1 Reasonable Financial Provision

S. 5 of Bauchi State Wills Edict[285] Provides as follows:

> …where a person dies and is survived by any of the following persons:(a) the wife or husband of the deceased;(b) a child of the deceased;and (c) a parent, brother or sister of the deceased who immediately before his death was being maintained either wholly or partly, by the deceased: that person may apply to the court for an order on the ground that disposition of the deceased's estate affected by his will is not such to make reasonable financial provision for the applicant.

In Bauchi, Kaduna,Kwara, Abia, and Oyo state, the person who can apply for reasonable financial provisions include the parents, brothers or sisters, who immediately before his death were being maintained by the deceased[286] and in case of such persons (parents, brothers or sisters) 'reasonable financial provision' means such financial provision as it would be reasonable in all the circumstance of the case for the applicant to receive for his maintenance . While in the case of Lagos State, financial provision is only made for the maintenance of a child or spouse only[287].. Such persons included in Bauchi,Kwara, Kaduna, Abia and Oyo state will be treated as being maintained by the deceased either wholly or partly if the deceased was making a

[285] Similar with S,4(1) of Wills Law of Abia State,S.4(1) of Wills Law of Oyo State,S.5 (3) Kwara State wills Law and S.2 of Bauchi State Wills Edict.
[286] Section 27 Kaduna State Wills Law, Section 4 of Abia State Wills Law, Section 4(3) of Oyo State Wills Law,S.5(3) of Kwara State.
[287] See Section 2 of Lagos State Wills Law.

substantial contribution in money or money's worth towards the reasonable needs of those persons[288].

The application is usually made to the High Court on the estate of a deceased who has failed to make reasonable financial provision (by will) to his close relatives i.e. children, spouse, parents, brothers, sisters of the deceased. In case of parents, brothers, and sisters, one of the criteria should be that they were being maintained by the deceased during his lifetime.

The application must be made within six months of the grant of probate[289]. The rationale for the provision is to take care of situations where the deceased did not benefit the applicant at all or comparatively with other beneficiaries the applicant's legacy is less.[290]It also takes care of situations where the testator failed in his attempt to provide for the applicant either due to a failure of legacy under the general Law or where the deceased miscalculated the size of the estate in making the disposition.[291]

3.8.2 Customary Law Restrictions

Customary Law has also been employed as a basis to limit the unfettered right of a person to freely dispose his estate e.g. Section (4)(a) of Bauchi State Wills Edict[292]states:

> It shall be Lawful for every person to bequeath or dispose of, by his will executed in accordance with the provisions of this Edict, all property to which he is entitled, either in Law or in equity, at the time of his death; provided that the provisions of this Edict shall not apply: (a) to any property which the testator had no power

[288]See section 5(30 Of Bauchi State Wills Edict,which is similar to Section5(3) of Kwara State Wills Law & Section 5(3) of Kaduna State Wills Law.
[289] Sections 5(4) 0f Bauchi State Wills Edict, 5(4) of Kwara State Wills Law,2(3) of Wills Law of Lagos State, 4(4) of Wills Law of Oyo State.
[290] Ibid 256
[291] Adekile, O. (2008) *Family and dependants Right To Financial Provision under the Wills Statute in Nigeria*. In: Smith, I. O. (ed), *Law and Real Property Rights In Nigeria*, University of Lagos,p255-276
[292] Which is similar to Section 4(1)&(2) of Kaduna State Wills Law, Section 1 Of Wills Law of Lagos State, Section 3(1)(a) of Wills Law of Oyo State, and also several States of the Federation.

> to dispose of by will or otherwise under customary Law to which he was subject.

Abia State Wills Law does not have both restrictions i.e based on Customary and Islamic Law and accordingly, a person who made his will pursuant to the Abia state Wills Law enjoys a complete freedom to dispose of property in a similar way guaranteed by the Wills act of 1837.

The effect of the customary law restriction is that it limits the right of a testator to freely dispose property as he wishes. It also acknowledges that complete right to disposition of property, will cause hardship and unless it is restricted, the custom and orders in many Nigerian communities will be upset.[293]The aim of the restriction is that, it does not mean that nobody can make a will, the limitation in respect of the will is that it cannot disregard the custom of the people with regard to disposition of property.

Thus, under *Bini* Customary Law, the *Igiogbe* could not under any circumstances be given away as a gift, but must be left for the eldest male child, and at his death, the testator is entitled under *Bini* customary Law to dispose all his property except "*Igiogbe*" since at his death will no longer be his own to give away[294].

So when a bequest or disposition is subject to customary Law, the implication is that the bequest or disposition shall not be inconsistent with or contrary to customary Law. In other words the bequest or disposition is to be governed and controlled by customary Law.

In ***Lawal Osula vs. Lawal Osula***[295]. One of the issues for determination was whether the *Bini* Customary Law of Inheritance was incompatible with the law or repugnant to natural justice, equity and good conscience and therefore inapplicable to the estate of the testator. The case involves the gift of the "*Igiogbe*" to one of the wives of the deceased testator rather than to

[293] Dadem ,Y.Y.D.(2009) *Op.cit* p 258.
[294] *Idehen vs Idehen* (1991)7 SCNJ pt.11,196.
[295] (1995)9, NWLR pt 419 p.259

his eldest son. The court held that the gift was invalid based on the restriction which the *Bini* customary Law attaches to it, which says that it must go to the eldest surviving son of the deceased.

But in ***Asika vs. Atuanya***[296], the plaintiffs (most of whom are married women) are the daughters of the testator, who made a will dividing his property in equal shares to his male and female children. The Plaintiffs claimed against the defendant (a son to their brother) for a declaration that under the will of their late father, they were entitled in equal shares to the property.

The defendant denied their claim and contended that all the plaintiffs except one are married women, that by the native Law and custom of Onitsha people, the plaintiffs are entitled to inherit only the properties of their husbands and not their father. That the third plaintiff who was not married cannot inherit her father except she becomes a person of good behavior and only during her lifetime. The Court of Appeal held that the constitution of the Federal Republic of Nigeria grants women as citizens, the right not to be discriminated upon as a result of their gender and the circumstances of their birth and also the right to acquire and own property (immovable) in Nigeria.[297] That while the testator of the will in question did not discriminate againt any of his children in the division of the property in question, his grandson defendant has introduced the elements of native Laws and custom that discriminates against female sex with respect to succession to property and such custom being repugnant to natural justice, equity and good conscience contravenes the Constitution, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter on Human Rights[298].

[296] (2008) ALL FWLR pt 433,at 1293
[297] Section 42 and 43 of 1999 CFRN.
[298] Dadem ,Y.Y.D.(2009) *Opcit* p 261.

3.8.3 Islamic Law Restriction

Section 4(1)(b) of Bauchi State Wills Edict [299] provides:

> It shall be Lawful for every person to bequeath or dispose of, by his will executed in accordance with the provisions of this Edict, all property to which he is entitled, either in Law or in equity, at the time of his death; provided that the provisions of this Edict shall not apply: (b) to the will of a person who immediately before his death was subject to Islamic Law.

These provisions which is enacted in most states as a result of the outcry of the decision of the case of ***Yunusa vs. Adesubokan***. Where the testator a Muslim who was subject to Islamic Law made a will in accordance with the Wills act of 1837, thereby discriminating his first son from inheriting his property, the trial court held that the testator in accordance with Islamic Law cannot dispose of more than one-third of his property. Thus the Wills Act cannot override Islamic Law.

The Supreme Court reversed the decision of the trial court, that since the testator, intended to distribute his estate according to the Wills Act, the act prevailed over any native Law and custom. Here Islamic Law is treated as part of native law and custom.[300]

In essence the provision of Section 4(1)(b) of Wills Law of (Bauchi State) summarizes as follows.

1. Every person is guaranteed the right to dispose of his property.
2. This right does not apply to the Wills of a person who immediately before his death was subject to Islamic Law (as Muslims are guided by Islamic Law of bequest).

[299] Cap.168 Laws of Bauchi state 1989 which is the same with Section 4(1)(b) of Kaduna State Wills Law,Cap 163, 1991, Section 3(1) of Wills Edict Oyo State 1990, Section 4(1)(b) of Kwara State Wills Law, Cap 168, Laws of Kwara State 1991.

[300] See *Ila Alkamawa vs. Hassan Bello* 1998) 6 SCNJ 127 at 136 where it was held that "Islamic Law is not the same as customary Law as it does not belong to any tribe .It is a complete system of universal law, more certain and permanent and more universal than the English common law.

3. This provision was applied in the case of ***Ajibaiye vs. Ajibaiye***[301]**,** where the testator made a will under the Wills Act and disposed of his estate as he wished not in accordance with the principles of Islamic Law.

The will was challenged on the ground that the testator being a Muslim from Ilorin in Kwara state, the Wills Law of Kwara state applies to his will and by the provision of that Law he cannot dispose of his estate anyhow, thus the Court of Appeal in affirming the decision of the trial court added that the will in dispute in *void ab initio* for being contrary to the Wills Law of Kwara State and could not have validly made a will under the Wills act of 1837, a statute of general application which is no longer applicable in Kwara state.

Thus accordingly the property of a Nigerian Muslim in Kwara state, after his death, is subject to the dictates of Islamic Law of Inheritance which does not allow a Muslim to give out in a will more than one-third of the whole property, the remaining two-third must go to the legal heirs after they are identified.

It is pertinent to note that in Nigeria due to multiplicity of Laws i.e. the Wills Law of various states (for those states that modified their Wills Law and for those States that are yet to enact their own Wills Law). Each case depends on the facts and circumstances i.e. it depends on where the testator is located in Nigeria and who the testator is (in terms of his religious faith.)

[301] (2007)ALL FWLR(pt 359) 1321

CHAPTER FOUR

COMPARATIVE ANALYSIS OF WILLS UNDER ISLAMIC AND STATUTORY LAWS

4.1 Introduction

The aim of this chapter is to bring the two laws i.e. Islamic law of wills and statutory law of wills together, to be able to compare the requirements under both laws to identify the area of difference as well as similarities. And to also criticize on the application of these laws in Nigerian courts, especially where the laws are conflicting; being that wills is one aspect where the impact of legal pluralism has posed a challenge in Nigeria.

4.2 Comparative Analysis of Essential Requirements.

Islamic Law tend to be broad as to who qualifies to be a testator, Islamic law insist that a testator has to be a Muslim or a non Muslim living in an Islamic state, free man not a slave, an adult who reaches the age of majority or atleast of a discerning mind in possession of his full mental faculty and a *mukhallaf* (A person of complete legal capacity i.e sanity and majority) the focal point under Islamic law is that the testator has attained puberty or majority,.[302]

Under the Wills Law of various states, the requirement is of statutory age, thus any person of full age and capacity can make a will. Thus the wills Law of various States in Nigeria places the statutory age at 18 years, hence no will made by a person under the age of 18 years shall be valid.[303]

[302] Hussain, A. (2005) Opcit p.386

[303] See Section 6 of Bauchi State Wills Edict, Cap 168 Laws of Bauchi State 1991,Section 6 of Kaduna State Wills Law, Section 6 of Kwara State Wills Law cap168,1991,Section 5 of Abia State Wills Law, Section 5 of Oyo State Wills Edict.

Both Islamic law and statutory law insist on mental capacity, thus a testator must be of sound mind, he must understand the nature of making a will and its effects, he must understand the extent of the property he is disposing, and know his beneficiaries.[304]

Islamic Law does not recognizes making will by an insane person during lucid intervals, it does not also recognize a will by a drunkard or any person in a state of intoxication. Under the Wills Law of Various states, apart from the requirement of age (which the Wills law places at 18 years)[305] and mental capacity, there is no other qualification of a testator (as the Wills Law does not recognize intoxication as a vitiating element) , thus a testator can be any one under the Wills Law.

Islamic and statutory law recognize the concept of ownership, "*Nemo dat quod non habeat"* i.e you cannot give what you don't have, thus the testator must own the subject matter of bequest. Subject matter can be anything under the Wills Law so long as it is susceptible to testamentary disposition.[306]Under Islamic law subject matter must be something lawful in the eyes of Islamic Law.[307]

There is no formal requirements for making of Will under Islamic law, thus bequest may take any form, it may be oral, by conduct, in writing or partly written and partly oral.[308] Thus so long as the testator's testamentary intentions are manifestly clear and reasonably devoid of any ambiguity.[309]

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[304] Dadem, Y.Y.D (2009) Opcit p 235.
[305] See Section 6 of Bauchi State Wills Edict,
[306] S.6 of Kwara State Wills Law, Cap K58 Laws of Kwara State; S.6 of Will Law Cap 163, Laws of Kaduna State 1991; S.3 of Wills Law Cap W2 Laws of Lagos State 2004; S.5 Wills Law No 13, Laws of Oyo State 1990; S.5 of Wills Law, Cap 155 Laws of Jigawa State 1998; S.5 Wills Law, Cap 133 Laws of Western Region of Nigeria 1959 etc.
[307] *Ige vs. Dobi* (1999) 3 NWLR Pt. 596, p.550; Hussain, A. (2005) *The Islamic Law of Succession*, Maktaba Darrussalam, Riyadh, p.386; Keffi, U.S.D. (nd) *An Introduction to Islamic Law of Bequest* (unpublished) Faculty of Law, Ahmadu Bello University, Zaria, p.10
[308] *Bankole vs. Tapo* (1961) 1 All NLR 140
[309] Abbo, U. S. and Mafa, U. M. (2002) *Bequest (Wills): The Islamic Perspective and Development in Nigeria*, Vol. 5, University of Maiduguri Law Journal, p.155

However writing is much more preferable going by the implied provision of the *Qur'an* and *Sunnah*,[310] under the Wills law certain prescribed formalities must be adhered to, to which compliance is mandatory, i.e Wills must be in writing, signed and attested in the presence of two witnesses[311]. Under Islamic law even though it is recommended to provide witness to a bequest, the only place that it was mentioned in the *Qur'an* is when the testator is on a journey and approaches death[312].

A testator under statutory law can be partial if he so desires in his bequest as done in *Yunusa vs Adesubokan's* case, the law will give effect to his wishes but it is not so in relation to *Wasiyya* as Islamic law will not give effect to an unjust bequest.[313]

While morality or otherwise is not considered under the Wills Law, it is important in *Wasiyyah*. Under Islamic law a bequest can only be made for lawful (*halal*) purposes, but under the Wills Law, a bequest in favour of a mistress[314], concubine or illegitimate child or made for any other forbidden or *haram* purposes might be accepted.

A will under Islamic law is a religiously divine institution which depending on the circumstance of the testator can be *wajib* (obligatory-in respect of performance of certain duties to Allah (SWT) or to individuals), recommended (*mustahab*-in respect of a person with abundant wealth, and detestable (*makruh*) if wealth is not sufficient, and forbidden (*haram*) if the aim of the bequest is to harm the heirs. Although Islamic law is guided by the fixed rules of *Qur'an* and

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[310] Baba-Ahmed, N. (2008) *The Islamic Law of Will (Wasiyyah): An Obligation Abandoned by the Ummah*, Merchant Yeoman Publishing Ltd, Ali Akilu Road, Kaduna, p.18

[311] Section 7 of Bauchi State Wills Edict, which is similar to S.7 of Wills Law of Kaduna State Cap 163 Laws of Kaduna State 1991,S.7 Kwara State Wills law Cap k.58 Laws of Kwara State 2006, Section 4(1) of Wills Law of Lagos State, Cap W2 Laws of Lagos State 2004, S.6 of Wills Law of Abia State Cap 37 Laws of Abia State1991-2000 and S.6 of Wills Edict of Oyo State

[312] Qur'an 5:106 in:Yusuf, A.A. (1983) *The Holy Qur'an, Text, Translation and Commentary,* Amana Corp, Kingdom of Saudi Arabia. P.276

[313] Oba, A. A. (2008) Opcit p.65

[314] Like the instance of *Johnson* vs. *Maja* under English Law.

Sunnah, is much more flexible in comparison with statutory law which is not capable of rotation in such divine capacities.

4.3 Comparative Analysis of Testamentary Power

It is clear from the preceding chapters, that there are restrictions placed on the testamentary power of a testator under both laws in Nigeria. Under Islamic law, the right to disposal of property by way of will is limited to one-third, thus all disposition of a testator must be within one-third of his net-estate,[315] in essence where a bequest exceed the bequetable limit of one-third, such bequest has to be altered and the fraction be reduced within the bequettable third, except the legal heirs ratify it.[316] The Wills Law of various States in Nigeria imposed some restrictions on testamentary freedom of a testator, i.e the testator must make reasonable financial provision for family and dependants, a testator also has no power to dispose property subject to customary law, also the application of the Wills law does not extend to a person whom before his death was subject to Islamic law ,In essence a Muslim can only make a bequest in strict compliance with Islamic law[317].

The restriction under Islamic law focus on the quantum of property to be bequeathed out i.e. the subject matter and to whom it can be bequeathed to i.e. beneficiary of the will. While a testator under the Wills law is not restricted to a particular fixed percentage of subject matter.[318] It only empowers the courts to make reasonable financial provisions for testator's spouse and dependents, in case the testator did not make adequate provision for them in his will. In essence statutory law does not imposed any fixed quantum as restriction on the testator to Will out his

[315] See *Song vs Song* (2001)FWLR 44,447.where it was held that "a will is only limited to one-third of the Muslim's estate and is not applicable to an heir".
[316] Idris, S. I. (2002) Opcit p.58
[317] see Section 4 & 5 of Bauchi State Wills Edict, Cap 168 Laws of Bauchi State 1991 which is the same with,Section 4& 5 of Kaduna state Wills Law Cap 163,1991 and Section 4 &5 of Kwara State Wills Law Cap K58 2006..See also *Ajibaiye vs Ajibaiye* supra at pg 4.
[318] Section 5 of Bauchi State Wills Edict.

property, except that upon his failure to make provision for his family and dependents, the court will be empowered to do so within his estate.

The philosophy under Islamic Law is for the protection of the rights of legal heirs which has been divinely prescribed. And also to promote the hands of charity and generosity to non-legal heirs. Also the fact that the right of legal heirs has been divinely fixed, they should not be provided for in a will.

The restriction under the Wills Law also centered on the preservation of Nigerian customs, norms, culture and religious beliefs and the need to make adequate financial provisions for certain categories of relations who immediately before the death of the testator where his dependents.

As a matter of fact, in Islamic law the testator cannot by his Will, deprive his heirs of their respective shares in his estate, since Islamic law provides for each heir his fixed share.[319] Under the Wills law, the testator may by his will dispose of all his property by will, thereby to some extent depriving his heirs of having any share in the property. In Islamic law, bequest made in favour of an heir is invalid except with the consent of other legal heirs. Prophet (SAW) said "Allah appointed for everyone who has a right what is due to him, therefore, there is no bequetthal to an heir unless the other heirs wish so"[320]. However under the Wills law, will could be made in favour of an heir even without consent of other heirs.

Under the Wills Law a beneficiary who is found guilty of murder or manslaughter of the testator will be prevented from taking the benefit on the ground of public policy, except where

[319] Qur'an 4:11, 12 and 176 in: Yusuf, A.A, (1983) *The Holy Qur;an,*Translation and Commentary,Revised Edition Amana Corp, Kingdom of Saudi Arabia.pg 181,182 &235.
[320] Al-Jaza'iry,A.J (2001) *opcit* p 304.

the beneficiary successfully proves insanity[321].Under Islamic Law a beneficiary responsible for the death of the testator is also not qualified to benefit from the estate, however Islamic jurist differ as to whether the killing was intentional or not, whether the testator is aware that the beneficiary is responsible for the injury that result to his death and where the heirs consent to it.[322]It is also a settled law under Islamic law that an apostate cannot be a beneficiary to a will.

4.4 An Examination of the three Nigerian celebrated cases on wills.

By the provisions of the Constitution of the Federal Republic of Nigeria, three distinct legal systems operate concurrently in Nigeria, the Common Law and Statutes enacted by various legislative houses of various tiers of government, the Native Law and Custom (as long as it meets and satisfies the repugnancy test) and Islamic Law which by its very nature is an absolute law and which is not subjected to repugnancy test.[323]

These recognized sources of law in Nigeria are bound to be conflicting and challenging in terms of application in Nigerian courts. The concept of wills is one aspect where the effect of legal pluralism can be felt in Nigeria.

For instance the unfettered testamentary freedom under Section 3 of the Wills Act of 1837, which was judicially confirmed in the case of ***Yunusa vs. Adesubokan*** has generated a lot of controversy. Hence, a discussion on the three *locus classicus* cases which were controversial in relation to wills and the applicable laws in Nigeria are discussed below:

4.4.1 *Yunusa vs*. *Adesubokan* (1971) 1 All NLR 225.

The facts of the case were as follows: the testator a Muslim born in Omu-Aran in Kwara State who grew up in Lagos made a will under the Wills Act of 1837. The testator gave the

[321] Dadem,Y.Y.D(2009) Opcit p 254.
[322] see Hussain,A(2009) Opcit p.389.
[323] *Osagie vs*. *Osagie* (2011) All FWLR, Pt. 555, p.363

plaintiff/respondent his first son ten pounds and to his two sons a plot each situated at Zaria, each plot worth 350 pounds, and also devised to the two sons jointly, a house in Lagos and the residue of his estate in equal shares. Probate was granted to the defendant/appellant.

The plaintiff/respondent filed an action in the High Court on the grounds that the testator being a Muslim can only distribute his estate in accordance with Islamic law, and a Muslim cannot dispose of more than one-third of his estate by bequest and he is not permitted to make a bequest to his legal heirs except with the consent of other legal heirs.

Bello J. (as he then was) held that the will was invalid on the ground that the testator did not comply with Islamic law in the dispositions he made in his will. On appeal to the Supreme Court, the decision of the lower court was reversed. The Supreme Court held that any person can make a will under the Wills Act of 1837, to dispose of his estate in any manner he likes. The court also held that the inconsistency between the contents of the will and the requirements of Islamic Law could not avail the respondent because under Section 34(1) of the High Court Laws of Northern Nigeria, any customary law that is incompatible with the provisions of a statute is void. Islamic law was treated as a customary law which was incompatible with the provisions of the Wills Act of 1837,[324] a statute of general application.[325]

By this decision, the Supreme Court seems to suggest that the deceased had two options for devolution of his property and the options are mutually exclusive. Thus the testator by adopting devolution under the Wills Act of 1837, customary and Islamic law has been

[324] Madaki, A. M. (2011) Opcit, p.233

[325] Section 28 of the High Court Laws of Northern Region No 28 laws of northern region provides: "subject to the provisions of any written law…"

(a) The common law
(b) The doctrine of equity
(c) The statutes of general application which were in force in England on the 1st day of January, 1900 shall…be in force within the jurisdiction of the court.

displaced.[326] The classification of Islamic law as a customary law was wrong as it does not belong to any particular tribe, and secondly it is difficult for a Muslim to separate religious injunctions from his ordinary way of life.[327]

This case attracted alot of arguments that went beyond the estates of Muslims, persons subject to customary law also became apprehensive of the implications of the case on them[328]. As a result of these criticisms and in order to reconcile the provisions of the Wills Act of 1837 which later formed the model for various States Wills legislation with peculiarities of Nigerians, the Nigerian Law Reform Commission proposed a draft wills law with some restrictions on testamentary freedom for states to adopt.[329] This gave birth to the enactment of various State Wills Law with amendments at the Federal and State level, though differently worded but which made the Wills law subject to customary and Islamic law.[330]

Despite the controversy generated by the case of ***Yunusa vs. Adesubokan***, some scholars are still under the perception that the Wills Act of 1837 is still applicable to states that have not yet enacted their own wills law to restrict the freedom of a testator to dispose of his estate.[331]

However, in State like Kaduna, Kwara, Oyo, Bauchi and host of others that enacted and made amendments to their own Wills Law, making it subject to Islamic and customary law, the ratio in ***Adesubokan vs. Yunusa*** may not be a good law because the applicable law is the Wills Law of the states as enacted by the State Assembly.

4.4.2 *Ajibaiye vs. Ajibaiye* (2007) All FWLR Pt. 359, p.1321

[326] Madaki, A.M (2011) *Opcit page 234.*
[327] Ibid
[328] Oba, A. A. (2002) "*Islamic Law as Contemporary Law: The Changing Respective in Nigeria"*, In: *International and Comparative Law*, Vol. 51, p.817-829
[329] Inheritance Provision for Family and Dependents Act 1975
[330] Oredola, M. A. (2005) *The Relevance of Yunusa vs. Adesubokan in a Multi-Religious Society*, A Paper presented at the 40th NBA Kaduna Branch Anniversary Week, held at Kaduna on 16th of November, 2005, p.25-27
[331] E.g. Abia State and Kano State.

While the amendments have been upheld severally by the Supreme Court in relation to customary law,[332] the Court of Appeal case of ***Ajibaiye vs. Ajibaiye***[333] was the first reported case in relation to Islamic law, where the Court of Appeal held that where there is a local legislation on a subject matter recourse may not be had to foreign laws or authorities, such as the Wills Act of 1837, which had been abolished by Section 4 of the Wills Law of Kwara State Cap. 168.

The facts of the case where as follows: one *Alhaji Disu Ajibaiye* made a will under the Wills Law of *Kwara* State, only the third and younger wife of the deceased (the defendant/appellant in the case) had knowledge of the will. In the will he gave this direction.

> I also direct and want my estate to be shared in accordance with the English law and as contained in this Will having chosen English laws to guide my transactions and affairs in my lifetime notwithstanding the fact that I am a Muslim

The testator also directs that "My burial should be done in accordance with Muslim rites without drinking of alcohol either on the date of my death, burial or the 8 days prayer".

The Will was contested at the High Court on the ground that the testator being a Muslim to whom Islamic personal law applies to his estate cannot make a Will under the Wills law. The plaintiffs relied on Section 4(1) of the Kwara State Wills Law which state thus:

> It shall be lawful for every person to bequeath or dispose of by his will executed in accordance with the provisions of this law, all property to which he is entitled either in law or in equity, at the time of his death provided that the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic law

The plaintiffs argued that the provision stated in the sub-section prohibited Muslims from making Wills under the Wills law. The trial High Court agreed with the contention and held that

[332] See *Ogiamen vs. Ogiamen* (1967) NMLR 245; *Arase vs. Arase* (1981) 5 SC 33; *Idehen vs. Idehen* (1991) 7 CNJ, 196; *Lawal Osula vs. Lawal Osula* (1995) 10 SCNJ 84

[333] (2007) All FWLR, Pt. 359, Pt. 1321

the Will was invalid, null and void having regard to Section 4(1) of the Wills Law of Kwara State. This decision was upheld on appeal to the Court of Appeal.

The appellant had attempted at the trial to establish by evidence that the deceased could not have been subject to Islamic law because of his lifestyle being that he had children out of wedlock and also he sold and consumed alcohol. This was dismissed by the appeal held by the learned Judge and affirmed an appeal, the Court of Appeal held that despite the allegation, the testator was a Muslim, he had not renounced his faith and there was no controversy about his faith.

And that assuming the deceased committed any wrong when he was alive, he can only be sanction by the law of his faith, it is not for the appellant or anyone to judge.[334] From the above case, it appears from the colonial days, the English courts have always been reluctant in applying Islamic personal laws even where all the parties are Muslims.[335]

In ***Maryama vs. Sadiku Ejo***[336] the court in refusing to apply Islamic law to the parties even though they were all Muslims and the matter was within the ambit of personal law, applied the "intention" and "manner of life". The court hold that the parties are bound by *Igbirra* Native law and custom and not by Muslim law.

Also in ***Apatira vs. Akanke***, the court refused to apply Islamic law to the estate of Yoruba Muslim who had made a will couched in the common law form. In the will, the testator devised part of his estate in a manner consistent with Islamic law. The court after setting aside the will for lack of compliance with the formalities of will making declined to apply Islamic law but opted for English law. The court reasoned as follows:

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[334] Abdullahi, J.C.A.
[335] See *Mariyama vs. Sadiku Ejo* (1959) NNLR 81; *Apatira vs. Akanke* (1944) 17 NLR 149; *Ayoola vs. Folawiyo* (1942) 8 WACA p.39; *Yunusa vs. Adesubokan* (1971)1 ALL NLR 225.
[336] (1959) NNLR 81

> The will read as if it was intended to be a will made in accordance with English law. Moreover, the fact that it makes legacies to his heirs (as they would be in Mohammed law) and disposes of all his property contrary to Mohammedan law also suggest that it was intended to be made according to English law to enable him to do so

The colonial courts tried all they could to ensure that Islamic law was not applied to the estate of Muslims, Yoruba Muslim were particularly victims in this regard.[337]The implication of the restriction provided in Section 4(1) of Kwara State Wills Law and other States Wills Law with other similar restriction, is that a Muslim cannot make a will under the Wills Law, a Muslim can only make Wills[338] in strict compliance with the provisions of Islamic law, and this is exactly the decision in ***Ajibaiye vs. Ajibaiye***.[339]

The position had been criticized by authors on the ground that the law discriminated against Muslims and therefore unconstitutional.[340] Because Nigerians of other faith are not subjected to the same restriction. It was also criticized that the judgement[341] has prohibited or ousted persons subject to Islamic law from making a will under the Wills Law, and therefore calls for the re-drafting of Section 4(1) of the Wills Law of Kwara State.[342] With due respect, the restriction under Section 4(1) of the Kwara State Wills Law is only to make the laws inapplicable to Muslims, because Muslims personal law is Islamic Law which is part of the legal system in Nigeria[343].

Even in the Nigerian context where only segment of Islamic law is applied, Islamic law is still the personal law of all Muslims. No Muslim can opt out of Islamic law so long as he or she

[337] Oba, A. A. (2008) Opcit p.1
[338] Wills Law of Cap. 163 Laws of Kaduna state 1991 (which is the same with Section 3(1) of Wills Edict Oyo State 1990,S,4 of Bauchi state Wills Law cap. 168 Laws of Bauchi state 1989.
[339] Supra at pg 87
[340] Oniekoro F. J. (2007) Opcit p.36-55
[341] Ajibaiye v, Ajibaiye op.cit p87.
[342] Dadem, Y.Y.D. (2008) Opcit p.60
[343] Section 38, 275-279 of 1999 Constitution of Federal Republic of Nigeria recognized the enforcement of Islamic Personal Law

professes Islam.[344] *Ogunwumiju JCA* stated thus "The peculiarity of this case is that Islamic faith is not strictly speaking just a religion, it is a way of life. The Holy *Qur'an* and *Hadith* encode a way of life guiding the faithfuls from the cradle to the grave."[345]

In ***Shittu vs. Shittu***[346] *Per Oredola* while holding that Islamic law is the personal of the Muslims remarked thus:

> The point needs to be made that a Muslim, as long as he or she profess Islam, has no option or choice regarding the application of Islamic law, personal or otherwise on his person. Having voluntarily assumed the status of a Muslim, he or she is disentitled from accepting or rejecting according to his whims and caprices. He cannot back out there from and he must not allow anybody to either encourage or discourage him there from. There cannot be a super imposition or juxtaposition of customary law over Islamic law, it cannot be done. It is never done.

Thus in a country where Islamic Law is in existence there is no reason to permit a Muslim to make statutory Wills. This is because statutory Wills and w*asiyya* are premised on different world views and value systems and are governed by very different rules.[347]

4.4.3 *Giwa Osagie vs. Giwa Osagie* (2011) All FWLR, P.t.555, p.363

However, in States where no amendments of provisions were made, there may well be situations where the determination of a person's personal law becomes complicated. One of such situations presented itself in the recent case of ***Giwa Osagie vs. Giwa Osagie***.[348]

The facts of the case is that: the deceased father of the plaintiff and defendant, a Moslem and a *Bini* man inherited the *Igiogbe* from his father. He executed a deed in respect of same to his eldest son, the defendant. He also made a deed transferring a house built by him and where he

[344] Oba, A. A. (2008) Opcit p.134
[345] *Giwa Osagie vs. Giwa Osagie infra p 92.*
[346] (1998) Annual Report of Shariah Court of Appeal (Kwara State) 93, p.98
[347] Oba, A. A. (2008) Op.cit, p.139
[348] (2011) All FWLR (Pt.555), p.363

dies to his second son, the plaintiff. The defendant prevented the plaintiff from taking possession of the house given to the plaintiff on ground that as the eldest son, the house where his father lived and died was the *Igiogbe* and rightly belongs to him by custom, therefore the gift *intervivos* was null and void. The plaintiff therefore instituted an action in the High Court of Justice, Edo State claiming declaratory reliefs that: the gift *inter-vivos* of the disputed property to the plaintiff was valid. He is the person entitled to the statutory right of occupancy to the property, the disputed property was not part of the *Igiogbe,* he request for an order of perpetual injunction restraining the defendant from trespassing upon the property and that the deceased father lived and died as a Moslem and his estate is governed by Moslem law of inheritance which does not recognize *Igiogbe*. The defendants counterclaimed. The trial court dismissed the plaintiff's claims on grounds that a *Bini* man could not make a gift of Igiogbe and dismissed defendants counterclaim since he has not performed the required second burial and therefore could not bring an action. Aggrieved, the plaintiff appealed to the Court of Appeal.

The Court of Appeal concludes that the *Bini* customs applied, again the court had to consider the way of life of the deceased with a view to suggesting which of the personal law should apply. The learned Justice *Ogunwumiju JCA* conceded to the fact that it is difficult to determine the personal law of a person in such cases thus:

> The way our cultural and religious belief have been interwoven in the Southern part of Nigeria makes the question of whether a man gave his cultural laws up for his religious laws difficult to answer. A man might be a Moslem or a Christian assiduously practicing his religion during his lifetime and also in other areas of his life for example, when giving his daughter out in marriage or acquiring a chieftaincy title, subject himself to the dictates of his cultural heritage. Such conduct over the years as practiced by majority of the people of Southern Nigeria does not ipso facto make the person less of a Bini man or less than a Moslem or Christian.

Another test that was used in this case is whether the deceased was a practicing Muslim or not (even though evidence shows that he was not going to Mosque for the past 20 years of his life, yet he lived and died as a Muslim). On this the majority judgment supported the findings of the trial court that he was not. Conversely, *Gumel JCA* in his dissenting opinion reacted to the findings of the deceased not being a practicing Muslim he retorted thus:

> I do not accept this findings, it is unreasonable and perverse in the circumstances of this case. My knowledge of Islamic religion, which I am lawfully entitled to rely on in the circumstance, tells me that the religion does not accept and has no place for this types of strait jacket typification or categorization of its adherents. One is either a Muslim or not. No more no less. And once one is a Muslim, the Islamic religion, according to the evidence of PW5, stipulated that its provision and rules must be applicable to the estate of a deceased Muslim.

In this case, the deceased neither divides his property according to Islamic law nor according to *Bini* customary law, because he made a bequest to his wives which is unheard of under *Bini* customary law, and Islamic law also does not recognized a bequest to legal heirs i.e. wives in this instant who are entitled to a fixed share of one-eight.

Also the plaintiff/applicant (the second child) is a Christian while the defendant is a Muslim. Thus as Justice *Gumel* reiterated, the defendant/respondent being a Muslim son is only entitled to inherit with the deceased other children, thus the defendant being an eldest male child cannot inherit to the exclusion of other Muslim children of the deceased any house where their father lived and died.

The plaintiff/applicant also being a Christian is not a legal heir, but he can inherit through a valid will . In essence the learned Justice Gumel concluded that none of the parties had made out a case to support a claim under Islamic law because the plaintiff had failed to establish his

claim for a gift *inter vivos* and the defendants claim must fail because the concept of *Igiogbe* is not recognized under Islamic law.

Although in the final analysis, the judgement of the court is that of the majority which invalidated the gift of *Igiogbe* to a person other than the eldest son, the observation of learned Justice *Gumel* is instructive and illustrious in the area of Islamic law, and is capable of titling the pendulum on further appeal to the Supreme Court.

By the provision of Section 4(1) of Kaduna State Wills Law, a testator can only dispose his property which his customary law does not prohibit him from disposing of by Will or otherwise. The effect of this restriction is that objects, items or properties from which a particular customary law has prescribed mode of devolution, a testator is not allowed to circumvent such customs through the instrument of Wills. Thus any disposition contrary to such native law and custom is invalid. This Section is the *groundnorm* support for the concept of *Igiogbe* under the *Bini* native law and custom.

The concept of *nemo dat quad non habeat* that[349] is also well reiterated under Section 4(1)(a) of the Kaduna State Wills Law, to which courts have construed it to mean family property which the testator has no power to dispose of by will to hold that a person cannot in whatever guise alienate property that does not belong to him.

In northern Nigeria the tradition for reservation of property out of deceased estate for the common use of heirs is popular, this tradition is practice either by unanimous agreement of the

[349] That "a person cannot give that which does not belong to him",

elderly heirs[350] or by instruction left in a *wasiyya* .[351] However, this tradition is alien to Islamic law and is capable of generating a lot of crises.[352]

Thus Qur'an 33:36 provides:

> It is not for the believers, man or woman when Allah and His Messenger have decreed a matter that they should have any opinion in the decision. And whosever disobey Allah and His messenger has indeed strayed into a path of error.[353]

It seems nations and states are struggling through legislation to achieve what Islam had since over 1000 years ago put in place. The legislature in amending and enacting the provision for family and dependents as envisage in Section 5(1) of Kaduna State Wills Law might have been influenced by Islamic law relating to Wills and succession as per the $^1/_3$ quantum restriction as provided in the Sunnah of Prophet (SAW).

Section 5(1) of the law[354]which ensures that the testator makes reasonable financial provision to his family and dependents has been criticized as problematic and its practical utility doubtful[355] as the Section fails to provide a guideline as to what is reasonable in all circumstances, the discretion of the testator to distribute his estate in particular way had been meddled with by the court.

[350] See *Hajia Hamsatu vs. Hajia Koshe and Seven Ors*, unreported Suit No. CV/493/2002
[351] *Alh. Mohammed Jajere*, unreported Suit No. Cv/395/2002
[352] Abbo, U. S. and Mafa, U. M. (2004) *The Tradition of Reservation of Property for Heir's Common Use in Nigeria, The Islamic Perspective,* In: University of Maiduguri Law Journal, U. Maid L.J. Vol. 7, p.61-64
[353] Yusuf, A.A, (1983) *THE HOLY QUR'AN, Text, Translation and Commentary,* Amana corp, Kingdom of Saudi Arabia. p 1117.
[354] Kaduna State Wills Law.
[355] Madaki, A. M. (2011) Op.cit, p.242-243

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

The absolute power of disposal of property giving to a testator without any restrictions under the Wills Act of 1837 has been reduced by this present regime through the enactment of the Wills Law of various States. The application of the Wills Law is now made subject to customary law and the reosonableness provision for certain relations termed as "dependants".[356] And in some states, the Wills Law is suspended on the wills of a person subject to Islamic law.[357]

The testator's personal law has now been independently guided by either the state wills law ,customary law or Islamic law, and it is the particular personal law to which the testator is subject to, that governs the extent of testamentary freedom exercisable by the testator. The determination of the appropriate personal law of testators in Nigeria, is still a subject of judicial controversy, as the interpretation is complex in states yet to suspend the application of wills law on persons subject to Islamic law and also states yet to enact the wills law completely.

The concept of *wasiyya* even though neglected by the muslim *ummah* (though not compulsory) is an act of righteousness *bir* which attract reward by Allah (SWT) .The pressing need to address this obligation is even more today, as Muslims are in the process of organizing themselves and their lives to observe the duties of *Shariah*, and since no one knows when or where death will overtake him/her ,one must hasten to write his/her will.

[356] See Section 1&2 of Lagos State Wills law,Cap W2 2004, S.3&4 of Oyo State Wills Edict No:13,1990.
[357] See Section 4&5 of Bauchi State Wills Edict,Cap 168,1990,Section 4&5 of Kaduna State Wills law,Cap163,1991,Section 4 &5 of Kwara State Wills law,Cap K58,2006.

A muslim through the instrumentality of *wasiyya* can create an endowment, make a gift *inter vivos* or charity *sadaqa* thereby aiming at providing social and economic relief to the members of the muslim *ummah*. It is also an opportunity given to the testator to rectify his wrong doings, settle his debts and finish off all his outstanding obligations and make provision for hereafter.The muslim heirs or *ummah* may be glad to oblige him such post-mortem request.

The constitution of the Federal republic of Nigeria has recognized the practice of will making under Islamic Law, and confers jurisdiction on the Shariah Court of Appeal[358] throughout the federation to try disputes involving "any question of Islamic personal law regarding a waqf,gift, will or succession where the endower,donor, testator or deceased person is a muslim. The import is that, now a muslim has no excuse for making a choice of wills in English form, for any reason whatsoever in Nigeria. For any muslim to still write his will in English form is tantamount to mistrust on what the prophet (SAW) brought as well as giving preference to the law of man over that of Allah(SWT).[359]

5.2 **Findings**

From the foregoing discussions the following findings are made:

1. The ignorance of the law of Wills and succession by potential experts and testators, is in fact the main cause of conflict of laws that pause a challenge to courts, in construing the appropriate personal law of a testator in Nigeria. Thus majority of cases where Muslims wills were contested in courts, are clear cases of total ignorance and illiteracy on Islamic law and perhaps the only reason why a Muslim testator's (who has faith in his religion) can voluntary opt out of Islamic law and prefer English law to guide his Will.[360]

[358] Section 277(2) CFRN,1999.
[359] Ishola,A.S.Opcit p126..
[360] ibid

2. It has been observed that there is still much to be done on the application of Islamic Law of wills on muslims in Nigeria., for instance the provision for making *wasiyya* has been neglected despite its immense benefit, in Northern Nigeria, apart from instructions like appointing guardians to marry off their daughters, or performance of funeral rites etc, majority prefers Islamic Law of inheritance , hardly is bequest made on how property/wealth is to be shared after death. And in the southern parts of Nigeria (with marginal muslims) the application of Islamic Law on the estate of muslims living in that part has not been recognized.
3. It is also observed that the implication of the restriction provided in Section 4(1) of Kwara State Wills Law and other States Wills Law with other similar restriction, is that a Muslim in Nigeria cannot make a will under the Wills Law, a Muslim can only make Wills in strict compliance with the provisions of Islamic law [361] , and this is exactly the decision in ***Ajibaiye vs. Ajibaiye***[362]**.**
4. It is also observed that the absolute power of testamentary disposition which gives the testator the unrestrained liberty to do as he wishes[363] is no longer the popular law in Nigeria, the correct position now is that the power of the testator has been highly restricted customary and Islamic law limitations except for the States yet to enact their own Wills Law. Thus attempt to accommodate the tripartite system of laws has changed and altered the operation of the Wills Law on the testator's power in Nigeria. Presently in Nigeria, determination of a testator's personal law is done in three ways depending on where the testator resides:

[361] which is the same with Section 4 Wills Law of Cap. 163 Laws of Kaduna state 1991 ,Section 3(1) of Wills Edict Oyo State 1990,S,4 of Bauchi state Wills Edict cap. 168 Laws of Bauchi state 1989.
[362] Opcit at pg 80
[363] As provided in Section 3 of the Wills Act of 1837

i. For the States that made there Wills law to be subject to Islamic Law[1] and customary law limitations, the applicable law to a Muslim testator is the Islamic law of Wills as the Wills Law is made inapplicable to a person subject to Islamic Law.

ii. For the States that made their Wills law subject to only customary law limitations.[2] Then perhaps determining the personal laws of an indigenous Muslim testator, living in such State, the applicable law will be either the Wills law or customary law of the testator. This is the reason for the dilemma in the case of ***Giwa Osagie vs. Giwa Osagie***.[3]

iii. For the States yet to enact their own Wills law, the implication is that they have left a *lacunae*, and since the State House of Assembly is silent and yet to pass its own wills law that will prescribe what will happen, if a muslim draft a will coined in English form (e.g Kano State), there will be confusion as to which law applies. Some authors are of the opinion that the Wills Act of 1837 with all its antecedence is likely to apply[4].Thus the complexity and challenge on which law applies in such states is still ongoing.

5. It is also observed that the Notion that the Wills Act of 1837 is still applicable in some states in Nigeria (i.e Kano State) is rather erroneous .The Wills Act of 1837(being a Statute of General Application) has ceased to exist as it has been repealed .Hence all Imperial Laws (The Wills Act of 1837 inclusive) has been repealed in Nigeria.[5]

[1] Section 4 of Wills Law of Cap. 163 Laws of Kaduna state 1991 (which is the same with Section 3(1) of Wills Edict Oyo State 1990, Section 4 Bauchi state Wills Law cap. 168 Laws of Bauchi state 1989, Section 4 (1) of Kwara State Wills Law, Cap 168, Laws of Kwara State 1991, etc. This is what influence the Court in deciding the case of *Ajibaiye vs. Ajibaiye* op.cit p 4.

[2] See Section 1 of the Wills Law of Lagos State this is also what influence the decision in *Giwa Osagie vs Giwa Osagie* opcit p 5;, *Lawal Osula* vs *Lawal Osula* op.cit p 4;*Arase vs* Arase op.cit p 5; *Ogiemen vs. Ogiemen* op.cit p 5 etc in Edo State.

[3] Where the Court of Appeal was faced with the difficult task of determining which among the three is the personal law of testator i.e. between Bini Customary Law, Islamic Law or the Wills Law

[4] See Madaki , A.M.(2011) Opcit page 234.

[5] Section 1 of the Laws of the Federation, No.21 Laws of the Federation of Nigeria,Decree 1990

6. It is observed that custom such as the *Bini* Native Law and custom which vested the *igiogbe* (a house where the testator lived and died)[6] on the first male child, is not only a hindrance to Wills Law in Nigeria but also discriminatory to widows, daughters and other minor children who are completely denied inheritance. And just like other tribes in Nigeria, there are *bini* men and women, who are muslims and their rights to be Muslims of Edo State origin is recognized by the Constitution of the Federal Republic of Nigeria 1999.[7]

5.4 Recommendations

From the above observations, this study suggest that Islamic law of succession is more in tune with the wishes aspirations of Muslims citizens in Nigeria. Thus Islamic law should be accorded legal pre-eminence over the statutory law in regulating wills among Muslims in Nigeria. This will bring the law to the realities on ground also reduce conflicts and miscarriage of justice,thus the following recommendations:

1. Testators and experts need to know the particular system of law that apply to a particular testator (between Islamic, statutory or customary law), this is to avoid such instance like *Yunusa vs. Adesubokan, Apatira vs. Akanke, Ayoola vs. Folawiyo, Giwa Osagie vs. Giwa Osagie* (supra) from re-occurring. Thus it is essential that testators be it Muslims or otherwise need to be very knowledgeable relating to either Islamic law of Wills or the Wills Law before drawing up a Will, thus the knowledge of essential requirements as well as testamentary limitations of a testator is very paramount.
2. There is a need for massive public awareness nationwide and enlightenment campaign to educate Muslims not only about the principles and rules of succession, and especially in the

[6]*Lawal Osula vs. Lawal Osula* (1995)10 SCNJ 84, *Eghareba vs Oruonghae*(2001)1 NWLR pt 734 p.318 ;*Ogbahon vs Registered Trustee of Christ Chosen Church of God*(2001)FWLR pt 801 p 496

[7] Section 38, 275-299 allows the recognition and enforcement of Islamic Personal Law)

Southern part of Nigeria where as a result of ignorance of Islamic law many Muslims ignorantly prefer English law to guide their Will despite the fact that they are Muslims.[8]

3. The provision of Section 4(1)(b) of the Bauchi State Wills law which is similar to other states merely suspend the application of the state wills law on person subject to Islamic law is not sufficient, instead a separate code should be enacted to guide Islamic law of wills.
4. Since the determination of the appropriate personal law of testators is done in 3 ways in Nigeria,:
    i) For the states that made their wills law to be subject to all 3 laws, acknowledgement of the improvement in the various Wills Law upon the Wills Act is not sufficient, there is a need to go beyond just inserting the restriction clause in the laws, if it is accepted that Islamic law is the accepted law applicable to Muslims, then there is a need to encode this principles. In other words instead of enacting a statutory law to which Muslim are expressly exempted from its application, it is better to enact Muslims values as a statutory law for muslims. This is possible, just like the way the northern States enacted the Shariah Criminal Code to replace Criminal Law despite widespread opposition and concern over constitutional matters. Hence a *Shariah* Civil Codes of succession should also be enacted. The object being to make Islamic principles of succession more certain and readily available to the masses.
    ii) States Wills Law that have only the customary law restrictions on testamentary power should take a hint from their counterparts that have included Islamic law (by suspending the operation of the Wills Law on persons subject to Islamic Law) so as to protect the right of people whose personal law is Islamic Law within their

[8] *Yunusa vs. Adesubokan (1988)4 NWLR pt 89, 478; Apatira vs. Akanke(1944) 8 WACA 39; Ajibaiye vs. Ajibaiye(2007) ALL FWLR pt 368 1142; Ayoola vs. Folawiyo (1948) WACA 39*.

domain and as well ease the interpretation task of the court, so as to prevent incident like that in ***Giwa Osagie v. Giwa Osagie***[9] from re-occurring.

iii) States without their own Wills Law (like Kano) should endeavour to enact one, which will consider both Islamic and Customary restrictions, this is to avoid ambiguity. And also to protect people whose personal law is Islamic law within their domain and to make it easy for the courts task of interpreting on testamentary capacity[10].

5. Thus it is suggested that *wasiyya* should also be in writing to make the intention of the testator easily ascertainable. Islam encourages the writing down of transactions involving debt contract and other undertakings. Since the *wasiyya* only becomes operative after the death of the maker who cannot be present to confirm his intent. In Nigeria where competition among the sources of law is at its peak and poses difficulty in determining the actual personal law of a particular testator, *wasiyya* should also be made in written form. By making it more formal by inclusion of signature, stamp or thumbprint or any other usage that is peculiar to the testator will aid the establishment of the will in a court of law.

6. The rigidity and harshness of some customary laws on succession also need to be restricted, like the *Bini* Native Law and custom on *Igiogbe* should not be applied rigidly.[11] Where exceptional circumstance have been established e.g where the surviving eldest son is known as irresponsible, such customary law should be varied to meet the expediency of time. Since the main feature of customary law is its flexibility which allows it to adopt to changed circumstances without entirely loosing its character.[12] Also Islamic Law of Wills should also

[9] Op.cit p 94.
[10] The perception that the Wills Act of 1837 still applies in Kano if similar facts like *Yunusa vs.Adesubokan* occurrs, need to be eradicated.The correct position is that Islamic Law applies just like in marriage even without codification.
[11] Madaki,A.M (2011) Opcit *p 229.*
[12] *Lewis vs. Bankole* (1908)1 NLR 81.

be entrenched in such communities since there are indigenous *Bini* men and women who are Muslims and are living their lives as Muslim.

7. The council of legal education should include in their syllables for Nigerian Law school *wasiyyah*, so that lawyers as experts need to be acquainted with the rules to be able to advise their potential clients (who are Muslims) whenever the opportunity present itself.

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