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WRITE-UPS

WILLS: DEATH CERTIFICATE; OR SAVIOUR AFTER DEATH?

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A legal material portal

I humbly invite my cherished readers to follow me in this journey of brief but comprehensive article which is intended to educate all persons who may want to know more about making a valid Will and the reasons for making a Will in accordance with law. It has been my desire to share my opinion on the above subject matter having experienced, though in a short while in the legal profession, the challenges that our Courts and law practitioners as well as lay persons have had for some time now in Ghana. A Will is a very important document in the lifetime of all persons, particularly for persons of the ages of 18 years and above with reference to the laws of Ghana.

Despite its importance, many persons hold the perception that a Will is the preserve of those who are about to join their maker. Yet, many others hold the belief that a Will does not resolve any issue because after the death of the testator, the courts are still inundated with cases of estate matters even where there are valid Wills in respect of those properties. Others question the relevance of a Will when **PNDCL 111** makes provision for the distribution of the properties of a person who dies without making a Will. Many others hold a perception, though erroneously, that once a person makes a Will, it will automatically facilitate the early death of that person even if he or she would not have died that early. These are, but a few of the questions and perceptual beliefs that spark my curiosity to discuss comprehensively the issues of Wills in Ghana and the nuances it may entail in its execution process. Indeed, a Will is, but an empty document if the purpose for which it was made by the testator is eventually not achieved. Unless, for emphasis at some point, this article will solely deal with Wills and not Letters of Administration (L/A), even though most of the procedures described in the article are applicable to LA *mutatis mutandis.*

What is a Will?

Generally, it is more difficult to define what a thing is, but easier to explain the function or its use. Some of the writers in this area understandably, have not proffered a precise definition of what a *Will* is, but rather resorted to explanations which I guess, make the appreciation of a *Will* much easier.

Samuel Azu Crabbe, in His invaluable book, *'Law of Wills in Ghana*[1]*, indicates that a Will is usually a written document, in a form prescribed by law, by which the person making it (called the testator), provides for the distribution or administration of his self-acquired properties after his death'*. On his part, N.A. Josiah-Aryeh, in his book entitled 'Ghana Law of Wills[2], explained that when the testator expresses his will in a testamentary document, he states what he intends to happen to his property upon his death. The learned writer adds that, the document is the product of the testator's own volition about post-mortem arrangements and devolutions of his property among beneficiaries.

Lord Penzance illustrates in the case of *Lemage vs. Goodban*[3] that, '*The Will of a man, is the aggregate of his testamentary intentions so far as they are manifested in writing duly executed according to the statute'*. As far back as 1817, the common law case of A.G vs. Jones & Bartlett[4], explained a Will

1 Samuel Azu Crabbe, in His Invaluable Book, 'Law of Wills in Ghana', published in 1998 by Vieso Universal (Ghana) Ltd., Accra North-Ghana
2 Ghana Law of Wills by N.A Joshiah-Aryeh, republished in 2015
3 (1865) LR 1 P & D 57
4 (1817) 3 Price 368

to mean, '*…..essentially a document or documents about testamentary intention which have no effect until the death of the maker.*'

In Ghana, a Will is governed by the Wills Act[5]. The interpretation section of the Wills Act[6], defines a Will to include a codicil and any other testamentary instrument, and a testator shall be construed accordingly. Codicil could be explained as a document executed in the same manner as a Will and makes reference to the main Will.

Per the provision of the Wills Act, a Will may be defined as a document which contains testamentary disposition made by a person of or above the age of 18 years to dispose of his personal properties he had at the time of making the Will or any property he may acquire at the time of his death[7]. An exception is made to a member of the Armed Forces in active service to disregard age limit and other formalities in making a Will under the law[8]. A Will is a document and must be made voluntarily by the testator. However, it is imperative to add that a Will is **NOT** a **LEGAL DOCUMENT**[9]. As recent as 1984, the Courts in Ghana in the case of *Conney v. Bentum-Williams*[10], added that a Will is an ambulatory document and it is therefore, intended to have effect only after the death of the testator. The next question then is, how did Wills originate in Ghana?

The Origin of Wills in Ghana.

From the available authorities, there is no much controversy as to the origin of Wills in Ghana. The writers in this area are ad idem that Wills in Ghana have chequered historical antecedents. The English law of Wills started to develop after the Norman Conquest between 1066 -1075. However, history has it that the making of statutory Wills in Ghana is relatively of recent origin. The current Wills Act of Ghana can trace its origin from The Wills Act, 1837[11] following the enactment of the Supreme Court Ordinance of 1876[12].

The English Wills Act had since 1876, regulated the making of written Wills in Ghana before the year 1971[13]. This exotic mode of making a gift to operate on the death of the donor gradually became popular in Ghana, then the Gold Coast[14]. The case law suggests that Ghana began to practice the making of Wills in English form soon after the passing of the Supreme Court Ordinance in 1876, but it gradually became popular after the year 1971.

In the case of *Andoh & Anor vs. Franklin & Ors*[15], Lingely J, said … '*I consider that I must hold that Franklin could make a Will in English form. The practice has gone for many years. …..If I have been asked earlier the question of the capacity of an African of matrilineal family to make an English Will, I should have said he could not. It is now a matter for the Higher Court to decide….*'

5 1971 (Act 360)
6 Section 18 of Act 360
7 Section 1 of Act 360 and Banks v Goodfellow (1870) LR 5 QB 549, per Cockburn CJ
8 Section 6 of Act 360
9 Section 56 of Act the Legal Profession Act, 1960 (Act 32)
10 (1984-86) 2 GLR 301
11 Act of the UK Parliament (1 Vict. C 26)
12 Ghana Law of Wills by N.A Joshiah-Aryeh, republished in 2015.
13 Samuel Azu Crabbe, in His Invaluable Book, 'Law of Wills in Ghana'
14 Ibid
15

The West African Court of Appeal also observed in the case of *Nartey vs. Nartey* **in 1953 as** follows: '*…the matters that felt for decision were the rights and duties of the parties under a Will. As all the parties although natives recognized and claimed under it. It is right to say that the parties by implication had agreed that their obligations in connection therewith should be regulated substantially according to the English Law as to Wills*[16].'

On the basis of the above narration and case law, it would be nearly accurate if not entirely accurate to conclude that, for about a century, there was no locally tailored statute regulating the making of testamentary disposition in this country[17]. The enactment of the Wills Act, 1971 by Parliament of the Republic of Ghana was an important landmark in the history of Law Reform in Ghana. Until 1971, and except for the decision of the Court of Appeal in the case of In Re Lartey (Decd)[18], which decided that the English Wills Act, 1963 was applicable in Ghana, it was the Statute of General application and The English Wills Act, 1837 which were applicable when issues were raised in relation to Wills.

On 3rd July 1971, after the Presidential Assent had been given, there was enacted in Ghana **THE WILLS ACT, 1971 (Act 360)**, and this enactment was entitled: '*An Act to regulate the making of Wills and to give effect to provisions therein.*' The Act was intended to have retrospective effect for a very limited period, for it is specifically provided under section 20 that the Act shall come into force on July 1, 1971. It is therefore, important at this stage to know how a Will is made in Ghana.

How can a Will be made?

A Will must be made in compliance with the provisions of the Wills Act[19]. For a Will to be validly made, the person making the Will must be a person of sound mind and understanding who is of or above the age of 18 years[20]. The Will itself must be in writing and should not be influenced by factors such as fraud, duress or undue influence[21]. The reason is that a person suffering from an infirmity of mind or insanity and or unsoundness of mind which will not assist him to appreciate the import of a Will is not a competent person to make a Will[22]. A Will made may also be vitiated by fraud, undue influence or duress and shall become void in any of such instances.

A Will shall be attested to by at least two witnesses. The testator shall either make his signature or acknowledge his signature in the presence of two or more witnesses present at the same time[23]. The attesting witnesses shall sign and attest the Will in the presence of the testator. A Will could also be signed by another person at the direction of the testator. Where the testator directs another person to sign the Will on his behalf, it shall be signed in the presence of the testator and two or more witnesses present at the same time[24].

16 Nartey vs. Nartey and Another (1962) DLHC 1602
17 Ibid
18 In Re Laertey (deceased): Lartey vs. Affutu-Nartey (1972) 2 GLR 488
19 1971 (Act 360)
20 Wills Act, 1971 (Act 360), Section 1
21 Ibid
22 Hall v Hall (1868) LR 1 P & D481, Per Lord Sir JP Wilde
23 Wills Act, 1971 (Act 360), Section 2(3)
24 Wills Act, 1971 (Act 360), Section 2(4)

A disposition or direction which is underneath the signature or follows it or an insertion made after the signature shall not have effect unless the testator signs against them or acknowledges same in the presence of the attesting witnesses at the same time[25].

A Will made for a testator who is illiterate or blind shall have a *jurat* clause to the effect that the content of the Will was carefully read over and explained to the testator by a competent person and the competent person shall state that the testator appeared perfectly to understand the Will before the Will was executed[26]. An executor should be named in the Will and s/he shall be above the age of 21 years[27]. The executor could act as attesting witness but a beneficiary under the Will should not be an attesting witness[28]. The devises shall be made and there should be no ambiguity about the beneficiaries and the properties to be devised. A Will could be changed or revoked at any time in the life time of the testator because it takes effect after death[29]. However, the revocation must be made in accordance with law.

The Will would be sealed in an envelope bearing the name, address and the date the Will was executed. The original Will and the duplicate copies would then be deposited in the registry of the High Court after paying the appropriate filing fees[30]. The next relevant question is, why do I make a Will when the PNDCL 111 can distribute my properties/estate after death intestate?

The Need to Prepare a Will.

It has been said that where a man leaves a Will, it means he has his property in mind. Where the testator wants his intentions to be carried out upon his death, the only way to realize that dream is to prepare a Will.

Preparing a Will indicates that the testator intends not to die intestate. The Will enables the testator to avoid disputes or confusion upon his death, determines who should get what portion of his estate, apportions how much who should get, specifies how his estate/properties/affairs should be managed after he has left this world, indicates how other affairs could be dealt with or managed, for example, how his funeral arrangements could be made, how his just debts could be paid and which property should be held in trust and for whom? etc.

The usual question to ask is whether it is necessary to make a Will in view of the fact that the Intestate Succession Law[31] provides for distribution of a person's estate after death?

Enoch D Kom, in his book entitled, '*Inheritance, Marriage and Divorce*[32] itemized the main objectives of making a Will despite the PNDC Law 111. He states to the following effect:

- In making a Will, it means that you do not like the distribution of your estate as stated in the **PNDCL 111.**
- It is still necessary to make a Will because you belong to a church or a voluntary organization or social club which you will like to benefit or leave something to.

25 Wills Act, 1971 (Act 360), Section 2(2)&(3)
26 Wills Act, 1971 (Act 360), Section 2(6)
27 Wills Act, 1971 (Act 360), Section 3(1)
28 Wills Act, 1971 (Act 360), Section 3(2)
29 Wills Act, 1971 (Act 360), Section 7(1)
30 Wills Act, 1971 (Act 360), Section 11 and Order 66 Rule 16(1) & (2) of C.I 47
31 1985 (PNDC Law 111
32 Objectives of Making a Will @ Page 15

- It is still necessary despite **PNDCL 111** because you have already sufficiently and reasonably provided for a child in your life-time and you would want to leave something smaller to him than his brothers and sisters.
- It is still relevant to make a Will because you want to show your disapproval to a grown-up child of yours by disinheriting him or her.
- It is still necessary to make a Will because you have servant, worker, niece, etc you may like to benefit in your estate.
- It is important to make a Will because you want to tie down property to descend in particular line, example, as family property to be enjoyed by only male or female descendants of your niece or sister.
- There is the need for a Will because you want to appoint a guardian or guardians for your infant children left behind.
- There is the need for making a Will since you will want to appoint persons, that is, executors, who will sort out your affairs after you have gone.
- There is the need for making a Will because you want to state clearly, what should happen to your property you may be leaving behind.

The above writer, **E.D Kom,** in capturing the need for making a Will in his conclusion, characteristically likened the two systems of laws as follows:

'Succession under the PNDCL 111 may be likened, with all due respect, to ready-made or BRONNI WAWU suit, whilst succession under the Wills Act, 1971 may be likened to custom made suit which is tailored to suit one's taste, measurements and requirements'. And I should add, that a Will is the custom-made suit that one wishes to wear to join His maker in peace.
In sum, Wills are made to prevent dissipation of one's property upon death and gives the maker the power and autonomy to decide how his estate ought to be distributed or managed and to whom it ought to go in order that it will avoid disputes among relations after the testator's death. If a Will is this relevant, has a lawyer any role in drafting a Will?

The Role of a Lawyer in Drafting a Will.
As already indicated supra under the definition of a Will, it is not a legal document and therefore, it needs not be necessarily drafted by a lawyer. The important thing to note is that, the maker of the Will has complied with the Wills Act or the enabling statute under which the Will is made.

However, the role of a Lawyer becomes very crucial where the party making the Will engages the services of a Lawyer as a professional to do so on his behalf. In that regard, the usual duty of a lawyer to his client is invoked automatically.

Generally, the duty of a Lawyer to his client in Ghana, is governed by such laws as the Legal Profession Act[33], Legal Profession (Professional Conduct and Etiquette) Rules, 2020[34] and Part III of The Code of Ethics of The Ghana Bar Association (GBA)[35].

In drafting a Will, a lawyer who knowingly prepares that document at a *legal fee* paid by the client, and who did not have practising licence at the time he prepared it, would be guilty of an offence

33 1960 (Act 32) & Legal Profession (Professional Conduct and Etiquette) Rules, 2020 (L.I 2423) & GBA Code
34 L.I.2423
35 Rules 27 to 45 of the Code of Ethics of The Ghana Bar Association

and that may affect the validity of the document he prepared[36]. This was sanctioned by the Supreme Court in the case of *Exparte; Justin Teriwajah Pwavra & Korboe*[37]. This means that a lawyer is duty-bound to ensure that he is duly licenced to practice before accepting a legal representation and charging a legal fee to prepare a Will.

Another role similar to the above, is that a Lawyer should charge a reasonable fee for the value of the services being rendered in drafting the Will. The lawyer is entitled to a reasonable compensation for his services and therefore, he should not overestimate or underestimate fees for any reason. The breach of this role amounts to professional misconduct under L.I. 2423[38]and the GBA Code of conduct[39]. The lawyer is therefore, under a legal duty in preparing a Will to be reasonable in charging his fees.

Having satisfied the above general roles, another important role a lawyer must specifically play in drafting a Will is to ensure that the maker of the Will complies strictly with the requirements of the Wills Act. For example, the lawyer must advice the client, to appreciate that it is only the self-acquired properties that could be disposed of under his Will, and the need for strict compliance with requirements of executing the Will under the Act.

Yet another role of a lawyer in drafting a Will is to be honest and frank about the legal implications the client may be requesting of the lawyer. If a lawyer fails to give such an honest legal advice, it will affect the client's interest and naturally, constitutes a professional misconduct under the L.I 2423[40]. The above position was endorsed in the case of A*boagye Da Costa vs. Disciplinary Committee of the General Legal Counsel*[41].

In furtherance of the interest of the client, a lawyer owes a duty to the client to avoid disclosing the content of the Will the lawyer has been engaged to draft or discuss how the dispositions were done by the client under his Will. The role of the lawyer is to maintain confidentiality. Failure to comply with this disclosure would attract an offence under the GBA Code of Conduct[42] and section 100 thereof of the Evidence Act, 1975 (NRCD 323).

It is a misconduct for a lawyer to draft a Will for a client and deliberately forge or insert deceptive information which the lawyer knows does not comply with the Wills' Act[43]. That act of a lawyer would adversely affect his client and consequently offends against the L.I 2423[44]. As rightly, in my considered view, emphasized by Justice Benjamin Nathan Cardozo in In Re Jacob Rouss & quoting the case of *Selling vs. Radford,* 243 U.S. 46[45] when speaking on the issue of the privilege of a lawyer, he states, "*…membership in the Bar is a privilege, burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission. Whenever the condition is broken, the privilege is lost".*

36 section 8 of Act 32
37 (2013-2014) 2 SCGLR
38 S. 28 and 29 of Act 32, Rule 16 of Legal Profession (Professional Conduct and Etiquette) Rules, 2020 and Rule 31 of GBA Code
39 Rule 31 of the GBA Code of Conduct
40 Rule 67 of The Legal Profession Rules, 2020 and Rule 27 of the GBA Code
41 (1991) 2 GLR 313
42 Rule 38 of the GBA Code of Conduct
43 Wills Act, 1971 (Act 360), Section 1(3)
44 Rule 67 of The Legal Profession Rules, 2020 and Rule 27 of the GBA Code
45 243 U.S. 46 (1917). No. 21

On the basis of the above dictum by Justice Cardozo, a Lawyer will not be immune from punishment if his or her conduct is not in line with the relevant regulations and laws governing the profession because his privilege would have been lost by such a misconduct. If the lawyer then has the above roles to play in ensuring that a client's Will is drafted in compliance with the law, how does the Court come in?

The Role of the Court upon the Death of the Testator.

Generally, it is noticeable that the Court is the custodian of most Wills[46]. Upon the death of the testator, the Court has the duty to retrieve the Wills which are in its custody on notice by interested parties to the Will, or may be deposited at the Court's Registry immediately after the death of the testator by persons who might have had same in their custody[47]. Failure of a person who has custody of a Will to deposit same at the High Court within fourteen days upon having notice of the death of the testator, constitutes an offence, the punishment for which may be up to a maximum of ten (10) years imprisonment[48].

There appears to be two broad roles that the Courts are called upon to perform in the event of the death of the testator in contentious matters. The broad roles, for purposes of convenience, could safely be divided into the role in respect of Probate Actions[49], or the role in respect of Administration Actions[50].

The first broad role of the Courts is in contentious matters where the Will is challenged and the Courts are called upon to determine the validity, revocation or declaration of probate in respect of it.

The second broad role of the Courts is also contentious but relates to actions which concern the management and or administration of the estate of the deceased. In these actions, the parties do not concern themselves with the validity of the Will but rather, how the properties or the estate of the deceased are being managed or how the dispositions are made by the Executor(s) of the Will. Actions for the Executors to account are examples of the second broad role of the Courts.

The Court performs the role of an interpreter of the Will after the death of the testator especially where there is a challenge as to its validity or the content of the disposition. For example, in the case of *In Re Amarteifio (decd) Amarteifio v Amarteifio*[51], the court held that, *'a Will should be read together as a whole to realise the true intention and the court must do what was right by giving the Will its real meaning. …Where the literal sense of the words would create an absurd situation they might be properly discarded and modified….The court would have done an injustice if it did not give the words of clause 6 of the Will an import which would give effect and not defeat the intention of the testator.'* On its interpretative role, the Supreme Court similarly held Per Appau, JSC in the case of *Akua Marfoa v Margaret Akosua*[52], as follows; *'The law is clear that where an interpretation of document would lead to absurdity, it is only reasonable to impute in the **Will** words that would give meaning and satisfy the intendment of the testator as near as possible.'*

46 Wills Act, 1971 (Act 360), Section 11
47 Wills Act, 1971 (Act 360), Section 12
48 Ibid
49 Order 66 Rule 32 of C.I 47
50 Order 66 Rule 44 of C.I 47
51 (1982-83) GLR 1137
52 (Unreported, Civil Appeal No. J1/8/2015, dated: 5th December, 2016

Specifically, the Court performs the role of granting probate. This is particularly the case where the Will is not challenged as to its validity and in the opinion of the Court, the Will appears regular on the face of it (that is, proof of a Will in common form), the Court may grant probate to the Executors or Applicants as the case maybe[53].

The Court may deny grant of probate in some instances. Where the Court, upon an application for grant of probate, whether with or without a challenge by parties, in the opinion of the Court, the Court is unconvinced that the document purported to be a Will complied with the requirements of the Wills Act, the Court is duty-bound to deny grant of probate[54].

The Court is called upon after the death of the testator to pronounce on the validity or otherwise of a Will. This is usually instituted by a writ of summons (mostly, probate actions in relation to *Proof of Will in Solemn form)*. This is where either the Executors, for any reason, are in doubt as to the Will's validity, or the validity of the Will is disputed, then the Court is called upon to pronounce on it[55]. Actions which relate to the Will not being the deed of the testator, or the testator was not competent at the time he made the Will, or actions that relate to vitiating factors are some examples of probate actions.

The Court also performs what I may term as, ***'Special and Vulnerable Protective Roles'***, after the death of the testator. Some of these roles are found in two Acts of Parliament and The Constitution of Ghana[56]. The two statutes are, The Wills Act[57] and The Matrimonial Causes Act[58].

The first protection which is under the Constitution is to the effect that a spouse shall not be deprived of reasonable provision out of the estate of a spouse whether or not the spouse died having made a Will[59]. The provision continues that, a spouse shall have equal access to properties jointly acquired during marriage[60]. By this Article, where a spouse fails to make reasonable provision in the Will, or the spouse makes a Will of properties which were jointly acquired during the subsistence of the marriage, presumptively, the surviving spouse has a remedy as against the estate of the testator and the Court will protect that right accordingly. This could be granted by the Court by either making the reasonable provision for the life time benefit of the surviving spouse or severing the jointly acquired property, whichever one is appropriate in that action.

The second protection which is similar to the above is gleaned from section 13 of the Wills Act. The said provision allows any father, mother, spouse or child under 18 years of age to bring an application to the High Court within three years from the date of the grant of probate, if a reasonable provision was not made to him[61] either in the testator's lifetime or by the testator's Will. If the Applicant satisfies the Court that hardship will be caused if the application is not granted, the Court is likely to make such orders reasonably necessary to provide for the Applicant.

53 Order 66 Rule 25 of C.I 47
54 Order 66 Rule 17(1)&(2) of C.I 47 and In Re Mensah (D'ced) (1978) GLR 225 at 235
55 Order 66 Rules 26&28 of C.I.47 and Thomas Tata Atanley Kofigah & Anor vs. Kofigah Francis Atanley & Anor (unreported, Civil appeal suit No. J4/05/2019 & delivered by the SC on 22nd January, 2020
56 Article 22(1)&(3) of the 1992 Constitution
57 1971 (Act 360), section 13
58 1971 (Act 367), section 38
59 Art. 22(1)
60 Art. 22(3)(a)
61 Per section 41(1) of the Interpretation Act, 2009 (Act 792), the law is that the use of 'male' also refers to 'female' and vice versa

The third special role is captured under section 38 of the Matrimonial Causes Act to the effect that, unless there is express provision to the contrary, a divorced spouse forfeits the bequest made in the Will of the other spouse. Under the circumstance, if after the death of the testator, the divorced spouse could satisfy the Court that the bequest, despite their divorce, it was made to him or her under the Will, the Court could make a declaration to that effect.

Another role the Court plays after the death of the testator is the support in interlocutory matters in respect of Will. For example, where an interested party to the estate of a deceased files a caveat, the Court will stay every proceeding in that matter and determine the veracity of the caveat before granting or otherwise of the probate. But for that role of the Court, some key or crucial interested parties would have been surreptitiously left out in their benefit under a testator's Will. In respect of the last role concerning caveating in Will; what is it? How is it done? When is it done and to whom?

Caveating a Will.

Generally, a caveat is a formal notice from a person who has or claims to have an interest in the estate of a deceased and who wishes to ensure that a Court of competent jurisdiction should not grant probate or Letters of Administration in respect of that estate without notice to him[62]. To answer the question pointedly, caveating a Will is to formally notify the Court that, probate should not be issued to any applicant in respect of the estate of the testator until the caveator/caveatrix is given the opportunity by the Court to be heard. A caveat could be filed before or after an application for probate has been filed in Court. If probate is granted, the person with an interest could only institute Probate or Administration action and not a caveat[63].

Once a caveat is filed, every proceeding in respect of that matter would be stayed until the caveat is lifted or dealt with in accordance with the law. If the caveat is filed before an application for grant of probate, it will be brought to the attention of the Judge upon an application being filed. Suppose the caveat is filed after an application for grant of probate. In that case, the notice of the caveat will be brought to the attention of the Court/Judge immediately by the Registrar and a copy would be served on the Applicant. A warning would be issued thereafter, at the instance of the applicant for the caveator to file an affidavit of interest stating the nature and interest the caveator may have in the estate of the deceased. If the warning is ignored, the Applicant would then move the Court in respect of his original motion for grant of probate. If the warning is obeyed and the affidavit of interest is filed by the caveator, a copy of the affidavit of interest would be served on the Applicant and a date would be fixed by the Court for hearing.

On the return date, the Court will determine the caveat summarily and proceed to deal with the application. If the Court is unable to determine the matter summarily, the Court may order the applicant to issue a writ against the caveator for a full trial to pronounce on it. Once the Court makes a final determination on the caveat, the application for grant of probate will then be moved by the Applicant on notice to the Caveator/trix as the case may be. Even though a caveat could be renewed from time to time, once filed and there is no action, a caveat has three months to remain in

62 Order 66 Rule 11 of C.I.47

63 In Re Gyan Fosu (D'ced.); Boafo vs. Akwatia-Pekoh III(1974) 1 GLR 145 at 147 per Sowah J.A, CA.

force and automatically revoked[64].

To disperse the fears and myth surrounding the making of a Will among many Ghanaians, the next relevant question is, should the Will be binding on the maker once he has executed it or he can renege on it under the law?

Revocation of a Will.

The position of the law is that a Will is perpetually revocable in the lifetime of the testator. The reason is that, a Will takes effect as if it has been executed immediately before the death of the testator[65]. A Will is ambulatory in nature and therefore, the maker of the Will still has the autonomy to deal with the properties he has devised under his Will until death. In the law of equity, the property would be said to have been adeemed if the property was dealt with during the life time of the Testator. He can change the character, dispose of the property, re-assign the property in his subsequent Will or decide to die intestate by revoking the current Will and not making another. Again, where a property is devised to a beneficiary under a Will, and it is later declared void, that portion of the property will be considered to have lapsed to intestacy unless there was a contrary intention by the testator in the residuary clause[66].

Dennis Dominic Adjei, 2nd Edition of his book, 'Land Law, Practice and Conveyancing in Ghana', indicates that a testator who makes his Will can revoke it at any time even though he might have used words such as 'This is my final and last Will'.

There are three modes of validly revoking a Will. The first mode is where the testator who, in his own free will and without undue influence or fraud or who is not under a mistake of fact or law, intending to make any other disposition of the property which is not validly made, tears the Will or causes physical destruction to it or causes any other person to do so in his presence and by his direction with the intention of revoking the Will[67].

In the second mode, the testator may also intentionally revoke his Will by making a written declaration to revoke it and it shall be duly executed in the same manner as a Will is executed[68].

In the third mode of revocation, the testator will by a latter Will, expressly state that his earlier Will is revoked. A Will which is not expressly stated to revoke a previous Will shall not revoke it. However, where there are inconsistencies, the latter Will shall prevail over the former. If a testator makes a Will in two different jurisdictions and has not expressly stated that he has revoked the earlier Will in the other jurisdiction, the two Wills may co-exist and probate shall be applied for in both Wills in the respective jurisdictions.

The smack is where the testator makes two Wills in the same jurisdiction but has not expressly stated that he has revoked the earlier Will. For example, where the testator makes two Wills in the same jurisdiction without expressly stating that the former Will is being revoked by the latter Will, the latter shall not be deemed to have revoked the earlier Will. However, where there are inconsistencies

64 Order 66 Rule 11 (6) of C.I. 47
65 Section 7(1) of Act 360
66 Dennis Dominic Adjei (2021) at page 111 of his 3rd Edition, entitled 'Land Law, Practice and Conveyancing in Ghana
67 Section 9 (1) of the Wills Act, 1971 (Act 360)
68 Section 9 (2) of the Wills Act, 1971 (Act 360)

over the devises made, the provisions in the latter Will would prevail over the former Will but it shall be only to the extent of the inconsistencies[69]. The question remains, if one has no immovable properties or substantial movable properties, is one required to make a Will?

What Properties can be in a Will?

There is no defined properties or quantum of properties that are required before one makes a Will. The law does not require any of such conditions. One's personal effect including your dresses you wear, the beads, Jewellery, hoes for farming, tools for skill-based work, bowls, beddings, cattle, goats or animals of any kind could be Willed. The law does not discriminate as between a poor person or rich person who can prepare a document to anticipate how your affairs could be ran upon your death. You may not have any property to be Willed but you may require that your body be buried in a particular location of which the living would be required to respect your wishes once they are reasonable and in accordance with law and custom.

Conclusion.

To sum up, the fact that a testator makes a Will does not in any way occasion the death of the person. Where a person waits until he or she is aged before making a Will, that rather invites a logical question as to why the person would wait and make a Will within a short period before his death if indeed he intended to die testate. The reasonable question remains, why a last minute Will, when many years are still ahead of us to organize our affairs in life prior to the unavoidable invitation by our Maker? Even though a Will is construed as being made immediately before the death of the testator, one can make a Will once the person is 18 years of age and above. A Will may be a saviour of our personally acquired properties as it may direct us as to how and where we may want the dispositions to be made after our death. A Will can only be, but a document of a saving grace for the properties of the silent majority.

69 Section 9 (4) of the Wills Act, 1971 (Act 360)