

## **Inheritance, Succession, Wills & Private Trust**

It is with pleasure that I share with you some general legal information on the above. I will be happy to receive from you any question(s) or queries that you might have on the information contained herein. My mailing particulars are as stated on the last page of this paper.

### **Introduction**

Inheritance in Nigeria is normally determined by the customary rules of where the deceased person originates from and not by where he resides or lives, or, where the property is situated. This of course presupposes that he or she did not make a Will, or, made a Will before getting married.

Nigerian systems on inheritance and succession are predominately patrilineal (i.e. inheritance through the father) than matrilineal (i.e. inheritance through the mother). Let us look at some of the rules of inheritance, relating to some ethnic groups, in Nigeria . After that, we will consider some of the principles governing the making of a Will and finally, some comments on private trust as it relates to inheritance and succession.

**In Yoruba land** , distribution of an estate of a deceased person, who dies without a valid Will, is per stripe; i.e. by the number of Wives that the deceased had and not by the number of children. Where there is a serious dispute, the family head is permitted, in some parts of Yoruba land, to have a final discretion by recommending the distribution of the estate, per capital; i.e. by the number of children and not by the number of wives.

**In Benin Kingdom** , the doctrine of primogeniture applies; i.e. the right to succession of the entire estate belongs exclusively to the eldest son of a deceased person who acts as a sort of Trustee for the other children. Note that under Benin custom, where there is a Will, the maker of the Will cannot devise the House where he lived and died to any person other than his eldest son.

The same rules of succession that apply to the Binis also apply to most parts of **Igbo land** including Onitsha , which by history, originated from the Benin Kingdom . There is also the interesting custom, which requires that the property of a deceased woman, which she acquired

before her marriage, go back to her family on her demise.

In the general **Calabar area** , the eldest surviving male member of the deceased person succeeds as the head of the family and inherits the deceased estate.

**In Hausa land** , the Moslem rules of succession, under the Maliki code, have been largely absorbed into their indigenous system of property inheritance. Among the Fulani for example, the eldest son inherits his deceased father's cattle, the main asset in those days, out of which he makes presents of some of them to his younger brothers according to their needs.

The advent of the English into Nigeria changed and displaced, to a large extent, our local rules on inheritance. Of course, our Nigerian Courts have always made an effort to preserve and ensure that where possible, our fundamental local rules, which are equitable and not repugnant to natural justice and good conscience, are not totally displaced by the English rules of making a Will or establishing a private trust.

An example of the protection of some of our customs is the principle that a deceased person can only devise by his/her Will, his/her real property, which he/her has absolute title to and or, can freely dispose of under native law and custom. The Benin customary rule on where the deceased lived and died, being inherited by the eldest son of the deceased, is an example of this. Another example is the Iteskiri or Urhobo custom on a Wife's property. Another is the one that a Maker of a Will cannot devise family property to his beneficiaries. See also Section 1 of the Wills Law; *Oke v. Oke* [1974] 3 SC 1; *Ogumefun v. Ogumefun* [1931] 10 NLR 182.

Customary law on inheritance can also be displaced by necessary implication by the kind of marriage that the deceased contracted. One of the incidents of monogamous marriage under Common Law is the ouster of the rules of customary law on inheritance. See Section 49 (5) of the Administration of Estate Law, Cap 3, Laws of Lagos State ; *Cole v. Cole* [1898] 1 NLR 15.

## **Wills**

The necessity, and not the desirability, of making a Will cannot be over emphasised especially, in the light of our very precarious environment and local customs.

Why Make a Will: -

Some of the advantages of making a Will include:

- A Will excludes both our traditional and English Common Law rules of inheritance;
- The Maker of the Will can by his/her Will distribute his/her assets in the manner desirable to him/her;
- The Maker of the Will can appoint the persons who would manage his/her estate on his/her demise;
- It excludes the additional cost of applying for Letters of Administration and paying inheritance tax(es), which are usually high and would constitute an inconvenience to one's beneficiaries, where no Will is made;
- It comes into effect immediately the Maker becomes deceased and before its approval by a Court of Law.

**Note that a Will only takes effect after the demise of its maker.**

Who Can & When to Make a Will

Under the Law, any adult above the age of 18 years old can make a Will. The only exemptions are persons in military service or seamen. Also, persons of unsound mind cannot make a Will.

It is advisable that a person should make a Will as soon as he becomes an adult and has a regular income. This need becomes more important when an adult gets married. This is because once a person gets married, the customary rules under which he gets married may become applicable to his estate should he become deceased without making a new Will. Alternatively, should the English rules on inheritance be applied, the manner of distribution of the estate may not suit the desires of the deceased person.

### **Checklist**

Key information that the Maker of a Will should state in the Will include:

- His/her full names including his alias if any, address, occupation, telephone numbers, etc;
- His/her proposed executors/trustees; these are usually very close associates;
- Instructions as to burial and associated expenses;
- Instructions as to the distribution of all his/her properties; full details of these properties must be given;

- Instructions as to what happens to properties acquired after the making of the Will;
- Any other instructions.

Note that a Will need not be in any special form or language. In addition, a Will would be declared invalid where it is not signed at the end, in the presence of at least two or more witnesses who MUST both be present at the same time and sign the Will simultaneously after the Maker has signed in their presence. The Witnesses need not read the contents of the Will.

### An Invalid Will

A Will may become invalid where the Maker:

- Gets married and does not make a new Will;
- Makes a subsequent Will or Codicil; a Codicil is an addition or supplement to a Will;
- Expressly revokes his Will;
- Destroys or makes any kind of alteration;
- Expressly revives a previous Will.

Please note that Section 8 of the Wills Law discourages an attesting witness or the Wife of the Maker of the Will or any person claiming under him, from benefiting under the Will attested to by one of them. However, a beneficiary under secret trust, who witnesses the execution of a Will, will not forfeit his interest as his interest de hors, i.e. outside the Will and not from the Will.

### Conclusion on Wills

Due to the rigours associated with proving a Will under our legal system and possible protracted litigations that might arise, I advice that in addition to making a Will, a person can during his/her life time state in a deed who he/she wants to inherit a particular property or properties of his/her. This can be done by a gift inter vivos; which means that the gift only comes into effect on the demise of the Maker of the Will.

It is also wise to deposit copies of the Will in reliable places like the office of a long time Solicitor, the regular Bank of the Maker of the Will, the High Court Registry of the place where the Maker of the Will regularly resides and have a majority of his assets; some security companies also accept custody of a Will for a nominal fee.

Another modern trend is for the owner of a property to purchase the property in the joint names of

himself and his intended beneficiaries. This way, some of the title always remains with the beneficiary.

## TRUST

A Trust can be said to mean, 'a right of property, real or personal, held by one party ('the Trustee'), for the benefit of another party ('the beneficiary')?.

In general, the Law (i.e. equity) is more concerned with the substance rather than the form of a trust. Once the three 'certainties' are present, a valid Trust would be deemed to have been created.

Under the Common Law of Trust, which Nigeria also applies, it is essential that the following three 'certainties' are in place for a trust to be held applicable. They are (1) certainty of words; (2) certainty of subject matter; (3) certainty of objects or purpose.

### Advantages of a Trust

Private Trust in Nigeria is still a novelty. From our experience and investigations, the principal reasons why people establish a private trust for their personal estate are to protect their assets from bankruptcy (debtors) proceedings and to seek whatever tax advantages/shelter that they can get from such a Trust.

### General Duties of Trustee: -

The task of the office of a Trustee is one laced with a lot of responsibilities. A Trustee is not liable for any loss occasioned by his or their act or omission provided that he or they acted in good faith.

Some of the duties of a Trustee include:

- A duty to ensure that the Trust, including its funds, is properly managed and the latter are not depleted.
- Duty not to delegate his authority and responsibilities under the Trust. Whilst he can engage the services of professionals like Lawyers or Accountants to undertake some professional responsibility, the ultimate responsibility lies with him as the principal to exercise proper supervision.
- Duty to be impartial to all the beneficiaries under the Trust.
- Duty not to deviate from the instructions/terms of the Trust.

- Duty to prepare regular accounts as he acts in a fiduciary capacity.

Note that a breach of any of the duties by a Trustee requires the Trustee to make good whatever loss may have accrued to the Trust as a result of that breach.

### Statutory Requirements for a Private Trust

Section 7 of the Statute of Frauds 1677, which is a statute applicable in Nigeria, requires that all creations of a trust or other confidences in real property must be in writing and signed by the Maker; otherwise, the Trust will be held void. This requirement is essentially to prevent fraud.

There is also the requirement that the Trust Deed should be stamped otherwise, it may not be admissible in evidence.

### Workings of a Private Trust

The Maker of a Will and or a Trust Deed can devise his interest to a Trustee, relying upon the Trustee's promise to hold the property, in trust, for the Maker's beneficiaries. This is usually referred to as a fully secret Trust.

***It is crucial however that there should be some evidence that the Maker communicated his intentions to the Trustee at any time before his/her death and the Trustee either expressly or impliedly, acquiesced to carrying out the Maker's instructions/intentions.***

The property to be held in trust must be ascertainable and definite. Any increase in the assets under the Trust must be communicated to the Trustee otherwise, the Trustee will hold the increase under a resulting trust for the estate of the Maker. In addition, where the Trust fails for any reason, the Trustee also holds the property on a resulting trust for the Maker's estate. A resulting trust is a trust arising by implication of law when it appears from the nature of the transaction that it was the intention of the parties to create a trust or where the trust created fails.

The instructions of the Maker to the Trustee can be contained in a sealed envelope with instructions not to open the envelope until after the death of the Maker of the Trust.

### Taxation of Private Trust

In developed countries, save for countries that are referred to as tax haven(s), the problem of

resolving the question of the taxation of a private trust is still far from final resolution.

A solution in some of these countries have been to tax the beneficiaries of the Trust on their income from the trust either directly, under the personal income tax, or indirectly for the actual income received from the trust. The Trustees on the other hand are taxed only on the remaining income of the trust so that there is no double taxation. When these extra incomes are distributed to the beneficiaries, the latter should be able to earn the income tax free.

A practical solution, subject to obtaining professional advice from a tax consultant, is to have the Trust Deed drafted in such a way that the Trustees bear the tax element of the income coming to the Trust.

### Other General Comments

Let me further share with you some other important principles of the Law of Trust as they apply to inheritance and or succession.

A policy of assurance for example, effected by any man or woman, on his/her life and expressed to be for the benefit of another person or his/her children, creates a trust in favour of the beneficiaries and the moneys payable shall not, so long as the object of the Trust remains unperformed, form a part of the estate of the Insured/deceased or be a subject of his debts. See Section 11 of the Married Women's Property Act, 1882.

Another example of a Trust in our statute books is Section 7 (a) of the Lands Use Act, which permits the grant of a statutory right of occupancy to a Guardian or Trustee of an infant who will hold such grant on trust for the benefit of the infant.

Note that a Trustee can be held personally liable for any loss to the estate caused by his breach of duty as a Trustee.

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