

Legal Alert - Wills and Survivorships

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Legal Alert for May 2009 ? Wills and Survivorships.

In our Legal Alert for March 2003, we highlighted various aspects of Inheritance, Succession, Wills and Private Trust Laws in Nigeria. You can find this March 2003 Legal Alert on our website www.oseroghoassociates.com

It is observed that advancements in enlightenment, continues to reinforce the necessity for writing Wills. However, all manner of legal challenges, arising from disputes between the survivors of the beneficiaries of a Will, appear to be outpacing the traditional legal challenges to the authenticity of a Will, which are usually raised by the direct beneficiaries to the Will.

This Alert serves to remind you of what a Will is, the advantages of writing a Will, and the common law rules of survivorship in contrast to the customary law rules on the same subject.

What is a Will?

A working description of a Will is that it is a testamentary declaration contained in a deed, voluntarily made and executed according to Law by a Testator who is of sound mind and body, distributing his assets and giving such directives as he may wish to be carried out upon his death. The instructions in a Will only take effect after the demise of its maker, i.e. the Testator. A Testator cannot however generally distribute a property which he inherited under native customary law.

What is a Codicil?

A Testator can always effect changes or amendments, or insert additional devises or bequests to his Will, while he is still alive, by making a Codicil. A Codicil is a supplementary deed to a Will which is made for the purpose of adding to or varying or revoking the provisions of an existing Will.

Advantages of a Will

- (1) A Will excludes the rules of inheritance under native law and custom.
- (2) A Will excludes the statutory rules of inheritance.
- (3) A Will affords the Testator the opportunity to choose his executors, administrators and Guardians if the Testator's children are minors on his death.
- (4) A Will avoids the extravagant bureaucratic costs, effort and time expended in applying for letters of administration.

(5) A Will allows the last surviving executor to complete the winding up of the administration of the estate without applying to the Probate Registry for the grant of fresh letters of administration.

(6) A Will allows the executors to it, to act as from the death of the Testator pending when final Probate is granted. E.g. follow burial rites instructions, act as Guardian of minor, if any, etc.

Wills and Survivorship

There are two kinds of survivorship. The first and more common one in Nigeria is known as Joint Tenancy. This is where two or more people jointly own a property. In the event of any of the owners pre-deceasing the other owner(s), the deceased owner's share of the property passes to the surviving beneficiaries of such a property to the exclusion of the estate of the deceased co-owner. The other kind of survivorship is known as Tenancy-in-common. Here, in contrast to joint tenancy, the deceased owner's share of a property forms a part of his estate, to be inherited according to the terms of his or her Will - if there is any - or according to such Law that governed the deceased affairs during his life time.

Whether a devise or a bequest under a Will, to two or more beneficiaries, will be regulated by the rules of Joint Tenancy or Tenancy-in-common will depend on the interpretation of the wording of the Will.

Joint Tenancy and Tenancy-in-common

The rules regulating Joint Tenancies and Tenancies-in-common are common law rules which are not applicable to customary law modes of inheritance.

Where no specific words of severance are used in devolving a property, which words of severance indicate separate partitions or interest of the same property devolving to two or more beneficiaries, or to two or more people, the law assumes that a joint tenancy has been created with the result that the estate of any of the deceased co-owner cannot assume the place of the deceased in the enjoyment of such a property.

A Joint Tenancy is therefore implied where there is a unity of title, unity of interest, unity of time, and unity of possession.

Tenancy-in-common:

The presence of any of the following words in a Will creates a Tenancy-in-common: - "in equal shares"; "share and share alike"; "to be distributed between"; "to be distributed among them in joint and equal proportion"; "equally"; "among"; "respectively".

In the case of *Chinweze v. Mazi* (1989) 1 SC (part 11) 33 @ 46 for example, the Nigerian Supreme Court held that by operation of Law, Joint Tenancy leads to the doctrine of survivorship by which if one joint tenant dies without having obtained a separate share of the property for him or herself, during his or her life time, his or her interest will not pass to his or her estate but such

interest will accrue to the other surviving joint tenants. The Nigerian Supreme Court also held that on the facts in this suit, the legal assignment it considered did not contain words of severance and therefore, the half brothers to the 2nd Defendant's sister could not take any benefit in the contested property due to the applicability of the rules of joint tenancy to the disputed property. The case of *Sonekan v. Smith* (1964) ANLR 161 is also recommended in the event that you intend to undertake further research on this subject.

Conclusion

In order for the intentions of a Testator or a benefactor to be achieved, it is recommended that utmost care and precision are exercised when drafting a Will or bequeathing a property. This caution or precision will truncate an avoidable litigation or dispute in the future.

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