Limits of a testator on freedom of will testament

By Obiora Atuegwu Egwuatu

NO doubt a person has the unlimited power to dispose off his legal property inter vivos in any way or manner he chooses. He may decide to give out everything he owed to total strangers or friends at the expense of his wife, children, mothers, brothers, sisters or relations and nobody can question that. Upon his death, the law tends to limit this freedom!

Various reasons ranging from social responsibility, legal, tradition or custom religion have been put forward in justifying this restriction. Is it, therefore, justified to limit the testamentary freedom of a testator? I think not.

Wills take various forms but we will limit our discourse on the Statutory Will.

Will has no general definition as such. We will, however, attempt a working definition.

According to Kole Abayomi in his book "Wills: Law And Practice",

"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 limitation imposed by law and wherein he gives such other directives as he may deem fit to his personal representatives otherwise known as his executors, who administer his estate in accordance with the wishes manifested in the will".

Or better still, according to Black's Law Dictionary (7th Ed) edited by Bryan Garner, a "will is a document by which a person directs his or her estate to be distributed upon death".

A will takes effect only on the death of the maker. In other words, a will is a document, which is of no effect until the testator's death and until then, is a mere declaration of his intention and is at all times until such death subject to revocation or variation.

In England, testamentary freedom is in theory unrestricted, that is, the testator is allowed complete freedom to dispose his property in anyway and manner he chooses. The principal legislation is the

Wills Act of 1837 and Section Three of the Act is the section that grants the testator this unrestricted power of testation.

The said section provides that:

"It shall be lawful for every person to devise, bequeath or dispose of, by his will, executed in the manner hereinafter required, all real estate and all personal estates, which he shall be entitled to, either at law or in equity at the time of his death ..."

As time went on, this absolute freedom granted by the Act to the testator started resulting in the disinheritance of the testator's dependants by the testator in his will. Arguments and debates started on whether it was right to allow this absolute freedom or whether it was right to restrict testamentary freedom in any way. One school of thought is of the view that a person should be able to bequeath his property exactly as he wishes, and that it is no business of the state or anyone else to permit or encourage interference in his private arrangements.

The other school contend that within a family in particular, there is not necessarily any merit in where the technical ownership of property falls. That it is the business of the law to uphold and enforce obligations such as those providing financial support for one's dependants.

In the not unheard of situation of husband who does leave his widow without support, there is also the consideration that she must be provided for from some resources, and if those do not come from his estate, then that may well have to come from the general tax payer.

It must be noted that in England, there is no system of matrimonial property. The ownership of property remains with the person who acquires it under the usual rules of acquisition of property - the person who receives it as a gift or who buys it with their own money - even when they are married and the property is used for family purposes. The implication of this is that a wife has no interest in a matrimonial home if it is in her husband's name.

Due to this situation, it is believed that it may be particularly important for a disinherited wife to be able to apply for support from the deceased's estate. This led to the promulgation of the

Inheritance (Family Provisions) Act in 1938. This Act gave the courts a limited power to override the deceased's testamentary provisions by ordering provision to be made out of a man's estate for the maintenance of his widow and a limited category of other dependants (that is, infant sons, unmarried daughters or disabled adult sons or daughters). The Matrimonial Cause Acts of 1958 and 1965 brought in the possibility of applications by ex- spouses. The Family Provisions Act 1966 intended the jurisdiction to allow more judicial discretion and to remove many restrictions on the amount and form of provisions, as well as giving spouses a wider right to apply.

By 1975, the Inheritance (Provision for Family and Dependants) Act was passed. This Act gave extensive powers to the courts to award reasonable provision out of a deceased's estate for the maintenance of certain dependants if the will or intestacy failed to make such provisions for them. The Act allows claims by close family members and also by persons who were financially dependant on the deceased when he died, thus including cohabitants.

From the foregoing, it can be seen that though, the Wills Act allows a testator unrestricted freedom, in disposing his property, the subsequent enactments restrict this freedom practically.

In Nigeria, the testator's testamentary freedom is both restricted and unrestricted depending on the state.

The English Wills Act of 1937 is applicable to the northern and eastern states, including Anambra and Rivers states. These states copied Section 3(1) of the Wills Act 1837.

In Anambra State for example, the Administration And Succession (Estate of the Deceased Persons) Law Cap Four Laws of Anambra State of Nigeria, contains provision similar to Section Three (1) of the Wills Act 1837. It provides in Section 137 (1) as follows:

"Subject to this part, it shall be lawful for any person to devise, bequeath or otherwise dispose of any disposable property which he shall be entitled to at the time of his death, or any part thereof, by a will made in writing and executed in manner hereinafter prescribed.

A will made and executed in such manner shall be valid and binding on the estate of the testator".

The practical effect of the above provision is absolute freedom on the testator to dispose of his property in the way and manner and to whom he chooses. Section 138 (1) of the law further buttress this point. The section is to the effect that the testator can dispose all his property by will.

Statutes conferring restrictions or limitation on testamentary freedom can be seen in our jurisdiction under two different regimes namely the Western Region Models of Wills Law of 1959 and the Wills Law of Lagos State Cap W2 Laws of Lagos State 2004.

The Wills Law of the old Western Region of Nigeria was first passed as Western Region Law No. 28 1958 and subsequently appeared as Cap 113, Laws of the Western Region of Nigeria 1959. Following the break up of the region into states, each state has had to enact the provisions of Cap 113 as their respective laws.

Section 3 (1) of the Wills Law Cap 113 Laws of the Western Region of Nigeria Vol. VI 1959 which is the same as the various Wills Law of the states comprising the former Western Region except Oyo and Lagos states provides thus:

"Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estates which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeath and dispose of would devolve upon the heir at law of him, or if he became entitled by descent, or his ancestor or upon his executor or administrator".

But for the phrase "subject to any customary law relating thereto", this section is similar to Section 3 (1) Wills Act 1837.

The above provision places a significant bar or limitation on the power to bequeath property which is subject to customary law.

In Oke V. Oke (1974) 3 SC 1, it was held by the Supreme Court that the devise of a house subject to customary law by a testator to a person not entitled to it under customary law was ineffective.

In Lagos State, the restriction to testamentary freedom is contained in Section 1(1) of the Wills Law of Lagos State. The section provides as follow:

"1(1) It shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with the provision of this law, all property to which he is entitled, either in law or in equity, of at the time of his death - provided that the provision of this law shall not apply to any property which the testator had no power to dispose of by will or otherwise under customary law to which he was subject".

This provision is more elegantly worded, explicit and expansive. It covers property subject to customary law and any property which the testator has no power whatsoever to dispose of, that is family or community property. Section 3 (1) of the Oyo Wills Edit 1990 contains provision similar to that of Lagos State, the only difference or addition is the proviso that the provisions of the edict shall not apply to the will of a person who immediately before his death was subject to Islamic law.

In Lagos State, the main restriction to testamentary freedom is contained in Section Two, which is similar to the English Inheritance (Provision for Family and Dependant) Act 1975 earlier mentioned.

The said section allows the wife or wives or husband, child or children of the deceased testator to apply to the court for an order on the ground that disposition of the deceased estate effected by will is not such as to make reasonable provision for the applicant.

In Oyo State, it is captured in Section 4 (1) of the Wills Edict 1990. The difference is that it expended the categories of persons that is qualified to apply to the court. It included wife or husband of the deceased, a child of the deceased, a parent, brother or sister of the deceased who, immediately before the death of the deceased was being maintained either wholly or partly by the deceased.

Where such categories of persons successfully apply to the court, surely, the testator's will be altered so as to make provisions for such applicant.

Some of the leading cases that have emanated as a result of this restriction include Ogiamien, v. Ogiamien (1967) 1 All N. L. R. 191, Idehen v. Idehen, Osula V Osula (1995) 9 NWLR pt 419 page 259.

In Idehen v. Idehen, which had its origin in Benin had to do with "Igiogbe" and the interpretation of the phrase "subject to any customary law relating thereto" contained in Section 3 (1) of the Wills Law of Bendel State 1976, the Supreme Court held among others, that the opening words of Section 3 (1) Wills Law to wit "subject to any customary law relating thereto" clearly render the capacity to make, devise, bequeath or disposition by will, subject to customary law relating thereto. That the expression controls and governs the whole provisions of Section 3 (1), which includes testamentary capacity (freedom).

In essence though the will was valid, the devise of the Igiogbe to the deceased, first son was null and void.

The summary of the entire decision is that the wish of the testator to pass on his Igiogbe to his first son was invalid and void.

Is it, therefore, right to deny a man the freedom to dispose of his property in the way and matter he chooses? I think not. If he had that freedom while alive, I see no reason why he will be denied that right at death, after all the property are his and he laboured to acquire them.

Under the Bini Customary Law, as we have seen, the testator cannot dispose of his Igiogbe to any other person other than his eldest surviving son.

Why command a person to bequeath his property to a particular person when in actual fact the testator in his life time will not have given such property inter vivos to the child?

This type of restriction has brought so much litigation, family, friend and disharmony. In Idehen V. Idehen, it was brother against brother. In Jadesimi V. Okotie-Eboh, it was daughter against mother and brothers while in Oke V. Oke, it was between two brothers.

This unhappy trend of fighting over property of a deceased diligent and hard working testator by idlers, alayes and good-for-nothing children is a result of restrictions put by the statutes and customs.

Concerning the unhappy trend in fighting over property by the testator's family, Kolawole JCA in Dan-Jumbo V. Dan-Jumbo (1989)

5 NWLR 33 stated thus: "This is an unhappy case in many respects. When members of the same family dispute the validity or the due execution of will allegedly made by the testator, the outcome invariably is external rancour or disintegration of, or enmity in the family.

But the courts have a duty imposed upon him by law to settle all disputes between all manners of people who approach the court for the resolution of their dispute regardless of blood affinity. "This is one kind of such cases".

Mr. Reginald Onuoha my friend and a lecturer at the University of Lagos, had commented in this regard. He stated in one of his articles "The Will option in property settlement: Whose Will" thus;

"In this regard, we condemn the existing regime of testamentary restrictions. It is unhealthy and does not preserve the objectives of the testator in making a will. The courts must always resist any attempt to re-write the will of the testator. Will is not an inter vivos disposition, it speaks from death. Customs and statutes notwithstanding the sanctity of the will and the intention of the testator must be allowed to prevail".

I cannot agree more.

Why should the statute or the court change the bequest of a testator to a devisee and command him to give such bequest to a first son who "even on account of demonstrable unsuitability to undertake and discharge the responsibilities of the status of the head of the family" or who was at enmity with the testator while he lived or was a torn in the flesh of the testator in his life time. Or to borrow the words of Abayomi in his book: "What happens to a lunatic first son or one who is a recidivist who hops in and out of prison or one who is a vagabond?"

What is the justification to bequeath or make provisions to a wife who while the husband was alive never respected or showed love or treated him with devotion? Or a wife that has shown a total disregard to the institution of marriage but was fortunate not to have been divorced by the husband? It is my view that in situations such as these, the best way to punish such a wife is to disinherit her. Cases abound where testators disinherit their wives and or children for behaving waywardly. Such is the weapon the testator

has to curry the respect and attention of the testator's wife and children.

It is my belief that a wife or child who is responsible, respectful and who loved the testator will not be disinherited by the testator. But where he does, then if there is no ground to void the will, the bequest should remain valid. But where there is a proven case of undue influence exerted by a third party, probably a mistress, the court should intervene in such circumstances but not otherwise. Afterall, while alive, the testator can make a gift of his property to whosoever he desires, why can't he do same in death?

With this restriction on testamentary freedom, one other thing that is certain is that people, especially the educated, middle class, might grow weary of making wills which they may now see as an exercise in futility.

The case of Osula Vs Osula readily comes to mind. It will be recalled that the testator specifically stated in his will thus: "I declare that I make the above devise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this will. It is my will that the native law and custom of Benin shall not apply to alter or modify this my will".

Despite this clause in the testator's will, the Supreme Court still held the devise to be contrary to the Bini Customary Law on Igiogbe.

In the circumstances, I am of the opinion and I hereby call for the repeal of the various provisions in the West and Mid-Western States, which subjects testamentary disposition to customary law. It is very unhealthy and inconsistent with the philosophy of the concept of will.

Such customs as typified by the Bini custom of Igiogbe, promotes laziness in the eldest son and make him to wish their father dead were the father to be very wealthy, so that he can inherit his Igiogbe.

On a final note, a Will should be allowed to speak in the way it was made and should not be modified to suit imaginary intention of the testator. A Will is the wish or desire of a testator on how his property should be distributed upon his death! It should remain so.

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