

## **Protecting inheritance rights of the child**

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THE protection of the rights of the child in all its ramifications will continue to be the concern of the authorities, jurists and most citizens in view of recent happenings in Akwa Ibom State where some children were labeled witches and wizards, beaten and killed. Though Nigeria has ratified the "OAU Charter On The Rights and Welfare Of The Child" the United Nations Convention On The Rights Of The Child" and even gone ahead to enact the Child's Rights Act in 2003, yet more in terms of action is still left to be done in respect to the protecting the rights of the child.

Article IV (1) of the OAU Charter on The Right And Welfare Of The Child enjoined that "in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration". The United Nations Convention on the Rights Of The Child contained a similar provision in Article 3. The Child Rights Act 2003, is not left out in this area when it provided in Section 1 that "in every action concerning a child, whether undertaken by an individual, public or private body, institutions, or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration".

Is the statutory provisions and or customary law provisions as concern the inheritance rights of the child adequate or protective enough of the child's inheritance rights?

In this piece we shall be looking at the various laws that touches on this issue to see whether the rights of the child in such succession is adequately protected.

When a person dies leaving a will, he is said to have died testate. He is said to have died intestate where he does not make a will.

It is necessary to determine in the first instance the law which governs testate succession in the various parts of Nigeria. The Wills Act of 1837 and the Wills Amendment Act 1852 are clearly statutes of general application which were in force in England on January, 1 1900 see. *Adesubokan V Yinusa* (1971) NNLR 77.

They are therefore part of Nigeria law on testate succession. The Wills (soldiers and sailors) Act, 1918 which deals with the formal validity of Wills may also be regarded as applicable to Nigeria as it regulates "probate causes and proceedings" in relation to the various High Court Laws.

In Ogun, Oyo, Ondo and the old Bendel State (Edo & Delta), the Wills Law, 1958 cap 133, laws of Western Nigeria. 1959 applies, (These States have now enacted their own Wills laws). This piece of legislation (i.e the 1958 Wills Law) re-enacts the substantive provisions of the Wills Act 1837, and the Wills Amendment Act 1852. Some of the important provisions of the law do not derive from English statutes.

An area of law of succession important to the protection of children is that of the provision of maintenance for the dependants of the deceased. Both the Wills laws of Lagos and Oyo States provide for rights of maintenance of certain family members of the deceased in default of reasonable provision being made for their maintenance by the Will. If the Will does not make adequate provisions for the testators dependants (including children), an application may be made to the High Court for reasonable maintenance out of the estate for such dependants. See Section 2, Wills Law Cap IV 2 Laws of Lagos State and Section 4(1) Will, Edict of 1990 of Oyo State.

Section 2(1) of the Wills law of Lagos State provides

"2(1) Notwithstanding the provisions of Section 6 of this law, where a person dies and is survived by any of the following persons:

(a) the wife or wives or husband of the deceased; and

(b) the child or children of the deceased - that person or those persons may 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".

The Oyo State model is captured in Section 4(1) of the Wills Edict. It provides:

"4(1) Notwithstanding the provisions of Section 1 of this Edict, 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;

(c) 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. That person may apply to the court for an order on the ground that disposition of the deceased's estate effected by his Will is not such as to make reasonable financial provision for the applicant".

The succession Law Edict, 1987 of Anambra State contains provisions akin to the above provisions of the Lagos and Oyo State Wills Laws except that it covers the deceased estates effected by his Will or intestacy or a combination of both. The dependants who are entitled to make such application are the wife or husband, a male child who has not attained the age of eighteen years or a female child who has not attained that age and has not married at an earlier age. Others are a child who is attending an education or vocational training institution or is by reasons of some physical or mental disability incapable of maintaining himself or herself. See Section 58. By Section 58 (2) of the Edict, where the surviving spouse is entitled to less than one third of the income of the net estate and the only other dependant is a child of the surviving spouse, no application under the family provisions arrangement will be entertained. Where an application is brought by any of the dependants, the court may after considering all the circumstances of the case, make such provision for maintenance by way of lump sum payment or periodical payments as it regards adequate. (Section 58 (3).) By Section 58 (4), an order for periodical payment shall terminate on the re-marriage of a spouse, the marriage of a daughter or ceaser of a disability or the attainment of the age of eighteen years by an infant son. The effect of the order made under Section 58 is that the Will or intestacy, as the case may be, shall have effect as from the death of the deceased subject to such variations as may be specified in the order for the purpose of

giving effect to the provision for maintenance of the dependant(s).

The above provisions are modeled after the English Inheritance (Provisions For Family and Dependents) Act 1975.

It is noteworthy that in Lagos State the deceased dependants recognised is the wife, husband or child while in Oyo State, apart from the wife, husband or child of the extended family only 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 are recognised.

What these provision seeks to achieve, as in England is to protect the interests of the family especially the child against unjust dispositions by Will. The provisions do not confer rights to a particular share of the deceased's estate on any of his dependants. The court may in proper care direct that the whole of the deceased's estate shall be allocated to someone who would not have received anything under the Will or intestacy. It is submitted that it is not the function of the court to decide how available assets should be fairly divided, instead it is concerned with dependency, and in particular to remedy "wherever reasonable possible, the injustice of one, who has been put by a deceased person in a position of dependency upon him, being deprived of any financial support either by accident or by design of the deceased, after his death" see *Jally v Iliffe & Ors* (1981) Pam. 128, 137 - 138, Per Stephenson L. J.

Of course, the above provisions of Lagos & Oyo States comes into play where the deceased member of the family left a Will but the disposition of the deceased estate effected by the Will is not such as to make reasonable provisions for the dependant.

However, for various reasons, most Nigerians, even the highly educated, do not make Wills thus making intestate succession the most prevalent in this country. Intestate succession in the various parts of Nigeria is not uniform. In most cases, the applicable rules are either complicated or unsatisfactory. Let us examine the respective rules in the three regions of the Western Region, Eastern Region and Northern Region. In the Western

Region of Nigeria which now comprises Lagos, Ogun, Oyo, Ondo, Ekiti, Osun, Edo and Delta States the Administration of Estate.

Law 1959 applies. These states however have enacted their respective State laws but the provisions of these laws are immaterial with the Administration of Estates Law of Western Region of Nigeria in 1959.

In Lagos, it is covered by Cap A3 Laws of Lagos State 2004.

The provisions of the Administration of Estates Law do not apply where the administration of the estate of a deceased person is performed under the authority of the Customary Court. Similarly, the law is inapplicable where the distribution, inheritance or succession of any estate is governed by customary law. Once the succession is subject to customary law, it is immaterial that the actual distribution is done under the Administration of Estate Law or by a customary court.

Now, what did the law provide as a means of protecting the inheritance rights of a child?

Section 49 of the law lays down the rules of succession to real and personal property on intestacy. If the intestate leaves a husband or wife and issue (with or without a parent, brother or sister) the surviving spouse will take the personal chattels absolutely. In addition, the residuary estate of the intestate will be charged with the payment of a net sum of money equivalent to the value of one-third of the residuary estate, free of death duties and costs, to the surviving spouse, with interest at the rates of two and half per centum from the date of the death until the sum is paid or appropriated. Apart from the provision of the said sum and interest thereon, the residuary estate (less the personal chattels) will be held as to one-third on trust for the surviving spouse during his or her life and then on statutory trusts for the children of the intestate. The remaining two-thirds will be held on statutory trusts for the issue of the intestate.

By Section 50 (1) (iii) of the Administration of Estates Law 1959, where property is distributed on intestacy among the children of the deceased equity presumes that the father intends to preserve

the family harmony by giving to his children almost equal portions.

Unlike Lagos, Ogun, Oyo, Ondo, Edo and Delta States, there are no statutory provisions in the Eastern States except Anambra which in 1987 adopted the succession law Edict. In the other Eastern States, Section 36 of the Marriage Act which governs intestate succession to the estates of persons married under the Marriage Act provides that the personal property of such intestate and also any property of which the said intestate might have disposed by Will shall be distributed in accordance with the provisions of the law of England relating to the distribution of personal estates of intestates, any customary law to the contrary notwithstanding. But where by the law of England any portion of the estate of such intestate would become a portion of the casual hereditary revenue of the Crown, such portion shall be distributed in accordance with the provisions of customary law, and shall not become a portion of the casual hereditary revenues and real property, the succession to which cannot by customary law be affected by testamentary disposition, shall descend in accordance with such provisions of such customary law, anything herein to the contrary notwithstanding.

The practical effect of this is that there is no statutory provision protecting the inheritance rights of the child in the Eastern States.

Like I stated earlier, it is only Anambra State that in 1987 enacted the Succession Law Edict. Part 4 of this law deals with succession to real and personal estate on intestacy. Section 51 is the main Section that deals with this. With regards to the inheritance rights of the child, it is provided where the intestate leaves a husband or wife as well as children's children (whether or not he also leaves parents or brothers or children of brothers and sister), the residuary estate shall be held on trust as to the value of one - third thereof for the surviving spouse. The interest of such spouse shall be absolute in the case of a husband and in respect of a wife, for her life or until re-marriage which ever first occurs. The remainder of the estate together with any residue on the cesser of the wife's interest, shall be held on trust for the children in equal shares absolutely or failing children of the intestate's children in equal shares absolutely.

Again, it is provided that where the intestate leaves children or children of deceased children but no husband or wife, two - thirds of the residue of the intestate's estate shall be held on trust for the children of the intestate equally. Of the remaining one - third, one - sixth shall be held on trust for the parents and the other one - sixth for brothers and sisters.

In the Northern States as in the Eastern States, there is equally no statutory law which governs the distribution of intestates estates.

It could be seen from all the laws examined that the inheritance rights of the child is not adequately protected in States where there is a statutory provision. In those States, the rules governing the inheritance of the residuary estate of the child more or less aggregate the rights of the children with those of the surviving parent.

In Zambia, two principal legislations namely the Intestate Succession Act (ISA) Chapter 59 of the Laws of Zambia and the Wills and Administration of Testate Estate Act (WATEA) are in place to protect this right. The main scheme of distribution of estate under the Intestate under the Intestate Succession Act is governed by Section 5 of the Act. By this Section, children of the deceased person inherit 50% of his or her estate in such proportions as are commensurate with each child's age, educational needs or both.

Children may receive further portions of the estate as provided in Sections 6 and 7 of the Act. Where the deceased is not survived by a spouse, the children are entitled to 20% of the estate, in proportion commensurate with their respective ages or educational needs or both; where parents do not survive the deceased, the children receive 10% of the estate (being half of the parents share of the estate 20%); and where dependants do not survive the deceased, the children receive 5% of the estate (being half of the dependant's share of the estate 10%) Additionally, the children (along with their surviving parents) are entitled to personal chattels of the deceased parent which is defined to include clothing, articles of household use or document, simple agricultural equipment hunting equipment, books and

motor vehicles, but excluding chattels used for business purposes, money or securities for money .

The total effect in that child might receive or inherit up to 85% of the deceased estate!

The children are also entitled (together with the surviving spouse(s) to the house of the deceased and they have a right to choose a house of their own choice where the estate has more than one house (see Section 9 of the Act). In the case of the deceased being survived by more than one child, the house is to be held by the children as tenants in common, presumably with each child (or each spouse and her children) holding jointly an equal share. Finally, the children (and the surviving spouse) are the sole beneficiaries in the case of small estates of a particular value.

This is a clear provision concerning the family and which clearly stipulate the distribution formula. This helps in protecting the child's inheritance rights. This is clearly lacking in our laws. Thus subjecting the child inheritance rights to uncertainty. The second legislation in Zambia, as I have earlier stated is the WATEA.

This is modeled like the Lagos and Oyo State Wills, laws after the English Inheritance (Provisions for family and Dependents) Act 1975. The WATEA defined 'dependant' as "wife, husband, child or parent' of the deceased. It is noteworthy that of the deceased's extended family, only parents qualify to apply for reasonable maintenance out of the estate of the deceased.

Our Intestate Inheritance or Succession laws should be received with a view to adequately making provisions that will protect the inheritance rights of the child. This is particularly necessary in those state where upon the demise of the husband/father, the relatives of the deceased husband/father, drives or chases away the wife and the children of the deceased and inherits all that the deceased husband/father has laboured for all his life thereby leaving the real dependants in penury.

This review is further justified by the need to protect children from deprivation in their families in a country where there is a dearth of state social security for the care of its child population.

In the absence of a clear cut statutory provision, the customary laws of the subjects will continue to be the basis for this inheritance rights. This is not good enough if the child inheritance rights are to be protected.

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