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The Concept of Wills in Nigeria: Reflections on the Freedom and Limits of Testamentary Power

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ABSTRACT

Life is valued, living each day is an opportunity that we often take for granted, and the thought of leaving this world is appalling, this fear alone makes many shy away from the reality of death. However, death is inevitable and comes without a signal, how or when a person departs this world is only known to Allah, the All-knowing, all wise.

We have to make sure that we are prepared everyday to join the hereafter, one of such preparations is the writing of a valid will because the responsibility we are assuming in our life time will become a difficult task in our absence.it is our duty to leave clear instructions as to how such task and responsibilities will be dealt with on our demise.

In order to prevent family destructions and wrangling after his demise, the testator must ensure his wishes are clearly and definitely expressed in a valid and enforceable will strictly in compliance with S 9 of the wills Act of 1837 and the wills amendment Act of 1852.

Islamic law does not require strict formalities for the execution of a will, it is sufficient that the intention of the testator is manifestly clear.

Under statutory law according to the wills Act of 1837 a testator has absolute testamentary freedom, under Islamic law and customary law, a testator's power to dispose of his will is curtailed by law. This paper examines the concept of wills under statutory law, Islamic law and customary law and concludes that complete freedom is the exception rather than the rule and that a will under Islamic law can be legitimately accommodated and practically implemented within existing statutory laws, so far as they are compatible with the principles of Islamic law. Under customary law a testator is restricted to dispose of properties subject to customary law but has the capacity to make a will under the wills Act.

Keywords: Wills, Testamentary Power, Limitation, Islamic Law, Customary Law, Statutory Law.

INTRODUCTION

Law of succession to property is categorised into two; Testate (the testator has written a will) Intestate (the Testator dies without writing a will). In Nigeria there are three laws governing the laws of Testate succession, Islamic law, customary law, and the common law which comprises of the received English law, doctrine of equity and the statutes of general application. Under Islamic law testate succession is governed by the Holy Qur'an and the sunnah of the prophet (S.A.W) The first regulations on the subject of succession were on wills. Allah (S.W.A) says:

''It is ordained for you that anyone who is at the point of death, and has goods to leave, should bequeath equitably to his parents and near relatives. This is an obligation upon the pious''[1] and also Allah says:

''And those of you who die and leave wives behind, make a bequest in favour of their wives of maintenance for a year without turning them out'.[2] The above verses were abrogated when Allah revealed the verses on Inheritance. I e (surah 4 v 11 and 12)

The prophet Muhammad (S.A.W) Is reported to have said:

'' It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it.''

Under Islamic law the testamentary powers of a testator are restricted, the first restriction is that a person may not dispose by will of more than one third of his property, the origin of this rule is the hadith of the prophet (S.A.W) which was reported by Sa'd Abi Waqqas:

The Prophet (S.A.W) came to visit me in the year of the farewell pilgrimage when I was afflicted with a severe illness. I said to him: '' O prophet, you see how ill I am, I have property and no heir except my daughter, Shall I then give away two-thirds of my property as alms? He replied No, I said a half then? He still said No, I then asked a third? He replied A third and a third is much, it is better that you leave your heirs rich than to leave them destitute., begging from their neighbours. [3]

The second limitation on testamentary power under Islamic law concerns the beneficiaries of the will, a testator may not make a bequest in favour of his legal heirs. Abu Hurayrah narrated that the prophet (S.A.W) said: ''Allah has appointed for everyone who has a right what is due to him, and there is no bequest in favour of a legal heir.''[4]

Under the statutory law, the law governing wills in Nigeria is not uniform. In some parts of Nigeria especially the northern parts the main law that govern the wills law is the wills Act of 1837 which is a statute of general application. In most states created out of the old western states I e Edo, Delta, Ekiti, Ondo, Osun, Ogun, and Oyo states, the applicable law is the wills law cap 133 laws of western region of Nigeria 1959

Lagos state, Kwara, Bauchi, Plateau and Jigawa have enacted their own wills law. In the parts where the wills Act of 1837 applies the testator has absolute testamentary freedom and he can dispose of his property as he likes. However, in the states of the old western region which have enacted their own wills law there is a provision prohibiting a testator from disposing of his properties in a will in a manner that is contrary to native law and custom on inheritance.[5]

Definition:

A will is defined as a testamentary and revocable document voluntary 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 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.[6]

The Black law dictionary defined a will as:

'' The legal expression or declaration of a person's mind or to the wishes as disposition of his property, to be performed or take effect after his death''.[7]

Under Islamic law a will or wasiyyah is an oral statement or a written document which comes into effect after the death of the testator. A will is ambulatory both under Islamic law and the statutory law.[8]

WILL OR WASIYYAH UNDER ISLAMIC LAW

The testator is known as (Al Musi) the legatee is known as (Al Musa Lahu) it is very important for the testator to provide in his will for those near relatives who cannot inherit him. For example, an orphan grandchild, a Christian wife, or brothers and sisters under his care but are excluded from inheritance because of the presence of children or father of the testator. The bequests however beneficial to the legatees are not allowed to defeat the entitlement of the legal heirs to at least two-thirds of the estate. The limitation upon the quantum of bequests applies regardless of the small number or the affluent circumstances of the legal heirs.[9] Sunni jurisprudence approves of bequests only where the residue of the testator's estate is substantial enough to constitute a real benefit for his legal heirs.

Capacity of the Testator

Testamentary capacity involves two elements: the first is Age and the second is the mental capacity.

Age

Under Islamic law every adult with reasoning ability has the legal capacity to make a will.an adult for this purpose is someone who has attained the age of puberty. Evidence of puberty is menstruation in girls and night pollution (wet dreams) in boys. In the absence of any evidence puberty is presumed at the age of 15 for both sexes. The Maliki and Hanbali schools recognised the validity of a will made by a minor who has reached the age of seven on the grounds that, this is the age of discernment.[10]

Mental state of the testator

A full legal capacity to dispose of property belongs to those who have the quality of prudent judgment (Rashid), A person who lacks this quality and cannot be described as Rashid because of immaturity or irresponsibility or mental deficiency is said to be under interdiction. (Higr) the classes of persons subject to such interdiction include not only minors, lunatics and mental defectives but also simpletons and prodigals, those who by carelessness tend to squander their property immoderately and for no good purpose.[11]

According to Maliki law, a woman does not acquire a legal capacity to deal with her property until she has consummated her marriage and two qualified witnesses have testified that she is a prudent person capable of managing her own affairs. Maliki law also allows a husband a limited measure of control over his wife's dealing with her property. A Maliki wife may not dispose of more than one-third of her property without the consent of her husband.

A testator must be sane at the time of making the will, if a will is made by an insane person it would remain void, even if he subsequently recovers and remains sane till death, if however , a will is made by an insane person during a lucid interval the will shall remain valid only if the insanity does not last for a long time e g for more than six months. A will of by a person of sound mind would become void if the testator subsequently becomes insane and remains so till his death.[12]

Bankruptcy

Bankruptcy is a ground for interdiction, according to all schools of jurisprudence any transaction entered into by a bankrupt person with his property is void unless his creditors agree to it. Debts have priority over bequests, if a testator is in debt to the full amount of his property, the bequest will not be valid unless the creditors relinquish their claim. The court has the authority to declare a person bankrupt in order to liquidate his assets to pay his creditors.[13]

Women under Islamic law have full legal capacity to contract, own property, earn income, and inherit. Therefore, women can also become bankrupt. As such, laws apply identically to women as to men. In addition, this rule also applies to businesses.[14]

Death- sickness

Death sickness (Mard-Al-Maut) is an illness which in death. The final sickness is which death occurs is called mard al maut .it is the illness from which a person does not recover. Islamic law does not fully recognise a person's monetary operations during death sickness. Will which is effective is one third the value of the estate.[15] Any will made by a person who is mentally sound and fully conscious during his death sickness is treated as a valid will.[16] Any will which is made during death-sickness that affects the mind is void. Although a dying person may, in terms of sanity and prudent judgment, be perfectly competent to engage in transactions, he is placed under interdictions in order to protect the interests of his heirs and creditors, to the extent that any transaction which offends their interests will be effective only if they ratify it. Preparation of the will should not be delayed until the onset of the final signs of death.

Intoxication

Intoxication (Khamr) also known as drunkenness or inebriation is a physiological state that occurs when a person has high level of alcohol in his blood. The signs and symptoms of alcohol poisoning includes; confusion, vomiting, dangerous anger, seizures etc.

An intoxicated person is incapable of acting as an ordinary prudent and cautious person would under similar conditions.

Among the most cherished gifts of God is the faculty of intellect, which differentiates us from animals. It is through this faculty one is able to reason and make sound judgments. Such a precious blessings needs protection, anything that threatens the intellect is discouraged or completely prohibited by Islamic law. Prohibitions on intoxication with alcohol or drugs are aimed at keeping the mind sound and healthy.[17]

Allah says: ''O you who have attained to faith: Do not attempt to pray while you are in a state of drunkenness, but wait until you know what you are saying.''[18]

A bequest made by a person who is intoxicated is void. A testator who is drunk at the time of making the bequest cannot have necessary mental capacity.

Wills Under the Statutory Law

Under the statutory law a testator has full testamentary freedom to dispose his property in any way and manner. He can bequeath to total strangers and he can dis inherit his close blood relatives. The principal legislation which gave the testator power is the Wills Act of 1837. Section 3 of the Act provides as follows:

> ''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 estate which he shall be entitled to either at law or in equity at the time of his death.''

Capacity of the testator

Testamentary capacity is the ability in law to make a valid will based on understanding and reason[19] it is also defined as the term used to describe a person's legal and mental ability to make a valid will. Testamentary is not the same as general mental capacity and there is no direct connection between lack of testamentary capacity and incapacity under the mental health Act.[20]

The time at which testamentary capacity has to be present is that of execution of the will, however, if the testator had previously, given instructions to a solicitor and lost testamentary capacity before executing, a will prepared in accordance with those instructions might be valid provided that the testator still had the capacity to understand at the time of execution, that he is executing a will for which he had previously given instructions, even if he could not remember the contents.[21]

The testator lacks capacity to dispose of his property when he does not have sound disposing mind or where he has been forced and over powered to make disposition, he would not otherwise have made.

A testator may have the testamentary capacity to dispose of his property by will but may not have the testamentary power to dispose certain properties e g in Idehen v Idehen it was held that S 3(1) of the wills law of Bendel state relates to the subject matter of the devise. The expression does not qualify the testamentary capacity of the testator.

The testamentary capacity involves two elements, the first is Age and the second is the mental capacity.

Age

Under statutory law persons under the age of 18 cannot make a valid will (S 7 Wills Act 1837) as amended by

S3(d) (a) Family law reform Act of 1969 unless they have privileged status, privileged status is enjoyed by soldier on actual military service and mariners and seamen at sea.[22]

S 277 of the Child's Rights Act 2003 provide that a child means a person under the age of 18. On the death of a minor, (other than one who has made a privileged will) his estate will be administered under the intestacy rules.

S 7 of the Wills Act provide that: 'No Will made by a minor shall be valid'.

Mental state of the testator

Under statutory law, a testator has mental capacity if he has a sound disposing mind and memory. The essential test of mental capacity that a court will apply in assessing whether or not a testator was capable of making a valid will was stated by Cockburn C J in the Banks v Goodfellow [23] He said:

> It is essential that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing: shall be able to comprehend and appreciate the claims to which he ought to give effect and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or pervert the exercise of his natural faculties that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound would not have been made.

The testator does not have sound disposing mind according to Cockburn C J:

> If the human instincts and affections or the moral sense become perverted by mental disease, if insane suspicion or aversion takes the place of natural affection; if reason and judgment are lost and the mind becomes prone to insane delusion calculated to interfere with and disturb its functions and lead to testamentary dispositions due only to their baneful influence in any of these cases or a combination of any of them, the testator loses capacity and does not possess the power to dispose of his property by will, indeed, any will made under any of these conditions ought not to stand.[24]

The moral character of the testator's actions is not important, it is his capacity to comprehend his actions that matters, in Adebayo v Adebayo[25]the wife of the testator attacked the testator's will on two grounds; That the testator had suffered ill health from January 1965 until his death and that the bodily illness which afflicted the testator in the last few months of his life was such as to impair his mental capacity, that at the time when the will was executed the testator did not know or approve of its contents. However, on the basis of the evidence the court found that although the deceased was ill during the relevant period, and that he absented himself from the office for a while, he had worked in his house with his secretary in attendance during this period, he attended meetings and appeared normal both in behavior and conversation, in view of this the court held that the testator was fully aware of the contents of the will, and he knew what he was doing and wished to be his will.

The question whether a testator had the mental capacity to make a will was given extensive consideration by the supreme court in Okelola v Boyle[26] Ogundare JSC who read the lead judgment said that: 'where a document is ex facie duly executed the court may pronounce for it on the maxim Omnia praesumuntur rite esse acta.[27]

In the Estate of Randle Nelson & Anor v Akofiranmi,[28] It was held that this maxim only applies with force where the document is entirely regular in form and no suspicion attached to the will, but where suspicion is attached or the document cannot be said to be ex facie regular or where the testator suffers from disability such as deafness, blindness, or illiteracy the maxim does not apply with the same force.[29]

The concept of testamentary capacity was developed by the law to protect the individual, the family and society against the irrational devolution of property. Parties dissatisfied with the provisions made for them in a will who stand to benefit by having the decedent's estate pass by intestacy or under a prior disposition use testamentary capacity as a convenient basis for a will contest.

Mental capacity is a legal concept and any decision as to whether a person does or does not have mental capacity is ultimately a decision for a court of law.

A doctor assessing mental capacity does so as expert witness for the court and owes a duty to the court as well as to the person assessed.

The Golden Rule

Where there is any indication that a testator's capacity may be questioned, a good practice must be to invoke the golden rule.

The substance of the golden rule is that where a solicitor is instructed to prepare a will for an aged testator or for one who has been seriously ill, he should arrange for a medical practitioner to satisfy himself as to the capacity and understanding of the testator and to make a contemporaneous record of his examination and findings.

Templeman J in Re Simpson[30] said:

> In the case of an aging testator who has suffered a serious illness then one golden rule which should always be observed, however straight forward matters may appear and difficult or tactless it may be to suggest that precaution be taken. the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator and records and preserves his examination and findings.

The actual problem is the failure of the solicitor to address issues of capacity not his failure to refer the testator to a medical practitioner. When a solicitor is drawing up a will, the golden rule is that he should request medical assessment on the testamentary capacity for certain individuals including those who are elderly, infirm, and those show signs of mental illness and cognitive deficits. When a doctor witnesses and certifies a will, it is assumed that the doctor is not just a factual witness but has made an assessment of the person and reached the conclusion that he or she has the requisite capacity to make a will. It is therefore incumbent upon the doctor that he should conduct a proper assessment and Fully document his findings.

Knowledge and approval

A testator must know and approve the contents of the will. If a testator signs a will having no knowledge of its contents, the will is invalid. There is an obligation upon anyone seeking to obtain a grant of probate to satisfy the court that the will put forward is the last will of a free and capable testator. Normally if a testator had capacity and the will was duly executed a court will assume the testator to have known and approved its contents. Where however knowledge and approval are put in issue by those contesting the will, the court must b satisfied on the evidence that the testator did know and approve its contents. There may be an infinite variety of circumstances which may throw doubt on whether or not a testator knew and approved his will. One such circumstances is if someone writes or prepares the will under which he takes a benefit. Such circumstances are more likely to arouse the court's suspicion that the testator did not know and approve the contents of the will and that suspicion will have to be removed. The time at which knowledge and approval are required is the time of execution of the will. However, knowledge and approval are established if the testator knew and approved the instructions given to a solicitor to draw up a will.[31]

Insane delusion

Insane delusion means a false idea or belief held by a person that cannot be corrected by reasoning[32] or the belief of things as realities which exists only in the imagination of the patient.[33]a testator may not possess sound disposing mind as a result of his delusion. A person suffering from such a delusion can make a valid will provided the delusion is not connected with the will, but if the delusion affects the testator's judgment, either generally, or on one point which affects the disposition made, the testator does not have testamentary. 'No insane delusion shall influence his will in disposing of his property and bring about a disposal which, if the mind had been sound, would not have been made. The delusion, in order to void the probate of the will must be such as would have influence on the making of the will, the delusion must be relevant to the testamentary disposition.

In the case of Banks v Goodfellow[34] the court held:

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The existence of the delusion compatible with the retention of the general power and faculties of the mind will not be sufficient to overthrow a will, unless it were such as was calculated to influence the testator in making it, which was produced by the obsession rather than by the testator's free and unhampered will.[35]

Undue influence

Undue influence refers to manipulation, deception, intimidation or coercion resulting in impairment of the ability of the testator to make free choices in distribution of his estate. Indetermining undue influence, the evaluator should distinguish between encouragement of a relative or a friend for a testator to remember him, or her in his will from deceptive, manipulative, and coercive actions. The key element in undue influence is coercion. Without coercion, the influence applied does not amount to undue influence. Coercion may be of the worst form such as actual confinement or violence. The issue of undue influence is closely related to the issue of mental capacity as it will often be necessary that the testator's mental capacity was diminished at the time the will was signed, thereby making him susceptible to the influence of others. There are two forms of undue influence; actual undue influence and presumed undue influence. In the case of actual undue influence something was done to twist the mind of the donor and in the case of presumed undue influence the influence derives from the relationship between two persons where one has acquired some degree of influence over the other, or is coerced into making a will which he does not want to make. An immoral influence exercised over the testator does not constitute undue influence in the absence of force. In the case of Johnson v Maja[36]Mrs. Johnson challenged the will on the grounds that: the was not properly executed as stipulated by law. The testator was not of sound mind and understanding, that the will was procured by the undue influence of the testator's mistress. The court held that there was no evidence to show that the mistress was instrumental in drawing up the will.

FORMALITIES FOR THE EXECUTION OF WILLS OR WASIYYAH

The formalities for the execution of a will or wasiyyah under Islamic law are regulated by the Qur'an and Sunnah and it is sufficient that the testator's intention is manifestly clear. A wasiyyah or will may either be by word of mouth, gesture or in writing in either case it must made be before two impeccable male witnesses[37] it must be noted that the witnesses must swear on oath that they are truthful. Under Islamic law oath taking is considered mor authentic than the provision of signature and attestation. Allah says:

> O you who believe! When death approaches any of you and you make a bequest, then take the testimony of two just men of your own folk or two others from outside, if you are travelling through the land and the calamity of death befalls you. Detain them both after the sallah, then if you are in doubt about their truthfulness, let them swear by Allah saying, we wish not for any worldly gain in this, even though he (beneficiary) be our near relative. We shall not hide the testimony of Allah, for then indeed we should be of the sinful

When making a will, it is recommended to make it in the presence of two witnesses among your fellow Muslims, but in the absence of Muslims one is permitted to make Christians and Jews as witnesses when travelling.[38]

Formalities for the Execution of a Valid Will Under Statutory Law

A will must be in writing and signed and witnessed in a particular manner in order to be valid The formalities required are provided in S 9 of the Wills Act of 1837 as amended by the will's amendment Act of 1852. S 9 of the wills Act of 1837 provides:

No will shall be valid unless:

a. It is in writing and signed by the testator or by some other person in his presence and by his direction and

b. It appears that the testator intended by his signature to give effect to the will and

c. The signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time and

d. Each witness either

1. Attest and sign the will or
2. the signature in the presence of the testator not necessary in the presence of any other witness but no form of attestation shall be necessary.

S11 of the will Act of 1837 provides that S 9 of the Wills Act 1837 relating to formalities do not apply to any soldier in actual military service or any mariner or seamen being at sea.

When an illiterate executed a will, a special attestation clause should be inserted to show that the content of the will had[39] first been read over to the illiterate testator who appeared

Perfectly to understand and approve of same.

A blind person can make a will but it must be stated that the contents of the will had been read to him and he appeared perfectly to understand and approve the same.

LIMITS OF TESTAMENTARY POWER UNDER ISLAMIC LAW

A Muslim in Nigeria does not have full testamentary freedom as envisaged under S 3 of the Wills Act of 1837. Islamic law has placed two testamentary restriction on the power of the testator to make a will. The first restriction is the quantum of the bequests which states that a testator may not bequeath more than one-third of his property. The second restriction concerns the beneficiaries of the bequests. The testator cannot make a bequest in favour of a legal heir.

The Bequeatable One-Third

Bequests which exceeds in value of one-third of the testator’s net estate (after funeral expenses is and payment of debts are ultra vires to the extent of the excess portion)[40] the origin of the rule the following hadith of the Holy prophet Muhammad (S A W) narrated by Sa’d ibn Abu Waqqas:

> I was afflicted with a severe illness that led me to the verge of death. The prophet (S A W) came to pay me a visit, I said ‘O Allah’s apostle I have much property and no heir except my only daughter, shall I give two-thirds of my property to charity? He said No, I said half of it? He said No, I said one-third of it? He said you may do so, though one-third is much, for it is better for you to leave your heirs wealthy than to leave them poor begging from others.[41]

The testator may not dispose by will of more than one-third of his property, after payment of funeral expenses and payment of debts. Unless consented to by the legal heirs, in which case the shares of the legal heirs are reduced accordingly. If the bequests are greater than one-third and the heirs do not consent, then the bequests are abated proportionately so that the total does not exceed one-third of the net estate. This is the majority view. However according to Imam Abu Hanifa any particular bequest that is greater than one-third is first reduced to third, and then all the bequests are abated proportionately. The legal heirs of the testator can consent to bequests greater than one-third of the estate. The power of each heir to ratify bequest greater than one-third is directly proportional to the fractional share of each. But in Maliki law the application of the one -third rule is absolute, a testator can never bequeath more than one-third of the net estate, and in the absence of residuary heirs the public treasury acts as a residuary heir.

No Bequest in Favour of a Legal Heir

The testator cannot make a bequest to a legal heir, the purpose of this ruling by the prophet (S A W) is to prevent the enmity which arise among the heirs as a result of the preferential treatment of one of the heirs by the testator in his will. The Holy prophet (S A W) in his last sermon on the day of the farewell pilgrimage is reported to have said that:

‘’Allah has given everyone his due: there shall be no bequest to one who Inherits.[42]

The reason for this rule was explained by Islamic jurists, they said that if a bequest is permissible to the heir,

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verily a greater portion than which had been fixed by Allah will be allotted to him and he who bequeath to his heir violates the laws of Allah.

The Capacity of a Muslim to Write A Will Under the Wills Act of 1837

Once a Muslim accepts Islam as his Religion, it is mandatory for him to obey all the laws of Allah absolutely and unconditionally. The Sharia is the way of life to the Muslims. To a Muslim, the Sharia represent his entire life, symbolizes his existence and gives him his identity, His entire personality and character are shaped by the Sharia.[43]

The only section of the wills Act 1837 that is in conflict with Islamic law is S 3. Which gives the testator absolute testamentary freedom to dispose of his property in the manner he deems fit. But the other provisions are not against Islamic law, the most surprising thing is that many Muslims are not aware that the concept of wills existed in Islamic law.

It is very important for a Muslim to bequeath to those people under his care who are not his legal heirs. Also, for the Muslims in the southern part of Nigeria it is mandatory for them to write a will indicating that their property be distributed according to Islamic law, because in the absence of such will customary law will apply to their property.

In the case of ADESUBOKUN V YUNUSA[44] the testator, who was a Muslim living in the Northern part of Nigeria, executed a will under the wills Act of 1837, the will purported to bequeath five pounds to the plaintiff while giving his two other sons two plots of land worth 350 pounds each respectively in addition he gave these two sons jointly and in equal share another property located in Lagos as well as his residuary estate. The plaintiff challenged the will on the grounds that the testator being a Muslim was not allowed to dispose of his property according to the wills Act of 1837 in a manner contrary to Islamic law. The learned trial Judge in a considered judgment found the following facts:

1. That a Muslim of northern Nigeria is entitled to make a will under the will Act 1837 but he has no right to deprive by that will any of his heirs, who are entitle to share his estate under Islamic law, of any of their respective shares granted to them by Islamic law.

2. That in the case of a will of moveable, the testator must comply with his personal law, that is the native law and custom of his particular locality. Unless such personal law is repugnant to natural justice, equity and good conscience or incompatible with any law for the time being in force which does not deprive any person of the benefit of the personal law of the testator and

3. Where the testator is a native within the meaning of the land tenure law and the will concerns immoveable situated in the Northern states of Nigeria the testator must comply with the native law and custom relating to devolution, of the place where the land is situated.

The trial judge set aside the probate of the will and gave judgment for the plaintiff. On appeal to the Supreme court this decision was overruled.

Also, in the case of AJIBAIYE VAJIBAIYE[45] Testator Alhaji Disu Ajibaiye made will dated 30th September 2002, the testator died on 29th January 2004, only the third and the relied youngest wife of the deceased had knowledge and information of the will. The appellant on the dispositions made in the will, which the respondents objected to, contending that the testator, being a Muslim could not make a will in accordance with the wills Act. On trial at the High court the learned judge found that the will dated 30th September, 2002 purporting to be the will of a Muslim, Alhaji Disu Ajibaiye, governed by Muslim personal law disposing by will all his property in accordance with the wills Act 1837, having regards to S 4(1) of Kwara state is invalid null and void.

On appeal the court of appeal held that, the will is ab initio void for being contrary to wills law of Kwara state and the testator could not have validly made a will under the wills Act, the court also held that the properties of a Nigerian Muslim in Kwara state after his death is subject to the dictates of Islamic law of succession which does not allow a Muslim to dispose his properties anyhow.

We do not have much problems concerning the law of intestate succession in Northern Nigeria, because basically the distributions are done by Muslim clerics who are experts. The only problems are that people are reluctant to make wills either because they do not understand the concept of wills or they don't know of its existence. There is need to educate them on the significance of writing wills because those dependents under the testator's care who are not legal heirs can be provided for in the will. E g adopted children, non-Muslim wives, for charity etc.

We have enormous problems facing both testate and intestate succession of Muslims in southern Nigeria, first due to their attitudes, some of them don't regard Islam as a way of life, some are even afraid of the word Sharia not to talk of establishing Sharia courts in the region. without the Sharia courts, they can perfectly live their lives according to the tenets of Islam

Limits of Testamentary Power Under Customary Law.

A customary law will take the form of an oral declaration made voluntary by the testator in the presence of witnesses during his life time, such oral declaration refers to nuncupative wills. A nuncupative will is not the usual method of disposition of the testator's entire estate, under customary law a testator cannot dispose of undivided interest in family land by will. Testate succession under customary law wills give effect to the intention of testator as expressed in the nuncupative will.[46]

The wills laws of the states comprising of the former western region of Nigeria, the wills laws of Lagos, Kaduna, Plateau, Kwara, Oyo, and Delta States contains limitations to testamentary power.

Section 3 (1) of the wills law of the former western region provides:

> 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 a manner hereinafter required, all real, and personal estate which he shall be entitled to, either in law or in equity at the time of his death and which if not so demised, bequeathed, and disposed of would devolve upon the heir at law, of him, or if he became entitled by descent of his ancestors or upon his executor or administrator.

Under customary law a testator does not have full testamentary freedom. In the case of

LAWAL OSULA V LAWAL OSULA[47] the testator inserted a declaration in his will as follows;

> ‘’ I Declare that I make the above demise 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 the will.’’

In this case the Supreme court held that the devise by the testator who was subject to Bini customary law of his Igiogbe to persons other than his eldest son was held to be invalid.

In IDEHEN V IDEHEN[48] the testator left behind a will in which he devised the two houses in which he lived during his life time to his eldest son. The son predeceased the him and the two houses would pass to the residual estate since they were specifically willed to the son. The two houses in which he lived in his life time constituted the Igiogbe or family seat[49]under Bini customary law which is to pass automatically to the oldest surviving son of the deceased upon completion of the testator's second burial rites. To the exclusion of all his children. The family of the deceased instituted an action seeking declaration that the will Was invalid because it is in conflict with the Bini customary law. The supreme court held that S 3 (1) of the wills law of the old Bendel state related only to the subject matter of the will, that is it only restricted the property that he could devise under the will and not his capacity to make a will.

Limits of Testamentary Power Under Statutory Law

Under statutory law in Nigeria, the testator has full testamentary freedom to dispose of his property in anyway he deems fit but limited in practice by the inheritance (family provision Act 1938 and the inheritance (provision for family and dependents') Act 1975 Section (3) of the wills Act of 1837 provides:

‘’ 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 estate which he shall be entitled to either at law or in equity at the time of his death.’’

The law governing wills in Nigeria is not uniform. In most states created out of the old western states I e Edo, Delta, Ekiti, Ondo, Osun, Ogun and Oyo states, the applicable law is the wills law cap 133 laws of western Region of Nigeria 1959, Lagos, Oyo and Delta states have enacted their own wills laws. S 2 of the wills law of Lagos state made provisions for family and dependents. By this Section a spouse or a child of the testator who has been left out in the will, or whose legacies are considered by him inadequate, can apply to court to vary the will in order to increase such legacy or provide such a legacy in the case of someone who has been left out completely. [50]

The wills edict of Oyo state 1990, not only limits the right of a testator to dispose of his property which he is precluded from disposing of under customary law, but also provides that it shall not apply to a will of a person who immediately before his death, was subject to Islamic law.

Section 3 (1) of the wills law of the former western region provides:

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 estate which he shall be entitle to either at law or in equity.

In the case of AGIDIGHI V AGIDIGHI[51] it was held that the phrase ‘’subject to customary law relating thereto’’ in S3 (1) of the will law of Bendel state is only a qualification of the subject matter of the property disposed of by will not a qualification of the testator’s capacity to make a will.

A will is not invalid because a property which cannot be bequeathed to a person under native law and custom was bequeathed to that person in the will, what the court will declare invalid in such a situation is the bequest made contrary to native law and custom relating to the property so bequeathed. The only invalid part of the will in dispute was the bequest of the (Igiogbe)[52] to other beneficiaries than the appellant which was contrary to Bini native law and custom. The other part of the will was however valid.[53]

CONCLUSION

It is very important for a person to write a valid and acceptable will during his life time. Such a will should be fair and just. Under statutory law when a person dies intestate the government distributes his property in accordance with the intestacy rules which may not accommodate the testator’s intended beneficiaries.

A Muslim is permitted to write a will under the wills Act of 1837, If he does not exceed the one-third limit and provided he does not bequeath to a legal heir.[54] The will of Chief Gani Fawehinmi, a renown legal practitioner and a Muslim of Southern Nigeria is quite contrary to Islamic principles, when a person dies his property automatically passes to his heirs. Muslims living in the southern part of the country should write a will indicating Islamic law to apply to their property.

Under customary law a person can write a will under the wills Act of 1837 but cannot dispose of by will properties subject to customary law.[55]

The study recommends that the wills laws of the various states should be amended to accommodate Islamic law and customary law. To be fair and just to the Muslims in Nigeria, there is need to establish Sharia courts in all the states of the Federation.

FOOTNOTES

[1] Yusuf Ali: The Holy Qur’an Surah 2 v 180

[2]Ibid (surah 2 v 240)

[3] N J Coulson: Succession in the Muslim Family (Cambridge University press 1971) P 214

[4] A Hussain: The Islamic Law of Succession (Makta ba Dar-us-Salam, 2005) P 385

[5] S1(1) of wills law of Lagos state. See also Idehen v Idehen (1991) 6 NWLR (pt 198) P 382

[6] K Abayomi: Wills Law and Practice (Mbeyi and associate Lagos, 2004) P 6

[7] H C Black: Black Law Dictionary (4th edn St Paul Minn west publishing co 1968) P 1772

[8] A changeable will, a testator possesses the power of changing the will during his life time.

[9] Ibid (n 3)

[10] Ibid (n 4)

[11] The idea of proving the Rashid of the young and prodigal before validating their actions was initiated by the text of the Holy Qur'an, surah 4 v 5-6 which provides: ‘’ And give not unto the unwise your wealth which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice. And test orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them, but consume it not wastefully and hastily, fearing that they should grow up.’’

[12] I Ahmad: Muhammadan law (5th edn Delhi law house 1980) P430

[13] Abdur-Rahman Ibn ka'b Ibn Malik narrated that Mu'aazh ibn Jabal was a very generous young man and he spent money left and right, until he owed more than he had. He went to the Prophet (t S.A.W) to talk to his creditors. The Prophet (S.A.W) sold off his assets and paid his creditors.

[14] A Awad & R Michael: Classical Islamic law and modern Bankruptcy (44 International law 975 2010)

[15] Majilisul Ulama, Mard-al maut: the last sickness (p o box 3393, Elizabeth 6056 South Africa)

[16] Ibid (n 4)

[17] Aisha narrated that the prophet (S.A.W) said that ‘’ all drinks that produce intoxicants are forbidden to drink, also Jabir Ibn Abdullah narrated that the prophet (S.A.W) said if a large amount of anything causes intoxication, a small amount of it is prohibited. (sunnah Abu Dawud Hadith no 1567)

[18] Yusuf Ali: The Holy Qur'an (surah 4 v 43)

[19] L B Curzon: Dictionary of law (4th edn, pitman publisher 1994)

[20] C Sawyer: Principles of succession, wills and probate (Rutledge cavendish, 1998)

[21] Parker v Felgate (1883) P D 171

[22] S 11 Wills Act 1837

[23] (1870) L R 5 QB 549

[24] Ibid (n 6)

25 (1973) 1 All NLR (pt 1) 361

[26] (1998) 2 NWLR (Pt 539) 533

[27] All things are presumed to be done in due form

[28] (1962) 1 All N L R 130

[29] See In re Ceale (1864) 25 ST 431, 164 E R 1342- where a testator who was deaf, dumb and illiterate, the court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the will before making the grant.

[30] (1977) 1 21SJ 224

[31] See the case of Fuller v Strum (2001) ECWA Civ 1879, the court held that if suspicion of the court is aroused in any way about the circumstances of the drafting of the will, all the relevant circumstances will be scrutinised by the court which will be vigilant and jealous in examining the evidence in support of the will.

[32] Barbra P Wellers Nurses Dictionary, for nurses and healthcare workers. (24th edn)

[33] Per Brougham in Warring v Warring 6 moo p. cc 341

[34] Ibid

[35] W Hagen Wills: Insane Delusions Respecting members of the and heirs at law. (Marquette Law Review vol 31 issue 3 December 1947)

[36] (1951) 34 WACA 290

[37] F H Ruxton; Maliki law(El Nahar press Cairo 2004) p 372

[38] At-Tabari 11 163-164

[39] Ezenwere v Ezenwere (2003) 3NWLR 241

[40] N J Coulson: Succession in the Muslim Family (Cambridge University press 1971) p235

[41]S S Al Mubarakpuri: Tafsir ibn Kathir (2nd edn, Darussalam 2003) vol 4 p3

[42] Ibid

[43] A K Makinde: The Institution of Sharia in Oyo and Osun states Nigeria 1890-2005 (P HD Thesis march 2007) p 20

[44] (1971) 1 All NLR 225

[45] (2007) w 18 LRLR VOL 8 911

[46]P Izuka, S T Abdulrahman; Effect of will on Customary law in Nigeria (International Journal of law, vol 6 issue3 2020) p 61-69

[47] (1995) 32 LRCN 291 at 318

[48] (1991) 6 NWLR) (pt. 198) p 382 4

[49] I SAGAY, Nigerian Law of Succession: principles, cases, statutes, and commentaries (Lagos malthouse 2006) p 143

[50] Ibid (n 49)

[51] (1996) 6 NWLR Pt 454 at 300

[52] The house where the deceased lived, died and was buried

[53] Idehen v Idehen (1991) 6 NWLR (Pt 189) 382

[54] Justice Bello in the case of ADESUBOKUN V YUNUSA (1971) 1All NLR 225

[55] Ibid (n 53)