# RIGHTS OF SURVIVING SPOUSE UNDER NIGERIA'S LAW OF SUCCESSION: EXPEDIENT ACTIONS NEEDED FOR PROFITABILITY OF APPLICABLE LAWS ON A LARGER SCALE

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**BENIN CITY**

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**A PROJECT WORK WRITTEN AND SUBMITTED TO THE FACULTY OF LAW, UNIVERSITY OF BENIN IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF BACHELORS OF LAW (LL.B) DEGREE OF THE UNIVERSITY OF BENIN, BENIN CITY.**

**OCTOBER, 2023**

## CERTIFICATION

I, **Favour Adeola ADJOTO**, with Mat No: **LAW 1704657** hereby certify that apart from the references made to other people's works as duly acknowledged herein, this entire project is the product of my personal research, and is neither in part nor in whole been presented for another degree elsewhere.

……
**Favour Adeola ADJOTO**
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## APPROVAL

We are satisfied that this project was completed by **Favour Adeola ADJOTO**, with Mat No. **LAW 1704657**, in partial fulfilment of the requirement for the award of the Bachelors of Law (LL.B) Degree of University of Benin.

Prof. Emeka Chianu
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Signature & Date

## DEDICATION

This essay is dedicated to GOD ALMIGHTY without whom I would not be here, neither would I have been able to successfully sail through my undergraduate years.

And to the meekest, gentlest, and most valiant woman I know – my Mother; the most sacrificial and consistent human in my life, words fail me to express my gratitude for your labour of love, even in the toughest seasons of my life, in partnering with GOD to bring me to this moment. Here is a heartfelt thank you, I cherish you immensely.

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Universal Declaration of Human Rights 1948

## ACRONYMS/ABBREVIATION

NIV - New International Version

JELR – JUDY Electronic Law Report

## ABSTRACT

One function of law in any society is to regulate social conduct and behaviour. And beyond this, law helps to shape social values and transform societal norms to conform with what is just and acceptable. The Nigerian law of succession has undergone a really slow process of achieving this social change. Aside statutes and Islamic law on succession which provide a fair system of succession to a deceased's intestate estate, customary law of succession still retains its long-standing prejudice and discriminatory practices which the courts only recently, have begun to discountenance making commendable efforts to uphold justice instead. Meanwhile this intervention is limited in its impact as it only applies to parties who come to the court seeking justice, but then not many cases come before the court. What makes this even more worrisome is that despite the usefulness of statutory and Islamic laws that have dissociated from these discriminatory practices and which adequately provide for spouses, in reality succession in Nigeria automatically reverts to customary law, or a similar outcome of discrimination and disentitling of rightful beneficiaries as the case under customary law. This is due to a number of factors, one of which is lack of enforcement measures for these laws. All these will be discussed in this long essay as well as a breakdown and comparative analysis of these succession laws vis-à-vis the standard established by the Constitution and other international instruments relevant to this discourse. In the end, this essay would proffer solutions to the aforementioned problems and weaknesses in the law for enhanced and effective protection of the rights of spouses in succession matters in Nigeria.

# CHAPTER ONE

# GENERAL INTRODUCTION

## 1.0 Introduction

In Nigeria, when most persons think of inheritance, they avert their minds to the issue of the deceased, and if none, to the husband's relations; as the only persons to whom they believe it concerns. The reason for this is easily deducible. Native law had for long been the sole law guiding the indigenous people making up the country, and under these native laws, inheritance follows the blood.[1] Thus, inheritance under customary law was for persons related to the deceased by blood. The focus of this essay however is on the spouses – an aspect of succession not as popular in inheritance conversations as that of inheritance for children.

Inheritance is a term almost everyone from young to old is familiar with. It suffices to say that, especially in this part of the world, it is inherent in our values that a man not only plan for himself while he is alive, but also his descendants as against the day of his departure.[2] However, the concept of succession can be viewed not just as a legal term but a wider one. Black's Law Dictionary defines succession as the acquisition of rights or property by inheritance under the laws of descent and distribution.[3]

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[1] RA Onuoha, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' The International Journal of Not-for-Profit Law (2008) (10) (2) < https://www.icnl.org/resources/ research/ijnl/ discriminatory-property-inheritance-under-customary-law-in-nigeria-ngos-to-the-rescue > accessed 19 June 2023

[2] Proverbs 13:22a in the Holy Bible (NIV) reads, "A good man leaves an inheritance for his children's children."

[3] Black's Law Dictionary, (8th edn) 2004.

Succession extends to more persons than those covered under native law. Thus, female children for instance who are in most native laws disinherited can under the law of succession claim for their natural right as children of the deceased, to inherit from his estate irrespective of their gender. Similarly, spouses can under the law of succession claim certain rights of inheritance or entitlements depending on the relevant law. In some other jurisdictions, the law of succession has intervened to extend benefits to dependents of the deceased who are not relatives or near kin.[4]

[4] An example is section 17(1)(a) and (f) of the Malawi Deceased Estates (Wills, Inheritance and Protection) Act, sourced at < https://media.malawilii.org/files/legislation/akn-mw-act-2011-14-eng-2014-12-31.pdf > accessed 20 July 2023. Section 3(1) defines who a dependent in this context is.

Further, the law of succession can be seen as providing legal protection and remedy to these class of persons who should be entitled but are disinherited under native law. Though disputes under native law could be settled by traditional rulers, chiefs, etc. where the need arose, when it came to issues of inheritance, the native law applied in such circumstances were already discriminatory to sufficiently address the plight of this class of persons. However, with the repugnancy doctrine of the rules of equity the law of succession has been broadened to affect native laws of inheritance. (In any case, succession and inheritance still go together and can both be used singly, jointly, or interchangeably.)

**1.1 Background of the Essay**

The stages of development of Nigerian Law of Succession can be classified into three viz. pre-colonial era, colonial era and post-independence era. During pre-colonial times, succession in the different communities now making up the country was governed solely by the custom of each community or ethnic group. These customs make up the customary or native laws recognized in the Nigerian legal system at present subject to validity or enforceability tests. With the introduction of British colonial rule in the annexed region which became known as Nigeria, came the application of English laws to the country. These laws include the common law, the doctrines of equity, and statutes of general application in force in England on January 1, 1900. These laws were administered side by side with local laws.

However, with independence came the promulgation of decrees, ordinances, and enactment of statutes which governed the country. At present, these decrees and ordinances which used to be in force have now been repealed or modified by the legislature where it still applies.

By *section 315 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)*[5], existing laws remain in force in the country unless it has been repealed or declared invalid where it is inconsistent with the provisions the constitution. In summary, as relates the law governing succession in Nigeria, basically there is the customary law, Islamic law and statutory law. The situations wherein common law apply will be discussed next, doctrines of equity will be discussed later on in this essay, meanwhile the *Statutes of Distribution*, *Intestates' Estates Act*, etc. have been repealed by statute in most parts of the country.

The multi-faceted laws making up the Nigeria legal system creates a conflict of law situation hence when disputes on succession comes before a court, one basic thing to determine is which succession law applies. Common law applies where a person contracts a monogamous marriage outside Nigeria.[6] This is because for Nigerian statutes to apply, the marriage has to be celebrated in accordance with Nigeria's lex loci celebrationis which is the *Marriage Act*.[7] Common law was thus applied in *Cole v Cole*[8] as the deceased had contracted a monogamous marriage outside the country, and the widow and son were held to be the deceased's heirs to the exclusion of the brother who claimed to be the customary heir.

This rule has however been modified to take into account the manner of life lived by the deceased, and where the court finds that the contracting of a monogamous marriage by the deceased was for the purpose of conforming to the rules in that jurisdiction for a lawful marriage

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[5] Subsequently referred to as the 1999 Constitution

[6] Itse Sagay, *Nigerian Law of Succession: Principles, cases, statutes and commentaries* (Malthouse Press, 2012)

[7] Marriage Act 1914, Cap 6 Laws of the Federation of Nigeria 2011. On the above point, see section 49(5) of the Administration of Estates Law.

[8] (1898) 1 NLR 15.

and not proof that the deceased wanted his estate to be governed by English law, then the deceased's customary law will be applied to the distribution of his estate.[9] This however is not a comprehensive analysis into the conflict of laws issue that arises in succession matters under the Nigerian law of succession. The scope of this work begins when this initial problem has been resolved by the courts, in analyzing what the applicable law contains and expand on this body of knowledge to see what more is to be done in this area of law.

**1.2 Scope and Limitation of the Study**

Succession generally is either testate or intestate. This means that where anyone dies leaving an estate behind, the devolution of his estate to his beneficiaries or heirs would be governed by laws of testacy or intestacy.[10] Testate succession refers to the form of succession where a deceased left behind a valid will containing his directions or last wishes on how his estate is to be administered to named beneficiaries listed in his will upon his death. The law governing testate succession depends on the jurisdiction as various states have enacted their own Wills law. But for any State where there has not yet been enacted a local legislation, the *Wills Act 1837*- a statute of general application will be the applicable law to govern succession to the deceased's estate with regards to his will.

Intestate succession on the other hand is a form of succession to a deceased's estate in a manner that may not essentially be reflective of the deceased's wishes. This is so because the deceased died without leaving a will or a valid will which would have indicated how he wanted his estate to be shared. Where this is the case, the law steps in to secure the deceased's estate from

[9] This was the decision in Ashiata v Goncallo (1900) 1 NLR 42 where Speed, Ag. C.J. remarked that the parties had merely undergone a Christian form of marriage for local i.e. Brazilian reason but the deceased until the time of his death lived and died a Muslim.

[10] Note that the writer uses the male pronouns he, him, generically for both male and female except where a distinction is appropriate.

intermeddlers, third parties, executor dé son tort, to protect the interests of rightful beneficiaries, the deceased's creditors, to prevent wastage of the estate, among other reasons.

Thus, as it is impossible to know for certain what a dead man's wishes are, and as it is also important to preserve the estate for the above mentioned reasons, *section 10 of the Administration of Estates Law*[11] vests the deceased's estate on the Chief Judge of the State upon the death of the deceased until letters of administration has been granted by the court. As already explained above, common law could apply to intestate succession in certain circumstances.

However, intestate succession in Nigeria is mostly concerned with customary law, Islamic law and statute (the applicable Administration of Estates Law and the Wills Law) depending on the jurisdiction and the nature of marriage contracted by the deceased, or if the deceased left a valid will. Consequently, this essay will be limited to what is obtainable under these laws, though testate succession will not be discussed as it is not within the purview of this work. Thus the focus of this long essay is a broad discussion on these applicable laws of succession in Nigeria in relation to the rights of surviving spouses when the other spouse dies intestate.

**1.3 Statement of the Problem**

This research follows on the commendable strides the law of succession has made over the years in the country in seeking to ensure fairness, rightness and justice as regards inheritance rights of beneficiaries of a deceased's estate. Not only has the law and the courts brought about equity and justice in some notable instances as will be discussed in this work, the law has extended the category of beneficiaries entitled to inherit to include not just daughters but widows. Through the application of the repugnancy rule, the law has discountenanced and struck down oppressive and

[11] Cap 1 Laws of Western Nigeria 1959. This will be subsequently referred to as AEL.

discriminatory practices which were prevalent under native law such as dehumanizing widowhood rites and practices, the nrachi custom of the Igbos, widow inheritance, etc.[12]

Nonetheless, certain questions linger. How well does the effect of these laws of succession reflect in the lives of the concerned – the spouses? To put differently, how well have these laws in practical sense altered the status quo, do spouses really enjoy these rights of inheritance provided them by law? Also to what extent has gender inequality affected the rights of spouses under customary law, and what has the law done in this regard? Moreover, how do customary laws of succession differ from that applicable under statute? Is there still need for such differentiation, and what do international treaties and global trends say in this regard?

Clearly, the practical problems spouses, particularly widows, face in succession matters have not been fully resolved. These giant strides are better appraised in theory and not real life. Though the courts have intervened in not a few cases to enforce the rights of spouses when such cases are brought before it, there are numerous other cases that do not come before the court. This is due to several reasons; from lack of awareness of the legal protection provided these spouses, to prolonged court battles where parties eventually approach the court, to weak systems of enforcement which greedy family members of the deceased prey on to deprive spouses especially widows what is rightfully theirs. Yet another problem is that court proceedings are not best suited for family and succession related matters though in the end it is not to be dispensed with.

### 1.4 Aim and Objectives of the Study

[12] A discussion on widowhood rites is contained in Emeka Chianu, *Law of Succession* (University of Lagos Press Ltd 2022) at pp 131-132, nrachi custom at pp 207-209, widow inheritance at pp 50-52.

This essay aims to significantly impact on the existing legal framework available to spouses under the Nigerian law of succession to ensure that beyond the provisions of statute, there is enforcement of these laws. It seeks to bring to the surface and address the human, cultural, social barriers and limitations against spouses who seek to employ these legal provisions to overcome the gross injustice and oppression of culture. This will enable the present legal provisions of the country better reflect in the realities of life of the concerned persons i.e. the spouses.

Further, this essay seeks to bridge the gap between the degree of legal protection afforded widows married under the Marriage Act and those married under Customary/Islamic law. As stated by the courts in *Cole v Cole*, the type of marriage contracted by the deceased is a determinant factor of what succession law will apply to the estate of a deceased who died intestate.[13] However, this research will eventually find that in the light of the provisions of the 1999 constitution and international standards, custom-made local legislation should be made to apply to customary spouses especially the widows.

In addition to the above, this essay will proffer solutions to the practical problems spouses are faced with when they contemplate a legal remedy. On the other hand, this essay will try to give perspective as to why some spouses do not avail themselves the protection of law but resign themselves instead to fate. And finally, this essay will suggest alternative ways to resolve succession disputes without incurring spite from family and kin. All these objectives are significant in realizing ideological shifts and better policy.

### 1.5 Research Approach and Methodology

[13] Cole v Cole (1898) 1 NLR 15

This essay employs the doctrinal approach in conveying the scope of this work as outlined in the preceding pages. This means that the writer's approach will be purely qualitative, i.e. the above objectives will be achieved through a breakdown and comparative analysis of the applicable succession laws in Nigeria, employing available literature on the subject matter with specific reference to what is obtainable in major ethnic groups in the country to critically examine, analyze and evaluate the legal framework of succession in Nigeria for surviving spouses.

Primary and secondary sources will be used for the purpose of this research, and in the end, the information presented in this work will be used to proffer solutions to the aforementioned problems and weaknesses in the law for enhanced and effective protection of the rights of spouses in succession matters in Nigeria.

## CHAPTER TWO

## WIDOWS UNDER CUSTOMARY AND ISLAMIC LAWS

### 2.0 Introduction

In examining the rights of surviving spouses under the applicable succession laws in Nigeria, reference must be made to the type of marriage contracted by the parties.[1] Under the Nigerian legal system, a legally recognized marriage is such that is contracted between a man and a woman and where any marriage is not legally recognized, it shall also not be recognized as entitled to the benefits of a valid marriage.[2] It is also important to note that a legally recognized marriage can only be contracted between living persons. Thus in *Okonkwo v Okagbue*[3] the Supreme Court did not hesitate to hold the alleged marriage between a living woman and a dead man void. Ogundare JSC affirmed that '… The institution of marriage is between two living persons.'

Consequently, where a marriage conforms to the legal definition of a valid marriage under our law, then any of the parties can be rightly called a spouse and upon the death intestate of either of the parties, the applicable law of succession will apply to determine the beneficial interests of the surviving spouse.

### 2.1 Types of Marriage in Nigeria

By inference from *Item 61 of the second schedule of the 1999 Constitution*, there are two classifications of marriage. This section provides that: 'The formation, annulment and

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[1] Cole v Cole (1898) 1 NLR 15

[2] Sections 3 and 1(b) Same Sex Marriage (Prohibition) Act, 2013

[3] (1994) 9 NWLR (Pt 368) 301.

dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto' falls under the Exclusive Legislative List. This means that states legislatures have jurisdiction to make laws affecting customary law or Islamic law marriage, it being a residual matter.[4] This classifications of marriage have been well explained thus:

> Presently, there are two sets of marriage regimes existing in Nigeria even though they flow from the three systems of law operative in this jurisdiction. They are the customary law (including Islamic law) marriages on one hand and statutory marriage under the Marriage Act 1914 on the other. This categorization is traditional even though it seems that there is a distinction between customary law marriages and Islamic marriages … Apparently, the basis for grouping customary law and Islamic marriages together is that in relation to the MA (Marriage Act), both marriages have the same status: apart from being classed together, the MA does not apply to them.[5]

However, for the purpose of discussing the subject matter, succession under customary law will be set apart from succession under Islamic law.

**2.2 Succession under Customary Law**

Customary law governs succession to the estate of a deceased who died intestate where the deceased was married under customary law. Customary law derives from customs, accepted usages of the people of that community or place.[6] However, there are over 250 ethnic groups in

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[4] Michael Attah, *The Age of Marriage Question in Nigeria: How Far Resolved?* 2 GLR 111 (HeinOnline 2019) 113.

[5] ibid at page 112

[6] Section 258 of the Evidence Act 2011 defines custom as a rule which, in a particular district, has, from long usage, obtained the force of the law. See also the definition of customary law as the mirror of usage in *Owoniyi v Omotosho* (1962) WNLR 1 at p 5.

the country and the law of succession for these communities vary. It will be tantamount to an impasse for this writer to attempt an analysis of all these succession laws under customary law within the confines of this work.

However, because these customary rules of succession are really similar with little variations here and there, those of major ethnic groups in the country will be discussed particularly that of the Yoruba, the Igbo, and the Benin rules of customary succession. Because Islamic law of succession will be discussed independently of that of customary law, what obtains in the Northern part of the country will be discussed with reference to Islamic law even though other native customary laws apply in the region.

It is important to note also that by virtue of *Section 166 of the Evidence Act*[7] where the question arises as to the married status of a man or a woman under Islamic or customary law to a party before the court, the court is to presume the existence of a valid subsisting marriage where evidence of cohabitation as husband and wife has been given to the satisfaction of the court, unless this presumption is successfully rebutted.

This implies that where parties are in cohabitation as husband and wife, the law presumes them to be married under customary or Islamic law even if in fact, the requirements for contracting a valid marriage under customary/Islamic law was never performed by them. This means that the paramour of a deceased man can under this provision be considered a lawful wife of the deceased, and vice versa unless the contrary is proved. The burden of proof rests thus on the party asserting the no marriage relationship between the other party and the deceased after the other party has adduced sufficient evidence of cohabitation.

[7] Evidence Act, 2011.

### 2.3 Succession under Yoruba Customary Law

First it is important to note that under customary laws of succession, widows generally do not inherit. That is, they are not heirs properly so called under almost all customary laws of succession.[8] Widows themselves are regarded as chattels to be inherited.[9] Another reason for this rule of custom consistently reflects the desire of the deceased's first family or patrilinage to keep the deceased's property in the family line, for fear that the property will pass to the wife's family or that the widow would remarry and the property would become that of the new husband.[10]

Thus, under Yoruba customary law widows do not inherit from their deceased husband's estate. Again, the Federal Supreme Court in *Suberu and ors v Sunmonu and ors* held that it is a well settled rule of native law and custom of the Yoruba 'that a wife could not inherit her husband's property since she herself is, like a chattel to be inherited by a relation of her late husband.'[11] A further reason this is the case under customary law is that the widow is said to inherit through her children.

This is evident in the case of *Danmole v Dawodu*[12] where the mode of distribution by the Yoruba of the deceased's estate among the children was brought before the court. Under the idi-igi system of the Yoruba known generally as per stirpes, the deceased's estate is shared into equal portions according to the number of wives who had children by him. By reason of this, it

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[8] RA Onuoha, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' The International Journal of Not-for-Profit Law (2008) (10) (2) < https://www.icnl.org/resources/research/ijnl/discriminatory-property-inheritance-under-customary-law-in-nigeria-ngos-to-the-rescue > accessed 19 June 2023

[9] In *Akinnubi v Akinnubi* (1997) JELR 46339 (SC), the deceased's brother claimed in his pleadings that the widow under Ikale Customary Law became part of the deceased's estate and was thus bequeathed to him.

[10] Itse Sagay, *Nigerian Law of Succession: Principles, cases, statutes and commentaries* (Malthouse Press, 2012) at p 272

[11] (1957) JELR 80170 (SC)

[12] (1958) 3 FSC 46.

may be argued that that the widow is really not discriminated against with regards to the late husband's property. It has been argued that where the children inherit, it is tantamount to the widow inheriting. But how about childless widows for example?

This was the case in *Suberu and Ors v Sunmonu and Ors* above where the two childless widows had to contend for the property of their late husband alongside paternal and maternal relatives of the deceased. It is to state the obvious then that the childless widow takes nothing, and this for the widow amounts to a fruitless investment in such family. On the fate of a childless widow Chianu points out:

> The position of a childless widow is that she may reside in the matrimonial home at the mercy of her husband's agnates, return to her people or go elsewhere in which case she departs with nothing but her personal effects … Under many native laws, a widow may occupy her husband's house only if she has a child or grandchild surviving.[13]

This means that under customary law, on the death of the husband, the widow is left at the mercy and goodwill of her children or that of the husband's relatives. And where the above persons are uncharitable, greedy and selfish, the plight of the widow worsens greatly except where she was already standing on her own two feet without the deceased.

The disentitlement of widows under customary law is to the extent that they also have no right to be granted letters of administration to administer their late husband's estate. The extremity of this disempowerment of widows is seen in the case of *Akinnubi v Akinnubi* where even the widow's capacity to sue was challenged.[14] It was argued in that case that she could neither be entitled to apply for a grant of letters of administration nor to be appointed as co-administratrix

[13] Emeka Chianu, *Law of Succession* (University of Lagos Press Ltd 2022) at p 146.

[14] (1997) JELR 46339 (SC)

of her deceased husband's estate being part of the estate to be administered. The court cited *Bolaji v Akapo and Ors.*[15] and *Aileru and Ors v* Anibi,[16] as authorities on this point, but in this case held in favour of the widow that she could sue as her children's next friend.

**2.4 Succession under Igbo Customary Law**

Here, as in the Yoruba customary law of inheritance, the widow has no right of inheritance in the deceased husband's property. To begin, Daily Trust tells of the reported story of family members bickering over the estate of their deceased relative with the wife to the point of asking for bank details. This story is relevant to this essay particularly because of a comment from one of the readers which opened up the floor to more noteworthy conversations on Twitter. Some of the most relevant of these comments will be discussed later on in this chapter, however this user had this to say:

> "I am an Igbo man and my *omenala* gives me full right over the properties of my siblings when they're no more. As a woman, when your husband dies, just have it in mind that your contract in the family has been fully terminated. Know this and know peace."[17]

This authoritative statement from the user reveals more emphatically the plight of widows under customary law. But despite this bold statement, it should be recalled that under most customary laws a widow who has a child from the marriage has a right to stay on for life in the matrimonial home or until she remarries, as long as she remains of good behaviour.[18]

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[15] 2 FNR 241 at 245

[16] (1952) 20 NLR 45

[17] Editorial, 'Nigerian Women and the Inheritance Culture' *Daily Trust* (Abuja, 14 November 2021) < https://dailytrust.com/nigerian-women-and-the-inheritance-culture/ > accessed 15 July 2023

[18] The case of *Nezianya v Okagbue* (1963) 1 All NLR 352 is to the effect that a widow without a male issue under Onitsha native law and custom can deal with the deceased's property with the consent of the deceased's family.

Moreover, even though a widow under customary law rules of succession cannot succeed to the personal or real estate of her deceased's husband, under the Igbo customary law the widow has some recognized rights in the husband's family. Nwogugu states that:

> Although a widow does not inherit her husband's estate, she is entitled to some rights therein. First, she is entitled to live as a member of the family in her late husband's compound until she remarries or dies. In order to protect this right, the husband's heir has no power to dispose of the matrimonial home which is occupied by the widow. However, her right in this respect is subject to good conduct. Second, a widow has the right to be shown a portion of her late husband's land or family land annually for farming purposes according to her farming needs. Third, a widow while living has a right to be maintained by the person who inherits her husband's estate. Where, however, the widow's son is grown up she would be maintained by him.[19]

This was also pronounced upon by the court in *Nzekwu v Nzekwu*[20] that even where the widow has no children of the marriage, she was so entitled and should her husband's family fail to maintain her, she could let part of the house to tenants and use the rent gotten to maintain herself.

Good behaviour or good conduct has no singular interpretation. It appears to be a matter of literal interpretation depending on the circumstances of each case. Chianu states that where for example the wife abandons the husband during his illness and takes up residence elsewhere, she is disentitled to maintenance from his estate if he died from the illness. However, this broad and indefinite interpretation of the word can be exploited by anyone who seeks to disinherit a widow

[19] EI Nwogugu, *Family Law in Nigeria* (3rd edition, HBN Publishers Plc 2014) at 427- 428

[20] (1989) JELR 42925 (SC), per Nnamani JSC.

or take away her limited rights in the deceased husband's estate as was the case in *Nzekwu v Nzekwu*[21]

In this case, the evidence of misbehaviour found by the court namely the widow's attempt to sell part of her husband's estate, claiming that the property was her own, was argued by the deceased's relatives to amount to misbehaviour justifying the forfeiture of her possessory rights. Chianu faulting the judgment of the court in upholding this argument says the authorities cited by the court in this regard are cases of customary tenants' misbehaviour, and that in no known case did a court decide that a family member loses his right of possession on account of such misbehaviour.[22]

**2.5 Succession under Benin Customary Law**

Again, widows have no right of inheritance. In fact, this rule seems to be settled law that many of the cases involving widows married under these customary laws up until *Mojekwu's case* which pronounced on this,[23] were not an attempt by them to inherit but to pray the court for some other relief; for example, grant of letters of administration to protect the interest of their children, or to protect their limited rights in the deceased's estate against an unruly first son especially where there are many wives or a vicious relative.

In *Emokpae v Idubor*[24] a widow applied to be joined as co-administrator of the estate to protect her children's interest. The appellants who had been granted letters of administration opposed

[21] ibid

[22] Chianu, at p 143-144

[23] Mojekwu v Mojekwu (1997) 7 NWLR (Pt 512) 283 (CA) per Tobi JCA

[24] (2003) JELR 55970 (CA)

her application contending that under Benin customary law, a widow could not inherit her husband's estate. Muntaka-Coomassie JCA addressing the appellant's contention said:

> The issue of being a beneficiary is being confused with the issue of being administrator of an estate. I am not aware of any such law that says it is only a beneficiary to an estate that can be made an administrator. The respondent in her claim did not claim to be a beneficiary to the estate of her late husband. In fact, she did admit that she was married under the Bini native law and custom, which presupposes that she is quite aware that under the Bini native law and custom she is not a beneficiary of her late husband's estate. All that the respondent is saying is that even though she is not a beneficiary, she can protect her late husband's estate from being wasted in order to take care of her children.

In *Arase v Arase*[25] the court held that the eldest son takes the principal personal effects of the deceased while the other personal effects then go to other children. Also that the principal house in which the deceased lived and died, i.e. the igiogbe passes by way of inheritance to the eldest son. As to this rule, not even the deceased can validly dispose of the igiogbe whether by way of gift or through a will.[26] Consequently, the widow married under Benin customary law may not enjoy the limited interests she may have had in the matrimonial home where that matrimonial home is the igiogbe.[27]

However, where in a polygamous family the widow happens to be the one who gave birth to the first son, she can by his permission remain in the home, the same applies to a situation where the deceased married only one wife. Whatever is the case, the widow(s) can inherit from the

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[25] (1981) JELR 42505 (SC) per C Idigbe JSC

[26] Agidigbi V. Agidigbi & Ors (1996) JELR 46140 (SC); Section 3(1) of the Wills Law of Bendel State.

[27] The igiogbe is restricted territorially to Benin. This means that where the house the deceased lived and died is located outside Benin, it cannot be rightly called the igiogbe.

deceased's estate through their children. The situation of a childless widow on the other hand is even more pitiful. This is because by reason of the husband's demise, her relationship in the family terminates. Nobody needs to tell her to leave, traditionally, she is expected to leave after the funeral rites have been performed. And as she leaves, she does so with nothing. As the adage goes,

*Okhuo ma bie nomwan eyomwan emwin rio wa*, meaning that if a woman does not give birth for the man, she cannot return to her father's place with his property.

Further, it should be noted that while inheritance has specifically been discussed in terms of property, both movable and immovable under this chapter, widows in almost all native laws cannot also succeed to the position of the head of the family upon the death of their husbands. Again, it is important to note that the personal properties that belonged to the widow before the husband's death remains hers and does not form part of the deceased's estate. More importantly, family property cannot be inherited by either spouse under Nigerian law of succession: whether under testate or intestate succession. Such properties must follow the descent group:

> When a man dies intestate without issue, leaving property he had himself inherited, the property will devolve on the members of the family from which it came. If the deceased inherited it from a maternal ancestor, it goes to his maternal relations, and if he inherited it from a paternal ancestor, it goes back to his paternal relations.[28]

**2.6 Succession under Islamic Law**

This kind of succession is predominant in the northern part of the country. Nwogugu states that:

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[28] *Suberu and ors v Sunmonu and ors* (1957) JELR 80170 (SC) per Jibowu FJ.

> Although Islamic law remains the personal law in vast areas of the northern states, there are pockets of the population who continue to rely heavily on the indigenous customary law. This system of law is confined primarily to the northern states … Although there is a large population of Moslems in the Yoruba South-West of the country, customary law rather than Islamic law applies in personal matters including marriage.[29]

This law of succession is governed by shari'ah law (also known as sharia law). Here, the deceased's estate which is subject to succession includes both movable and immovable property after the deduction of actual and ascertained liabilities, funeral expenses, debts and legacies of the deceased within the limits of the disposable third of the estate.[30]

Again, Islamic law does not differentiate between ancestral and self-acquired property. A learned writer says: Although Islam allows women access to property they acquired or contributed to their husband's household, in practical terms, this is usually not attainable for the reason that women are kept in seclusion in northern Nigeria.[31]

It should be noted that Islamic law marriages like customary law marriages are potentially polygamous, thus the deceased could be survived by more than one wife. Under Islamic law, where the deceased is survived by a widow(s), the widow has a share in the deceased's estate. Succession here is distributed among the deceased's heirs, which includes the widow(s). The widow(s) gets one-eight of the estate if the deceased is survived by children or direct descendants like grandchildren, but where there are none, she takes one-fourth.

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[29] Nwogugu, at p 10-11

[30] ibid at p 433

[31] Yinka Olomojobi, 'Women's Right to Own Property' Social Science Research Network (2015) < https://ssrn.com/abstract=2716902 > accessed 27 July 2023

Where there are no such children or direct descendants but the deceased is survived by his parents, the widow takes one-half of the estate. If it is only siblings and other relations that survive the deceased aside the widow, then the widow takes one-fourth of the estate. Where there are more than one wife surviving the deceased, they take from the fixed share equally.[32] From the above, it is clear that the childless widow still gets a share of the deceased husband's estate without the intervention of the courts.

### 2.7 Legislative and Judicial Intervention in Customary Law of Succession

Having considered the inheritance rights of widows under this chapter, it has been shown that the widow married under customary law is highly discriminated against when it comes to inheritance. This discrimination begins at the husband's demise because the marriage between her and the late husband terminates at his death. Consequently, she becomes a 'stranger' to the husband's first family. This is more so the case where the widow is childless. The exception to this as shown above is the widow married under Igbo customary law who though childless has some limited rights nonetheless.

Another set of widows who fare better are widows married under Islamic law. This set of widows as have been shown have a fixed share they are entitled to from their late husband's estate. However, what happens to the other class of widows not so fortunate? Before this will be discussed, the comments mentioned above from twitter will first be considered.

Firstly, a user narrates how a discussion with the husband and opening of an account which was not reflected in his statement of assets provided an escape for her from the clutches of the

[32] OM Atoyebi, 'The Administration of Wills under the Islamic Law System in Nigeria' Omaplex Law Firm (2023) < https://omaplex.com.ng/the-administration-of-wills-under-the-islamic-law-system-in-nigeria/#:~:text=The%20reform%20introduced%20by%20Islam,done%20by%20the%20law%20of > accessed 28 July 2023

husband's family, as the relatives tried to take for themselves all the husband had worked had to acquire for his family's welfare upon his death. Another user - a widow commented that inheritance is easier when the family is an elite class with persons already rich themselves and have also gained exposure to western culture; noting that it was for these reasons her late husband's wishes were respected by his people and did not contend for her properties.

She continued by saying, "Whenever I hear issues of inheritance struggle between family members, it's mostly because the people trying to benefit are not so well to do. Most times, these people were benefitting from the deceased and now that he is no more, they see grabbing the properties and assets as a quick way to get rich, without caring about the family he has left behind."

Yet another user emphasizes the importance of couples discussing how such properties will be shared should the man die. She adds that a woman who is financially dependent is more likely to gain (especially in these modern times) respect from her in-laws than one without a source of income. The last comment from the feed was from a rights activist who said that "refusal to allocate inheritance such as land, buildings to women is a way of keeping gender inequality on its feet. A woman who acquires wealth and properties is seen as a powerful woman and in a system where patriarchy rules, it cannot stand."

These comments reveal more concretely the social reality of the country with regards to succession despite the level of judicial intervention in this regard. It is not surprising what length persons can go to protect financial assets. What is surprising however is that the widow who the deceased presumably looked after in his lifetime without ever objecting to doing so, (as it is the customary role of the man to provide for his family) should subsequently become disadvantaged upon his death while his estate remains. It is further argued that while the couple newly came

together before any child was born she was also taken care of from that same estate, neither did such provision stop in the husband's lifetime because she did not bear children.

Hence, it is argued that it is the marriage contract that creates these obligations, not the expectations from the union nor the longevity of same where the deceased still has something that could cater for his widow. This argument stems from the logical presumption that it is the deceased's desire that his widow be well taken care of from his estate as he would have done were he still alive. His death should thus not be an excuse to disentitle the widow who would not be so harshly treated if the husband were still alive.

Nonetheless this writer concedes that under customary law, marriage is not seen as a contract. The question then becomes whether widows should resort to self-remedial alternatives (like that employed by the first widow mentioned in the newspaper publication referenced above) in the absence of custom-tailored legislation like the AEL in this regard? This question will be addressed later in this work.

Thankfully, the courts have stepped in to fill these lapses when called upon to do so by applying the legislative requirement of fairness and compatibility. By virtue of *Section 19 of the Nigerian Supreme Court Ordinance 1914*,

> Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction, such law or custom not being repugnant to Natural Justice, Equity and Good Conscience…

Although this ordinance has been repealed, similar provisions exist in various high courts' laws of the various states. *Section 18(3) of the Evidence Act* provides that: In any judicial proceeding

where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience. Recall also *Section 315 of the 1999 constitution* which provides for the applicability of existing laws which includes customary laws except where such custom has been invalidated by the courts for being contrary to or incompatible with the provisions of the constitution.

The import of these provisions is that where a custom is contrary to notions of natural justice, equity or good conscience or it violates the standard established by the constitution, it will be invalid and unenforceable. In light of this, the courts have refused to enforce all such customs that do not meet these requirements. With regards to the principle of natural justice, equity and good conscience, Fabunmi takes the view that the expression natural justice, equity and good conscience should be taken to connote an uncomplicated meaning such as fairness or justice to reduce the area of uncertainty if the expression were split into its component parts.[33]

This writer equally adopts this definition as its grammatical analysis is not the purview of this essay. *Re Whyte*[34] is an early decision of this principle enuring to a widow's favour, Brooke Ag CJ. said,

> "The general rule is that where there is a native law applicable which is not repugnant to natural justice, equity and good conscience, the matter in controversy should be determined in accordance with such native law and custom. There is however an exception that if the decision of the court based on native law and custom would, having regard to the position of the persons affected, be contrary to natural justice, equity and good conscience, native law and custom should not apply."

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[33] JO Fabunmi, *Equity and Trust in Nigeria* (2nd edition, Obafemi Awolowo University Press Ltd 2011) at p 56

[34] (1946) 18 NLR 70

In this case, according to the Fanti law which was the applicable law to the succession of the deceased's estate, the property was to devolve entirely on his sister. Meanwhile, the deceased was also survived by his widow and a daughter who was a minor. The sister thus sought custody of the child so she could take care of the child's education. The court held that it would be inhumane to separate the child from her mother and on that basis, decided that the deceased's estate be distributed between the deceased's sister and daughter. Brooke Ag CJ. held the distribution proposed Administrator-General to be "equitable".

Also in *Nzekwu v Nzekwu*[35] Nnamani JSC holding in favour of the widow said:

> Any Onitsha custom which postulates that the 1st defendant has the right to alienate as the Okpala, property of a deceased person in the lifetime of his widow, is in my view a barbarous and uncivilized custom which in my view should be regarded as repugnant to equity and good conscience and therefore unacceptable to me.

Further, *section 42 of the 1999 constitution* is to the effect that no citizen of the country should be discriminated against or be subjected to any disability or deprivation by reason of his sex, religious or political opinion, circumstances of birth, etc. Therefore, these customs that discriminate against women by reason of their sex has been declared invalid for being inconsistent with this constitutional provision. The repugnancy doctrine and the constitutional provision against discrimination are often used one and the same by the courts.

Thus in *Mojekwu v Mojekwu*,[36] a titled Nnewi chief gave expert witness on the Nnewi customary law that under that law the deceased's female children who were the only children surviving him could not succeed to his estate as succession follows the male line and in the absence of male

[35] (1989) JELR 42925 (SC)

[36] (1997) 7 NWLR (Pt 512) 283 (CA)

children, the husband's male relatives were to inherit the property. Niki Tobi JCA stating that such a customary law which discriminates against women would be unenforceable for being repugnant to natural justice, equity and good conscience enunciated further in an obiter dictum:

> Any form of societal discrimination on ground of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people … It is the monopoly of God to determine the sex of a baby and not the parents … I believe that God, the creator of human beings, is also the final authority of who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself.

Although the Supreme Court severely criticized this dictum that the court below raised it suo moto,[37] this critic reveal, though inexplicitly, the reluctance of judges at that time to upset some of these customs. Aside from the facts of every case that comes before it, the court is to render judgement according to the provisions of the law as it applies to the case at hand. The judge having this duty therefore, need not wait for it to be raised by the parties to declare any such custom sought to be enforced as unconstitutional.

However, the dividends of that dictum by Niki Tobi reflects in the Supreme Court's judgement almost two decades after in *Anekwe v Nweke*[38] where the court held the widow entitled the matrimonial home of the husband, granting in her favour declaration of title to the land, not merely a life interest.

### 2.8 Conclusion

[37] Mojekwu V. Iwuchukwu (2004) JELR 44983 (SC)

[38] (2014) JELR 54573 (SC), per Ogunbiyi JSC

In this chapter, the rights of widows under customary law of succession have been examined. It has been shown that as much as the courts are empowered to apply customary laws of succession, any custom which is inconsistent with the provisions of the constitution and, or is repugnant to natural justice, equity and good conscience operating to deprive a widow from inheriting from her deceased's husband's estate would be declared invalid and will not be enforced by the courts.

## CHAPTER THREE

## WIDOWS UNDER ADMINISTRATION OF ESTATES LAW

### 3.0 Introduction

In this chapter, the law governing succession for widows who married under the Act will be examined. Marriage under the Act refers to marriage celebrated in accordance with Nigeria's lex loci celebrationis which is the *Marriage Act.*[1] It is also referred to as statutory or monogamous marriage. *Section 18 of Interpretation Act 1964* defines a monogamous marriage as: a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.

Thus where the marriage contracted conforms to the requirements stipulated by the Marriage Act for a valid statutory marriage, the *Administration of Estates Law*[2] applies to the distribution of the estate of either spouse upon death intestate. As such for AEL to apply, *section 49(5) of the AEL* provides that (emphasis mine):

> Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance (now Marriage Act 1914) and such person dies intestate after the commencement of this law leaving a widow or husband or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this law, any customary law to the contrary notwithstanding.

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[1] Marriage Act 1914, Cap 6 Laws of the Federation of Nigeria 2011

[2] Cap 1 Laws of Western Nigeria 1959. Most states have enacted their own AEL and where it is not so named, it still contains similar provisions to that discussed in this work. However, the AEL cited in this essay is that which applies to states created out of the former western region.

This means that there are about four conditions that must be in place for the AEL to apply viz.

The spouse:

a. was subject to customary law

b. contracted a marriage in accordance with the *Marriage Act*

c. died intestate, or left behind an invalid will or left a part of his estate undisposed

d. is survived by a spouse or an issue of such marriage.

There are two provisos to the above section. The second proviso is to the effect that any real property that cannot be affected by testamentary disposition cannot also be affected by this law and shall descend in accordance with customary law. These properties include family property that has not been severed, igiogbe, etc. Similar provision is contained in section 1(3) of the AEL. The AEL applies to the distribution of both movable and real property.[3] However, the interpretation section of the AEL in defining personal chattels excludes chattels used at the death of the intestate for business purposes, money and securities for money.[4]

There is a misconception among some women married under the Act that upon the death of their spouse intestate, his estate becomes theirs. This is not wholly true as it is only a stipulated portion of his estate that falls on the widow except where the widow is the only one surviving the deceased in that there is no issue, parent, siblings of whole blood or their children surviving as provided in section 49(1)(i). To address this misconception and others as well, inheritance rights of widows under the AEL will be discussed next in detail.

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[3] See section 2 of the AEL on the definition of administration.

[4] ibid

### 3.1 Widows under the AEL

Widows to whom the AEL applies fare better than widows to whom customary law applies. This is because apart from the fact that they do not need the intervention of court to enjoy this right of inheritance except where it is interfered with, the law adequately provides for them, and this provision is clearly established in the AEL as to their quota; unlike under customary law where the widow's right to inherit depends upon a pronouncement by the court and her share of inheritance also depends on the discretion of the judge, as there is no clearly stipulated formula for such inheritance.

*Section 49 of the AEL* makes provision for the devolution of a deceased's property to his heirs at law. But first and as customary, the interest of the deceased's creditors come before that of the heirs. *Section 37(1)(b) of AEL* empowers a personal representative to sell personal chattels where there is a special reason for doing so. Subsection 2 provides such reasons e.g. money owed the deceased's creditors, funeral expenses, etc. else, the personal chattels belong to the surviving spouse absolutely. Section 49 also contains similar provisions, that the residuary estate be 'free of death duties and costs' before distribution to heirs take place.

In *Salubi v Nwariaku*[5], Ayoola JSC defined residuary estate as including the entire estate of the intestate after payment of funeral, testamentary and administration expenses, debts, and other liabilities of the estate. This means that residuary estate includes personal and real property. However, because personal chattels are already excluded from residuary estate under section 49,

[5] (2003) All NLR 548

it implies that the personal property that forms part of the residuary estate of the deceased here is that which is excluded in section 2.[6]

This thus established, it should be noted that the section which covers specifically the distribution of the deceased's estate to his heirs at law is section 49 of the AEL. For the widow and as earlier stated, she takes the personal chattels absolutely in all cases mentioned in section 49. Where aside the widow, the deceased has an issue of the marriage surviving, the widow takes one-third of the residuary estate, this aside the personal chattels. It is equally important to observe that this is a life interest that accrues to the widow which devolves on the issue of the marriage upon the widow's death.[7] The issue of the marriage takes the remnant whether or not the deceased's parents, siblings of whole blood or their children also survive the deceased.[8]

Whereas, subsection 3 provides that where the deceased is not survived by an issue of the marriage but is survived by a parent, siblings of whole blood or their issue aside the widow, the widow receives one-half of the residuary estate absolutely, while the other half goes to the surviving parent(s) absolutely, and where there is none, to the sibling(s) of the deceased. If there is no sibling surviving as well, it follows that any child of the sibling surviving can step into the parent's shoes.

As earlier highlighted, the childless widow is in a better position under the AEL than a childless widow under customary law of succession. This is because by virtue of section 49(1), where the deceased is only survived by his widow, that is, there is no issue of the marriage surviving; nor parent, sibling of whole blood, or their children, the widow takes the residuary estate absolutely.

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[6] Emeka Chianu, *Law of Succession* (University of Lagos Press Ltd 2022) at p 167

[7] Section 49(2)(a)

[8] Section 49(2) AEL

However, where there is no issue surviving but any or all in the latter category survives, then the widow takes a half share of the estate while the latter category takes the other half share as contained in section 49(3)(a) and (b)(i-ii). This drastically contrasts with customary law which makes minimal provision for the widow in exceptional cases, and in the more general cases, makes none at all.

### 3.2 Splitting the Difference with regards to the Provisions of Section 49

A summary of the widow's right to inherit under the AEL reveals that adequate provisions are made for her as a beneficiary of the deceased's estate. In fact, the degree of priority given to the widow above that of the deceased's first family is such that Chianu raises concerns on the social dilemma that could result from this thus,

> Yet too large a provision for a widow may multiply the number of aggrieved and disappointed relatives of the deceased husband… Some consider the mode of distribution under section 49(1) too generous for widows. Take an example: H and W marry under the MA at a time when he has poor parents, ten siblings, several nephews, and nieces who are all struggling to make ends meet. H is the breadwinner of the extended family. He dies within weeks of the marriage at a time when W is pregnant. The AEL enables the widow and child to inherit everything the man left behind to the exclusion of his ascendant and collateral relatives…[9]

This scenario above reveals the hardships that can be occasioned by making no sufficient provision for the deceased's first family as well. There should be a reasonable equilibrium (not necessarily equal interests or equal sharing), a proper balancing in the devolution of property

[9] Chianu, at p 180-182

with regards to the demands of competing interests. Perhaps this deficiency in the AEL accounts for the reason its provisions are better reflected in theory than in practice, because given the cultural history of widows' rights denial and the persisting social inequalities in our society still present, there are very few relatives of a deceased man in Nigeria at present who, especially when it is a large estate, will sit back to allow the AEL have its free course to their disadvantage.

If the presumption of the lawmakers at the relevant time were that the surviving spouse or issue would be sensible enough to take care of the deceased's first family where there is need to, it definitely would have been an appropriate assumption at the time the AEL was enacted. However, this presumption in this modern time will be a really generous but hasty conclusion. While some of these widows and children are to be applauded for being supportive and taking care of the deceased customary heirs, such assumption in our day will breed not a few instances where widows and even children abandon the deceased's people to languish in suffering because of this extremism in the position of the law. If children neglect their own parents for example, how much more other relatives?

Chianu calls for the law to strike an acceptable balance between the demands of the customary heirs and those of the immediate family (i.e. the widow and children) taking into consideration the 'native social, economic, and cultural environment of the country.[10] He further states as follows:

> The philosophy of our AEL to the effect that once a person contracts a statutory marriage he turns his back on his ascendant and collateral family is considered as alien to our milieu… A wide distribution of property aims at strengthening the social relationships which bind near kin... The AEL definition of personal chattels and the distribution

[10] Chianu, at p 184

provided for in section 49(1) should be overridden by considerations of friendship which a widow seeks to maintain with her husband's not-too-remote kin.[11]

### 3.3 Joint Accounts and Jointly-owned Properties

A joint account refers to a bank account held by more than one person, each person having the right to deposit and withdraw from the account, while a jointly-owned property is a property that is held in the name of more than one person, i.e. it is owned by two or more persons. However, in the context within which the latter will be discussed, most times, the property jointly-owned is in the name of one person though the purchase of the property was through the joint contribution of both parties. Most times the property is in the husband's name while the property may in fact even belong to the wife where the wife paid all the purchase money.

For joint accounts, it operates like a joint tenancy. A joint tenancy is a type of ownership of property where property is held jointly by two or more persons, the interest of each owner passing on to the other owners upon any of the owner's death. This is known as the right of survivorship or the principle, *jus accrescendi*. That is by operation of law, the property passes on to the co-owners and not the intestate owner's estate, and so cannot be administered by succession laws. *Section 356 of the Securities and Exchange Commission Consolidated Rules and Regulations, 2013* describes a joint account as that of joint tenants with the right of survivorship, meaning that if one party dies, the survivor retains the entire account.

In *Russel v Scott*,[12] Starke J noted that, 'A person who deposits money in a bank on a joint account vests the right to the debt or chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship… it is not a testamentary

[11] Chianu, at p 184-185

[12] (1936) 55 Commonwealth LR 440

disposition… it is a form of gift.' Being a form of gift therefore, the rule of survivorship does not require the law to take effect except where challenged. Further, a joint account does not need to go through probate for it to devolve in the interest of the survivor or beneficiary as mentioned in the dictum of Starke J because 'it is not a testamentary disposition.'

Thus, it is clear that a major escape for widows from the clutches and oppression of customary succession laws has been to have a joint account with the husband, even though it is only the husband who pays money into the account. Although this joint account must be opened as a joint account with the right of survivorship as described under section 356 of the SEC rules and regulations for jus accrescendi to apply to it;

> Whether a joint account will pass to the surviving owner will depend on the signature mandate on the account. Where the signature mandate allows either of the joint owners to sign to retrieve money from the account, it would not matter that one of them has died intestate. However, where the signature mandate requires both signatories to give instructions on the account, then either a letter of probate or letter of administration must be obtained depending on whether there is Will or the joint owner died intestate.[13]

Opening a joint account is therefore an easy, fast, and usually a non-litigious way of protecting the widow, in escaping the cost of litigation and the animosity that it creates in the family, aside prolonged court battles and delayed judgements.

[13] Ese Nkadi, 'Nigeria International Estate Planning Guide: Individual Tax and Private Client Committee' (September 2012) < https://www.ibanet.org/MediaHandler?id=5DF8EC82-FBFE-4F90-BA9D-940B0E8301FD > accessed 2 July 2023 at p 7

'Under customary law, only men have the right to own land (excluding Islamic law) ... However, a couple married under the MA can own property in their individual names or jointly.'[14] In the case of *Essien v Essien*,[15] the court stated that direct financial contribution to the purchase of a matrimonial home or the repayment of a mortgage be established in order to infer joint ownership. *Amadi v Nwosu*[16] is an earlier case where the same judgement was upheld by the Supreme Court. This harsh rule brought much hardships to married women who usually have to quit their jobs most times for the man, and may have little or no 'direct financial contribution' to the property. This is not to say that women do not contribute, but their contribution is such that is difficult to measure financially most times; for example, taking care of the home, and other domestic duties that women assume traditionally.

These duties become a setback to these women who have no time to focus on advancing themselves economically or their careers, as these domestic duties are by themselves a full time job, tasking and demanding, which comes with no pecuniary compensation. This makes lots of women financially dependent on their husband, instead of them making substantial financial contribution to projects. Thus expecting these category of women to be financially supportive else she loses on her other 'non-financial' investments in the home, is a gross injustice. It was in light of these reasons that the courts intervened, changing this prior position of the law.

In *Okere v Akaluka*,[17] Ignatius Igwe Agube said:

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[14] ibid

[15] (2009) 9 NWLR (Pt 1146) 306 at p 331

[16] (1992) 6 SCNJ 59

[17] (2014) JELR 36208 (CA)

> That concept (tenancy by entirety) simply conceives of a single and indestructible joint ownership of real property held by spouses which like joint tenancy carries a right of survivorship but the right cannot be partitioned and is supported by the unity of marriage which in turn embodies the legal fiction that the husband and wife are one. Accordingly, the result of this unity is that neither husband nor wife can by his or her sole act defeat the survivorship interest of the other.

This was just one way the courts have used to circumvent the earlier position of the law. In *Ibeabuchi v Ibeabuchi*,[18] the court said:

> It is correct that the contribution of a party does not necessarily have to be in the nature of cash outlay for the purchase or development of the property. It can be by way of moral and /or financial contribution to the business of a husband by a wife where the property is purchased from the profits of the business… It is however essential that the property should have been purchased in the course of the marriage or where the property was purchased before the marriage, that the payment for the property was completed after and in the course of the marriage, as in the case of a property purchased on mortgage.

Still, the courts have widened this approach in some cases by saying that contribution may or may not be towards the purchase of the property, but a general contribution to joint living as husband and wife. However, there are only few cases reflecting this approach by the courts on joint property of spouses. Nonetheless, this approach is in this writer's view the better, and should be the applicable principle in future cases.

[18] (2016) JELR 48635 (CA)

'Where a widow is able to prove some contribution to the acquisition of the property in dispute, she is better advised to found her claim as a right of property, rather than consider it as one of succession or a matrimonial right.'[19] Both principles, i.e. that pertaining to joint accounts and jointly-owned properties, are not dependent on the type of marriage contracted by the parties. This is because they are governed by banking and property laws and not rules of succession. In *Tinubu v. Ojogun*[20], the parties were at the relevant time married and civil servants who operated a joint account and had their salaries paid into the account. The appellant who was the husband claimed sole ownership of land found to have been purchased with funds from the joint account on which the property in dispute was built. The respondent counter claimed that the property was held by the appellant in trust for himself and herself in equal proportion.

The court finding for the respondent held that: "Any building erected from such joint effort, in such a case, it is immaterial that the plot of land and the property thereon are in the name of one of the parties. The inevitable result is that the plot of land and property thereon are held in trust by the person in whose name the document of title is written for himself and the other party." However, it is usually difficult for women to prove contribution. There are certain misconceptions in the society that strengthens this difficulty.

First, the inability to provide documentary evidence of their contribution to the purchase of property acquired by their husbands in their lifetime, or jointly owned properties in their husband's name. Second is the belief that women cannot validly execute a sale for real property, as such, they most times purchase their properties in the name of their husbands. In addition to this point is the natural and social concept of trust in marriage, in that spouses should trust each

[19] Chianu, at p 166

[20] (2016) JELR 54754 (CA)

other. And because these transactions have for long being the domain of men, women are cultured to leave these transactions for their husbands even when they are the owners of the properties, and most times do not bother to ask for documentary evidence of their ownership or contribution.

Third, there is this cultural incapacity casted on a woman as being unable to be financially independent, and when she claims a real property as hers, it is discredited and if some believe her, they feel she could not have gotten it without major financial support from the husband.[21] Chianu says 'these and more shift the burden of proving title to the matrimonial home and any other property on widows and make the standard of proof almost insurmountable for them.'[22]

Meanwhile, the *Married Women's Property Act 1882*, a received English law, which for long seemed to be neglected by the court for the protection of the property rights of married women (and by extension widows) provides plainly in section 2 that:

> Property of a woman married after this Act (is) to be held by her as a *feme* sole. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage…

The application of this Act is not restricted by the type of marriage contracted by the widow unlike that of our succession laws, and it contains significant provisions that widows married under customary law can use to escape losing their separate property.

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[21] On these points, see generally page166 of Chianu's Law of Succession.

[22] ibid

### 3.4 Conclusion

In this chapter, the inheritance rights of widows under the AEL have been discussed and it has been shown that widows married under the AEL have better legal protection than widows under customary law as regards succession matters, with the exception of widows married under Islamic law who can share in their deceased husband's property than other customary law widows.

Also, the concept of joint account and jointly-owned property was mentioned and is seen to be a more practical safeguard than the law sometimes as both are not affected by the laws governing succession. However, in the next chapter succession laws for widowers will be looked into under the laws already discussed for the widow.

# CHAPTER FOUR

# WIDOWERS UNDER CUSTOMARY, SHARIA LAW AND AEL

## 4.0 Introduction

The first thing to be noted here is that really few cases can be found in law on inheritance for the widower. This is not surprising as given the Nigerian milieu, there are a number of reasons this is so. For a long time, women generally were not entitled to landed properties. They could not buy for themselves without their husbands (with such property usually bearing his name), neither did they receive such as gifts whether from their husbands or even inherit such from their fathers (although there are exceptional cases where women held landed properties).

In effect, there was nothing for the husbands to lay claim to in this regard, as personal properties would usually go to the daughter or the children automatically, and where there are no children, it usually remains in the husband's possession. This aside the fact that the patriarchal nature of the Nigerian society makes it undignifying for a man to begin to contend for his wife's property. As Sagay explains in his reference to inheritance for spouses in Yoruba and Ado-Ekiti,

> … it is significant that it was a wife's right that was being recognized, and not a husband's right. For that would be anathema to Yoruba custom. As Dr. Elias has put it, "Rules of inheritance apart, local sentiments would frown upon the idea of a scapegrace husband aspiring to share in his deceased wife's family property. For his own part Okunola states that the idea of a husband inheriting from his wife is repugnant to Yoruba custom and such a husband will be ridiculed in society.[1]

[1] Itse Sagay, *Nigerian Law of Succession: Principles, cases, statutes and commentaries* (Malthouse Press, 2012) at page 271

It appears that the reference here concerns family property however. As Onuouha puts it, 'in customary law generally, a husband cannot inherit his deceased wife's share of her family property, for the husband is treated as a stranger who is not entitled to share in property of the family of which he is not a member.'[2] But then, what happens to the wife's own property? This will be discussed subsequently under three subheads; under customary law, sharia law and the AEL.

### 4.1 Succession under Customary Law

When it comes to a wife's own property, there are two situations this comes under. The property in question devolves depending on whether the property was acquired before or during the conjugal relationship. Where the property was acquired before the conjugal relationship, it remains the property of the wife, such property will be inherited by the deceased woman's children. However, where she dies childless the property goes to the deceased's first family, but the widower cannot inherit such, though with regards to personal properties he usually would have claim to them.

Properties acquired during the conjugal relationship will be inherited by the man upon the deceased's death where the deceased died childless, otherwise the children inherit. This has been explained elaborately thus:

> The general principle is that the wife's ante nupital property is not inherited by the husband or his family. Even where a man goes to live in a house built by her before marriage, the real property retains its character as ante nuptial property of the wife unless

[2] RA Onuoha, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' The International Journal of Not-for-Profit Law (2008) (10) (2) < https://www.icnl.org/resources/research/ijnl/discriminatory-property-inheritance-under-customary-law-in-nigeria-ngos-to-the-rescue > accessed 19 June 2023

it has become mixed with other properties acquired during coverture. On the other hand, property acquired by a wife during coverture devolves upon her children, subject to the husband's right to use it concurrently with the children during his lifetime. Where the wife leaves no issue to inherit, the wife's family has no claim to the property which she acquired during coverture, as these properties will go to the husband's relatives – his children by other wives, brothers, e.t.c. According to Nwabueze, ordinarily,

> inheritance of a wife's property by her husband in default of issue contradicts the general principle that devolution follows the blood, but is explainable by the fact that marriage has the effect of transferring the wife to the husband's patri-lineage, and subjecting her to the control of the husband and his patri-lineage.[3]

On the property of the wife passing on the husband or his relatives upon her death, Chianu comments thus:

> Why, one may wonder, should a husband inherit his wife's property but she cannot inherit his? Perhaps the answer lies in the power of the bride price. The bride price constitutes a married woman a member of her husband's patrilineage and subjects her to the law of her husband and his patrilineage.[4]

In *Nwugege v Adigwe*,[5] it was held that a husband's right of inheritance depends upon whether the wife left any issue surviving her, and whether the property was acquired before or during coverture. The court accepted the testimony of six chiefs in this regard that on the death of a wife,

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[3] GU Emeasoba, 'An Evaluation of the Nigerian Judicial Attitude to the Igbo Customary Law of Succession' African Customary and Religious Law Review (2020) 1 < https://www.nigerianjournalsonline.com/index.php/ACARELAR/article/viewFile/2257/2201 > accessed 14 September 2023.

[4] Emeka Chianu, *Law of Succession* (University of Lagos Press Ltd 2022) at p 159

[5] (1934) 11 NLR 134

property which was acquired by her before marriage goes to her own family and not to her husband or his family, but movables taken by her to the matrimonial home go to the husband or his family on her death. However, where the property was acquired by the wife during marriage, such property goes to the husband upon her death. Again this would apply where the wife dies childless otherwise the property devolves on the children. Though this rule of succession was recognized as applicable to Onitsha, it has generally become the reference for judicially noticed custom regarding inheritance for the widower under customary law.

### 4.2 Succession under Islamic Law[6]

Unlike that of customary law where men who aspire to inheritance from their wives are regarded with contempt as such acts appear degrading, Islamic law stipulates how the estate of a deceased is to be shared where the deceased dies intestate. And though ante-nupital properties are differentiated from properties acquired during the marriage, this differentiation appears to be insignificant with regards to matters of succession as the share of the deceased's heirs are fixed, and such heirs include the spouse, parents, siblings of the deceased among others, aside the children. Where the surviving spouse inherits alongside the first family of the deceased and every person's share is fixed, it thus seems meaningless to separate between property acquired before and after marriage when it comes to succession.

However, only the rules of succession pertaining to the widower will be discussed. Succession here is essentially the same as that of the widow except for the one-eight provision for the widow where a child or grandchild survives the deceased. It is straight-forward and simple. Where there is a child or grandchild of the wife surviving, the widower takes one-fourth of the estate. But

[6] See generally National Open University of Nigeria, 'Al-Mīrāth: Islamic Law of Succession' (University of Ilorin Ilorin 2022) < https://nou.edu.ng/coursewarecontent/ISL438%20Mirath-%20Islamic%20Law%20of%20Succession.pdf > accessed 16 September 2023 at pp 48, 84, 87-88.

where there is no such child or direct descendant and the deceased's parent(s) is still alive, the widower takes one-half. Where there is no issue of the wife surviving her and no parents, but the deceased wife is survived by her siblings, the widower takes one-fourth.

Thus, what applies to the widow as discussed under chapter two applies also to the widower with slight variation as pointed above. The spouse inherits by reason of the marriage relationship.

**4.3 Succession under the Administration of Estates Law**

Because the AEL is an advocate for equity and equality for the spouses concerning matters of succession, the widower and the widow are treated alike. Therefore, what applies to the widow as discussed in chapter two under the AEL also applies to the widower. Consequently, by virtue of section 49(1) where the deceased died intestate leaving no issue and no parent, sibling of same parents, or any issue of any such sibling surviving, the surviving spouse in this case the widower, takes the residuary estate absolutely.

Subsection 2 provides that where any issue survives the deceased whether any of the other class survives, the widower takes one-third which is a life interest, while the issue takes two-thirds. But where there is no issue surviving and any or more of the other class survives, the widower takes one-half of the estate absolutely, while the remainder is shared between the latter group as contained in subsection (3)(a) and (b). This aside the personal chattels which devolve on the widower absolutely and in all of these instances.

With all these ample provisions for the widower, the AEL helps bring about a shift in the cultural mindset for the man who has in law a right of inheritance in his deceased wife's property and where this right has been denied, he cannot be precluded from seeking any legal remedy which is his due because of local sentiments. In other words, in the eyes of the law it is not ignoble for

such an aggrieved widower to seek redress in court for any unlawful treatment he receives in matters of inheritance of his deceased wife's property, notwithstanding that the cultural mindset of disdain for such acts by the widower largely persists in the society. After all, such feelings of contempt are of no moment as it is what the law says that count.

### 4.4 Conclusion

The modern society of today is one that has experienced economic shifts and adjustments, one that recognizes and accommodates the role of a woman in the economic development of the country. In some cases, this could mean the woman becomes the breadwinner of a home or more economically established than the man. What then happens to such a home or such man upon the death of the woman? To this end, Chianu calls for a change:

> The principles that regulate relationships in the family should not be static; they should develop as the needs and values of society change… To this end, relief should be readily provided to a widower who has physical, mental, or financial disability… If the deceased spouse owed the surviving spouse obligations, the law of succession should extend such obligations towards the surviving spouse so as not to render him destitute and a burden on the state and the society at large.[7]

Again, the principle of jus accrescendi deriving from joint ownership of property and of joint bank account as discussed under chapter three also applies to the man. Thus, any widower who considers it infra dignitatatem (beneath dignity) to contend for his wife's estate or who does not want to condescend to the public's scrutiny and ridicule, and who can also prove joint ownership

[7] Chianu, at p 160

should base his claim in property law instead of that of succession.[8] Further, the presumption of advancement can be extended in its application to the man in deserving situations except where the contrary is proven.

As stated above, some women are now better established financially than their husbands with some of them being the breadwinners in their homes. This is not true for all households but where it is shown that a particular household depends on the income of the wife, then the principle of advancement should enure in favour of the husband of that household who had an interest transferred to him by the wife before her death where the evidence in that instance suggests a gift and not a resulting trust, subject to the condition of such presumption being rebuttable when there is evidence which supersedes that presumption. The following describes the extant principle thus:

> … where a joint bank account is opened by husband and wife with the intention that the survivor shall take beneficially the balance at credit on the death of one of them that intention prevails, and, on the death of the husband, the wife takes the balance beneficially, although the deceased husband supplied all the money paid in and during his life, (or) the account was used exclusively for his purposes[9]

Thus, where the intention is proved and is not successfully rebutted, the same principle should also apply to the husband. The long-held belief that husbands are not to be advanced no longer fits into modern realities. The test should be whether economic dependence of one spouse on the other is present.

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[8] Chianu, at 166

[9] Emeka Chianu, *Law of Succession* (University of Lagos Press Ltd 2022) at p 682

# CHAPTER FIVE

# CONCLUSION AND RECOMMENDATIONS

## 5.0 Introduction

Thus far, intestate succession has been critically discussed under customary law, Islamic law, and the Administration of Estates Law, as it applies to the surviving spouse of a deceased. It has been shown that applicable customary laws are discriminatory and oppressive. It welcomes the newly-wedded spouse upon marriage and severs such ties upon the death of the other spouse when it comes to matters of succession. Meanwhile the widower has an advantage because of the bride price he paid to the family of the woman to effect the marriage.

As such, the estate of the deceased wife which she acquired during the marriage devolves on the widower and his patrilineage in the absence of any issue by the deceased. And even where there are children, the widower has a right of use concurrently with the children during his lifetime.[1] On the other hand, spouses to whom sharia law apply to have a fixed share from their deceased spouse's estate. This takes away the uncertainty that is found in customary law of succession where should the courts be asked to intervene, there is no such formula for distribution to guide them and it is thus left to the reliefs sought by the spouse and the discretion of the judge to apportion a share to such a spouse from the deceased spouse's estate as he deems fit.

However, many decisions in this regard still did not do thorough justice to such spouses. It has been seen that widows for example usually would limit their claim to the matrimonial home or letters of administration to protect their children's interests. And this is in reality no sufficient

[1] GU Emeasoba, 'An Evaluation of the Nigerian Judicial Attitude to the Igbo Customary Law of Succession' African Customary and Religious Law Review (2020) 1 < https://www.nigerianjournalsonline.com/index.php/ACARELAR/article/viewFile/2257/2201 > accessed 14 September 2023.

compensation for the widow compared to her contribution to the family, especially if it is a large estate. And even more pitiful are widowers who usually do not approach the courts for fear of being stigmatized. But under sharia law, spouses are entitled to a fixed share from their deceased spouse's estate and this without the intervention of the courts, except where there is a dispute.

Furthermore, sharia law of distribution provides a share for every member of the deceased's family. Where there is a spouse, issue of the deceased, parent, sibling all surviving the deceased, they all get a share of the deceased's estate. Only in some instances siblings of the deceased could be excluded depending on the circumstances, but the spouse, issue and parents are primary heirs who always inherit.[2] Distant relatives also inherit, only that inheritance devolves (except for the surviving spouse) according to blood proximity with the deceased.

This means that this latter group only takes after the fixed sharers – that is the surviving spouse and the deceased's relatives who have closer blood ties with the deceased have received their portion. Lastly, succession under the AEL was examined. Here, the widow and the widower inherit equally. It was also seen that the surviving spouse receives sufficiently from the deceased spouse's estate, although the deceased's relatives are not well represented in this scheme of distribution.

However, the concluding part of this long essay would examine the succession laws applicable in a few African countries, as well as evaluating the succession laws applicable in Nigeria with contemporary international standards. In addition to these, this chapter will delve into addressing the questions raised in the introductory part of this essay, while also proffering a more comprehensive strategy for better implementation and enforcement of succession laws in Nigeria.

[2] Rodiyyah Bashir 'An Overview of Estate Sharing and Inheritance under Islamic Law of Inheritance' The Trusted Advisors (July 2023) < https://trustedadvisorslaw.com/an-overview-of-estate-sharing-inheritance-under-islamic-law-of-inheritance/ > accessed 21 September 2023.

## 5.1 Other African Jurisdictions

In discussing succession laws in this subhead, notable provisions in force in some African countries relating to the law of succession will be examined in order to have a broad perspective of succession laws in these countries and how well it has progressed in the region which shares similar history and culture with that of Nigeria. Chianu remarks that, 'Much can be learned from some African jurisdictions which have parted ways with the English Administration of Estates Act 1925, the parent of our (Nigeria's) AEL.'[3]

An example is the *Malawi Deceased Estates (Wills, Inheritance and Protection) Act 2014* referenced above.[4] Section 17 of this Act provides the mode of distribution for the immediate family of the deceased and the dependents. Subsection 1(a) provides that protection shall be provided for members of the immediate family and dependents from hardship so far as the property available for distribution can provide such protection. Paragraph (b) is to the effect that the surviving spouse is entitled to the household belongings which belong to his or her household.

Meanwhile paragraph (c) provides that any property that remains after paragraphs (a) and (b) have been complied with, shall be divided between the spouse(s), children and parents of the intestate. Paragraph (d) further lists certain special circumstances which would determine the share of the spouse(s) and children, and one of these is that regard shall be had to the contribution of any spouse or child of the intestate to the value of any business or property forming part of the estate of the deceased. However, the proviso to this sub-paragraph provides that in the absence of special circumstances the spouse and children shall subject to subsection 3 of this same section be entitled to equal shares.

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[3] Emeka Chianu, *Law of Succession* (University of Lagos Press Ltd 2022) at p 180

[4] See Malawi Deceased Estates (Wills, Inheritance and Protection) Act, 2014

The import of these provisions is that the immediate family of the deceased is prioritized, and this includes the surviving spouse, while other family members of the deceased like the parents are also not neglected in the scheme of distribution. This is reflected in paragraph (a) that directs that as long as the deceased left an estate which is available for distribution, the immediate family shall be protected from hardship. Also, this law makes for equity in taking cognizance of the contribution of a spouse to any property forming part of the deceased's estate when determining the share of such a spouse.

Going further, the intestate succession law of South Africa will be looked at with reference to how a spouse is defined with regards to succession. A spouse is defined to include not only a party to a valid civil marriage but also a party to a subsisting customary marriage recognized under *section 2 of the Recognition of Customary Marriages Act*[5]. This therefore means that the *Intestate Succession Act, 1987* of South Africa thus applies to both spouses of a civil marriage (what is known as statutory marriage in Nigeria) and those of a customary marriage.[6]

In Kenya, the *Law of Succession (Amendment) Act 2021* introduced some reforms to the previous law not only for the widow but also for the widower, while making as heirs dependent relatives who were maintained by the deceased before his death. For the widower, he no longer needs to prove maintenance by and/or from the wife for him to qualify as a dependent for the purpose of succession. This law further defines intermeddling to include ejecting by force or by coercion a surviving spouse or child from the matrimonial home. Besides, the deceased's relatives including parents, grandparents, grandchildren, etc., which the deceased had taken into

[5] Department of Justice and Constitutional Development, 'Intestate Succession' 2023 < https://www.justice.gov.za/master/wills-is.html > accessed 27 September 2023

[6] ibid

his family as his own, and were being maintained by the deceased immediately before his death are also beneficiaries of the deceased's estate.[7]

This discussion will be limited to these examples, however, these innovations mentioned can greatly impact our laws of succession for improved justice for the spouses if adopted as part of our extant laws.

### 5.2 International Standards

Every society in the world has experienced some form of oppression or subjugation at some point in history. This common suffering the human race has witnessed has brought about a shift in perspective and ideology, and a global push for justice, equality and fairness. International efforts to achieve these ends have proved to be essential in having a free and fair world; and these efforts have been greatly fostered by globalization and modernization which have brought the world together to form a global community. As a result, certain basic norms have been set out as the minimum criteria to regulate individual state policies and practice.

The *Universal Declaration of Human Rights 1948* is one prominent document containing these basic norms. It recognizes and outlines the inalienable rights and freedom of human beings. It entrenches equality for example, article 1 provides that all human beings are born free and equal and should be treated the same way. Besides this document are many other treaties and conventions which individual states have assented to in their recognition and affirmation of these fundamental truths akin to all humanity. They include the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, African

[7] Cliff Manoti, 'Statute Review: Understanding the Law of Succession (Amendment) Act 2021 of Kenya' (2021) < https://www.linkedin.com/pulse/division-property-intestate-succession-polygamous-setting-letaya > accessed 28 September 2023.

Charter on Human and Peoples' Rights, Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Maputo Protocol on the Rights of Women in Africa, to mention but a few.

This discussion on international standards will however be limited to the Maputo Protocol which was adopted in 2003 by the Heads of State and Government of the African Union. This protocol has been ratified by Nigeria, though yet to be domesticated.[8] However, this protocol significantly addresses some major problems facing women in the continent. Meanwhile, because the African society with particular reference to Nigeria is more or less a patriarchal one, and because one major feature and purpose of law is to fill in the gaps and protect the weak and vulnerable; no international document for the man is available that suits this discussion. This is not to say there are no cultural norms or practices that are discriminatory to men, but that where this is the case, then what is good for the goose is also good for the gander.

Consequently, this discussion will be centred around what is obtainable for the woman. The Maputo Protocol is a short title for the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. This protocol in *paragraph 12 of its preamble* points out the following concern;

> … that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of State Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.

[8] See section 12(1) and (2) of the CFRN 1999 on domestication of treaties.

Hence the need for this protocol to specifically address these issues.

Article 6 provides that 'State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage' and paragraph (j) provides that 'during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.' Further, this protocol in Article 13 paragraph (h) provides that Sates Parties 'take the necessary measures to recognize the economic value of the work of women in the home'. Article 19(c) equally enjoins state parties to 'promote women's access to and control over productive resources such as land and guarantee their right to property.'

Another pivotal provision is article 20 which provides for the protection of widows' rights. Paragraph (a) provides 'that widows are not (to be) subjected to inhuman, humiliating and degrading treatment, paragraph (c) states that 'a widow shall have the right to remarry, and in that event, to marry the person of her choice. Article 21 is on inheritance. Paragraph (1) provides that 'a widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

Thus these provisions enhance the position of women in Africa, and this has a bearing on the status of widows irrespective of the kind of marriage conducted. One applaudable development is that this law recognizes the investments of women in the home as one having economic impact though she receives no pecuniary compensation in return.[9] This recognition serves to secure the welfare of many women whose careers and economic advancement opportunities are usually neglected in their traditional roles of tending to their families.

[9] Article 13(h) of the Maputo Protocol

One may however wonder what the significance of this Protocol is for women in Nigeria especially since like CEDAW it has not been domesticated in the country. The fact that this protocol has not been domesticated does not take away the obligation on Nigeria to adhere to its provisions having ratified the Protocol. Besides, and as earlier mentioned, this Protocol alongside similar international treaties and documents help provide international standards which individual states who are signatories to the agreement are to conform to.

As a result of these international standards which virtually all states affirm, local state policies are made to conform to these standards. And we see this even throughout the Maputo Protocol as states are obliged to adopt appropriate legislative, institutional and other measures in order to bring about implementation of their agreement under the protocol. This coupled with the shift in mindset and norms make for the changes so far in our laws, the institutions, policies, etc. that have been set up to promote equality, justice, and progress for all.

**5.3 Solutions and Recommendation**

It should be recalled that some questions were raised at the introductory part of this essay. Questions like that of implementation of the succession laws in Nigeria, the consequence of gender inequality in customary law of succession, the difference in the level of protection given to widows under customary law and those under the AEL, and whether there is need for a legislation like that of the AEL for widows under customary law. These questions will be addressed with recommendations also made in this subhead.

It cannot be denied that gender inequality has contributed greatly to the hardship and plight of widows in Nigeria. In fact, despite the AEL succession in Nigeria still goes back to customary law. It is only a few widows married under the Act who get to benefit from the protection of

AEL. One reason for this is that though there are good laws, there is poor implementation. However, before the issue of implementation is considered, some consequences of this inequality and poor implementation will be highlighted. It is also important to note that these consequences affect not only spouses particularly widows but the society at large.

To begin, inadequate enforcement leaves spouses vulnerable to exploitation and this is usually the case where the deceased's relatives connive to disinherit them. When this happens, the quality of life of the surviving spouse is reduced especially in cases where that spouse has no support system to fall back to. Where there are children of the marriage and they are equally disinherited, sometimes these children and the spouse – usually the widow may resort to hawking on the streets, or doing menial jobs to make ends meet.

Widows particularly may also have to deal with loss of the matrimonial home, which implies loss of shelter. This is a further economic burden on the spouse who has not only been deprived the dividends of her investments in the home and her own personal properties sometimes, but now has to find shelter for herself and children if any. This equally results in social disempowerment, like one of the commentators in the newspaper publication cited earlier mentioned, 'a woman who acquires wealth and properties is seen as a powerful woman and in a system where patriarchy rules, it cannot stand.'

However, what society over the years failed to realize is that this disempowerment whether because of greed, entrenched systems of inequality, the need to keep property in the deceased family, etc., has led to harmful practices like widow inheritance, early child marriage where the surviving spouse tries to ease off the financial burden by marrying off the female child, among other devastating effects. This hampers development in the society and the overall economic

advancement of the country, aside the disintegration of families which results as a result of these conflicts.

What way forward then? Firstly, it should be pointed out that even where the problem of non-implementation is solved, only half the problem is fixed because the AEL only applies to widows who marry in accordance with the Act.[10] What then happens to widows married under customary law? It is thus proposed that the AEL be broadened to include provisions that will apply to widows married under customary law. There is no justification for the difference in status and protection accorded to marriages under the Act and those married under customary law for the purpose of succession. Chianu states this plainly: 'what is called for is for Judges to take on the duty of recognizing all marriages and conferring on them equal status in the spirit of tolerance and pluralism.'[11]

To adequately address these ills and deficiencies in the Nigerian law of succession, the legislature and the judiciary must not let itself be handicapped by cultural norms and practices. However, because the AEL was custom-tailored for monogamous marriages, and customary law marriage is potentially polygamous, there is the need to modify or broaden the law as earlier mentioned to be able to respond to the peculiar problems of polygamy especially where the deceased's estate is small. In short, like South Africa, Nigeria should extend its AEL provisions to cover widows married under customary law.

Now to the issue of implementation of relevant laws. It should be noted that implementation of laws being referred to here are those laws in Nigeria that recognize and provide protection for spouses in succession matters; thus the AEL will serve as a reference for these laws. No matter

[10] See Chianu's interpretation of marriage in accordance with the Act at pp 148-149

[11] Chianu at p 149

how good these laws may be, they are meaningless where there is no framework for enforcement. And given the long history of discriminatory and oppressive cultural practices, the alienation of the widow upon the death of her husband from the estate of her husband, etc., it becomes necessary for drastic and radical measures to be taken to eliminate as much as possible these persistent cultural practices.

It is therefore suggested that a third independent party be placed in charge of administering a deceased's estate upon intestacy by the state whose succession law applies to the distribution of the deceased's estate. This should be the practice whether or not application for letters of administration have been made or already granted by the courts on behalf of the deceased's estate. Having an independent third party overseeing distribution according to the applicable law is a better option than having administrators with personal interests in the estate like the deceased's relatives in charge as these most times let their personal interests override clear provisions of the law.

This is not to say application for letters of administration by persons who have a claim or interest in the estate be done away with, rather it is that administration of the estate should not be left solely to these persons and that the third independent party proposed here should not be made just another administrator, but the main administrator of the estate while other interested persons who have obtained letters of administration can play a secondary role, further secure their interests, and somewhat act as check or watchdog on the enormous powers that this independent third party may wield.

Ordinarily, this independent third party is the Administrator-General.[12] However, one is left to wonder what impact his office has made in ensuring strict adherence to succession laws and the protection of vulnerable heirs given the subsisting oppressive practices still prevalent today. There are many reasons for this however. One major reason is that the office of the Administrator-General (subsequently referred to as AG) has not been fully maximized.[13] First, the AG can apply for letters of administration for an unrepresented estate.[14] This means that where an estate is represented, the role of the AG becomes limited.

There are other cases where the AG can step in to administer the estate.[15] However, where the estate is managed by other interested persons, the role of the AG concerning that estate becomes limited. What this long essay recommends is that notwithstanding any representation of the estate by other persons, the AG still plays a primary role in the distribution since he can better enforce the law as he is a government official and a non-interested party in the estate.

Where it is a third party who is involved in ensuring the surviving spouse gets what is due them, there will be less animosity in the family. Moreover, it is suggested that the model of criminal law i.e the method of enforcing criminal laws when violated be modified and extended to the enforcement of succession laws. Because of the degree of importance attached to compliance with criminal laws, not only are the sanctions severe when such laws are broken (depending on the gravity of the crime), the state alone exercises jurisdiction over any such violations. From

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[12] See the Administrator-General's Law, Cap 2 Laws of Western Nigeria 1959. See also the Administrator General Law of Lagos State 2015; subsequently referred to as AGL.

[13] On the office of the AG, see Adekile Oluwakemi, 'A Critical Appraisal on the Role of the Administrator-General and Public Trustee in Intestate Succession-Law and Practice' (In-house Training Programme Legal Education and Research Node, Faculty of Law, University of Lagos May 17 2012) < https://www.readcube.com/articles/10.2139/ssrn.3111922 > accessed 1 October 2023

[14] See section 13 of the AGL of Western Nigeria, and section 2 for definition of unrepresented estate.

[15] (n 13) at pp 13-17

investigation to prosecution; such that when it comes to criminal law, jurisdiction rests with the state and not private individuals.[16]

In the same vein, this model can be applied to succession matters but here, the state has primary jurisdiction from the start of the intestacy when the deceased is certified dead, to the distribution of the estate, to the close of administration of the estate. This is not to say that violation of succession laws be criminalized, but that any such violations be penalized under civil law with the state involved at every point, from administration of the estate to 'prosecution' of violators, among other functions through the office of the AG (Administrator General). This may seem too grave a measure to implement however, it builds on the premise that any legal regime that aims to see the woes of these harmful customs and practices a thing of the past should be prepared to counter every obstacle headlong.

The essence of this is to ensure maximum protection of the vulnerable and those easily exploited in succession matters. And for ease in enforcing this, the state can have other offices spread out across all the communities or local governments in the state. This way, the law is made effective while there is a corresponding impact in the lives of the surviving spouses. And so, much can be learnt from *sections 74 and 88 of the Malawi Deceased Estates Act* that attaches criminal liability to actions of administrators, guardians and executors who wrongfully deprives a beneficiary his right in the deceased's estate.

Furthermore, this essay recommends that Alternative Dispute Resolution (ADR) be employed in resolving succession disputes than litigation. Litigation breeds disunity, hostility and severs existing relationship between parties to the suit. The court is not the best of solutions, at best the

[16] See section 211 of the CFRN, though section 384 of the Administration of the Criminal Justice Act 2015 provides for cases of private prosecutions upon certain conditions.

courts should be a last resort for these kind of disputes. The reason is that court proceedings are centred on winning, the winner also takes all while the losing party leaves with nothing in most cases. An environment where everything is centred on winning is usually a hostile one, and thus not a conducive place for family disputes to be resolved.

The family is the basic unit of society and the stability of the family depends on the unity of its members. Where families disintegrate, the society disintegrates. Where societies become frail and prone to disintegrate, the whole nation is at risk. Families are the bond of any society, an attack on the cohesion of the family is an attack on the nation and must be taken seriously. Consequently, putting the widow for example, in a position where she has to choose between winning a court case and losing the relationship she has with the family is a really tight position for the widow. It is no wonder that most widows would rather let themselves be disinherited especially where there is an issue(s) of the marriage than break up ties with the family.

But the widow does not have to be in this disadvantaged position where the family can reach a consensus or arrive at a compromise upon intestacy of the deceased on how disputes arising can be resolved with the help of a professionally trained independent third party. The drawback to this approach however is that the weaker party is still likely to be exploited, and this is a major reason customary arbitration with regards to succession matters have been unable to address these issues. This is because the customary law system is already prejudicial to the certain persons, such as women.

Thus it has been suggested that:

> … it should be possible to have the Administrator- General's office more involved in resolution of disputes on intestacy especially where the interest of the vulnerable like

widows and minor children are (sic) in issue. In this respect the alternative might be to walk in close alliance with such offices (sic) like the Office of the Public Defender and Non-Governmental (sic) Organizations.[17]

Non-Governmental Organizations can also help with sensitization and enlightenment programmes aimed at reforming culture by bringing about a change in mindset, values and ideologies. Though there have been significant changes in perspective and way of thinking in recent times on this subject, there is still much to be done to put these harmful practices behind us for good.

### 5.4 Conclusion

In this concluding chapter, succession laws of some African jurisdictions were examined as well as international standards for spouses with particular reference to women though similar interpretation goes for men under the same circumstances. Recommendations were also made for improved measures of implementation with the aim of making the law more effective for the benefit and protection of the spouses.

In conclusion therefore, this writer is very positive that where these measures are carried out, the effect of the applicable laws on succession that will bring about the desired change not only for the benefit of the spouses, but also for all with a corresponding impact on the country as a whole, will be immediate.

[17] Adekile Oluwakemi, 'A Critical Appraisal on the Role of the Administrator-General and Public Trustee in Intestate Succession-Law and Practice' (In-house Training Programme Legal Education and Research Node, Faculty of Law, University of Lagos May 17 2012) < https://www.readcube.com/articles/10.2139/ssrn.3111922 > accessed 1 October 2023 at p 30

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