

EXAMINING THE CHALLENGES TO TESTAMENTARY FREEDOM IN NIGERIA

**BY
EXCEL OKOUNMEZE EMPIRE
LAW2002861**

**A LONG ESSAY PRESENTED TO
THE FACULTY OF LAW,
UNIVERSITY OF BENIN,
BENIN CITY**

NOVEMBER 2025

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**IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF
THE DECREE OF BACHELOR OF LAWS (LL.B) OF THE UNIVERSITY OF
BENIN, BENIN CITY.**

NOVEMBER 2025

CERTIFICATION

I, **EXCEL OKOUNMEZE EMPIRE**, with **Matriculation Number LAW2002861**, hereby certify that apart from references to other persons' works which have been duly acknowledged, the entire work is a product of my research, and this project has neither in whole nor in part been presented for another degree elsewhere.

EXCEL OKOUNMEZE EMPIRE

APPROVAL

We certify that this project was written and completed by, **EXCEL OKOUNMEZE EMPIRE**, with **Matriculation Number LAW2002861** in partial fulfillment of the requirements for the award of a Bachelor of Laws (LL.B) degree.

DR. (MRS) FLORA ALOHAN ONOMEHRHEINOR
PROJECT SUPERVISOR

SIGNATURE AND DATE

DR. (MRS.) OBIAGELI FRANCISCA OSUJI
PROJECT COORDINATOR

SIGNATURE AND DATE

PROF. BRIGHT BAZUAYE
DEAN, FACULTY OF LAW

SIGNATURE AND DATE

DEDICATION

This work is dedicated to God Almighty whose grace and mercy brought me this far and the cherished memory of my angel Mrs Fidelia Obu Michael.

ACKNOWLEDGEMENT

I want to appreciate the almighty God, author and finisher of my faith, the undying source of my life. Without him, the journey would have never started. I want to appreciate the Comforter and friend, the Holy spirit.

I want to appreciate the amiable Dean of the faculty of Law, Prof Bright Bazuaye and the lecturers of the faculty of Law. I want to appreciate the project coordinator Dr Mrs Osuji. I would also like to extend my sincere gratitude to Prof. Emeka Chianu for teaching the Law of Succession with so much patience and understanding. Your work is the foundation upon which this essay is built. I am thankful to my amazing and warm hearted supervisor turned mother, Dr (Mrs) Flora Alohan Onomrerhinor. Without her patience and gentle supervision, this project may have never seen the light of the day. Her kindness made the work lighter and more bearable.

I want to appreciate my parents, Mr Empire Samuel Esq and Mrs Onume Empire. To my father, thank you for walking so I could run. Thank you for believing in me even before I believed in myself. You allowed me to dream and hand you the bills. For being a role model, steward and the blueprint. Thank you for showing me that this path is possible. To my mother, it would never have been possible without you. You were always there, supporting, cheering, believing, praying and nurturing. Thank you for being my biggest cheer leader, I would not have had it better. God gave you the pen and you wrote this beautiful story.

To my dear Aunty, Keziah Samuel, thank you for being another mother to me. For always attending to me, for understanding my every whim and caprice. You always answered when I called. Your big baby is grateful. My dearest elder brother, Keseya Empire, thank you for existing, You are my spine. With you, I was not scared to soar because I know you would catch me if I ever fell. My dear grandmothers, Mrs Believe Samuel and Mrs Catherine Ebiaki, I am

grateful for your incessant prayers and support. You are the extensions of God's hands. My Uncles Justin, Ken and Rector, I am forever grateful for all the "urgent" 2k and the emergency data. It would have not been easy without you. My "gees" Dr God's time and Besivie, you guys are the best. Thank you for always listening to my incessant complains.

To my amazing best friend, Michael Tiamiyu, thank you for being amazing and caring, my ever reliable support system.

To the amazing family that I found in Benin, you guys were more than roommates to me, you left an indelible mark in my heart. In no particular order; Naomi Omoruyi, Hannah Solomon, Precious Momodu, Silver Uche, Anthonia Akporehan, Charity Igbinoba, Obehi Obode, Favour Iro, Precious Ogechi, Precious Momodu, Miracle Omeben, Blessing Otagba, Blessing Adesotu, Eghosa OSayamen, Eseosa Rowland, Faith Osamudiamen, Naomi Odiase, Deborah Osakwe.

My amazing friends; Nosamudiana, Smile Blessing, Osasere, Desmond, Segun Melody, Merit, Mercy Igbinedion, Tessy, Favour Agbomnwere, Abigail, Cherrie, Aisosa, Adya, thank you for putting up with me in my bad days and for celebrating with me on my good days.

This acknowledgment would not be complete without mention of my senior colleagues, Michael Ereyi Osasumwen, Asma'u Afegbua, Akpewve Oshevire and Mercy Akialo.

Without you guys, I would not have come this far. Thank you for always putting up with my complaints, advising me, feeding me and looking out for me at every turn.

Finally, I want to thank myself Empire Excel Okounmeze, for finishing. You ran and you are finally at the finish line. Thank you for not giving up, thank you for putting in the work and most importantly, thank you for staying strong. I am proud of you

TABLE OF CONTENTS

Title page	-	-	-	-	-	-	-	-	-	-	ii
Certification	-	-	-	-	-	-	-	-	-	-	iii
Approval	-	-	-	-	-	-	-	-	-	-	iv
Dedication	-	-	-	-	-	-	-	-	-	-	v
Acknowledgements	-	-	-	-	-	-	-	-	-	-	vi
Table of content	-	-	-	-	-	-	-	-	-	-	viii
Table of statutes	-	-	-	-	-	-	-	-	-	-	xi
Table of cases	-	-	-	-	-	-	-	-	-	-	xii
List of abbreviations	-	-	-	-	-	-	-	-	-	-	xiv
Abstract	-	-	-	-	-	-	-	-	-	-	xv
CHAPTER ONE: GENERAL INTRODUCTION	-	-	-	-	-	-	-	-	-	-	1
1.1 BACKGROUND OF THE STUDY	-	-	-	-	-	-	-	-	-	-	1
1.2 STATEMENT OF PROBLEM / RESEARCH QUESTION	-	-	-	-	-	-	-	-	-	-	2
1.3 AIMS & OBJECTIVES OF THE STUDY	-	-	-	-	-	-	-	-	-	-	3
1.4 SCOPE & LIMITATION OF THE STUDY	-	-	-	-	-	-	-	-	-	-	4
1.5 SIGNIFICANCE OF THE STUDY	-	-	-	-	-	-	-	-	-	-	5
1.6 RESEARCH METHODOLOGY	-	-	-	-	-	-	-	-	-	-	5

CHAPTER TWO: CONCEPTUAL CLARIFICATION	-	-	-					8
2.0 INTRODUCTION	-	-	-	-	-	-	-	8
2.1 MEANING OF KEY TERMS			-	-	-	-	-	8
2.1.1 SUCCESSION			-	-	-	-	-	8
2.1.2 WILLS	-	-	-	-	-	-	-	10
2.1.3 TESTAMENTARY CAPACITY			-	-	-	-	-	12
2.1.4 MENTAL CAPACITY			-	-	-	-	-	13
2.1.5 AGE	-	-	-	-	-	-	-	14
2.1.6 UNDUE INFLUENCE			-	-	-	-	-	14
2.1.7 TESTAMENTARY DISPOSITION	-		-		-	-	-	16
2.1.8 TESTAMENTARY FREEDOM			-		-	-	-	18
2.1.9 CUSTOMARY NORMS			-		-	-	-	19
2.1.10 RELIGIOUS DICTATES			-		-	-	-	20
2.1.11 STATUTORY PROVISIONS	-		-		-	-	-	20
2.2 INTER-RELATIONSHIP OF CONCEPTS	-		-		-	-	-	21
CHAPTER THREE: HISTORICAL EVOLUTION OF TESTAMENTARY DISPOSITIONS IN NIGERIA	-	-	-					24
3.1 HISTORICAL EVOLUTION OF TESTAMENTARY DISPOSITIONS IN NIGERIA			-		-	-	-	24
3.2 PRINCIPLES OF TESTAMENTARY DISPOSITIONS			-		-	-	-	29

CHAPTER FOUR: WILLS LAW IN NIGERIA	-	-	-	-	36
4.0 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA	-				36
4.1 WILLS LAW ACT 1837	-	-	-	-	37
4.2 WILLS LAW LAGOS STATE	-	-	-	-	40
4.3 WILLS LAW OF WESTERN REGION (1958)	-	-	-	-	42
4.4 WILLS LAW OF RIVERS STATE	-	-	-	-	43
4.5 ADMINISTRATION OF ESTATES LAW (ENUGU STATE)	-	-			45
CHAPTER FIVE: CHALLENGES OF ENFORCEMENT AND APPLICATION					47
5.1 CHALLENGES ASSOCIATED WITH TESTAMENTARY FREEDOM	-				47
5.1.1 SOCIAL AND CULTURAL BARRIERS	-	-	-	-	47
5.1.2 RELIGIOUS FETTERS ON TESTAMENTARY FREEDOM	-				49
5.1.3 STATUTORY PROVISIONS	-	-	-	-	53
5.1.4 NEMO DAT QUOD NON HABET	-	-	-	-	55
5.1.5 LEGAL AND INSTITUTIONAL CHALLENGES	-	-	-		56
5.2 RECOMMENDATIONS	-	-	-	-	58
5.3 CONCLUSION	-	-	-	-	60
BIBLIOGRAPHY	-	-	-	-	63

TABLE OF STATUTES

Administration of Estates Act Enugu State 2004

Evidence Act 2011

Interpretation Act, Cap 123 ,Laws of The Federation Of Nigeria 2004

The 1999 Constitution of The Federal Republic of Nigeria (as amended)

The Jigawa State Wills Law 1998

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TABLE OF CASES

Adekoya v Adekoya [2004] 6 NWLR (870) 476

Adesuobokan v Yinusa (1971) 1 ANLR 225

Aiguokunrueghian v Imaruagheru [1995] 9 NWLR Pt 419 p259

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Chalcraft, Charcraft v Giles (1948) 1 AC ,700

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Dimeari v Jumbo (1966-67) 10 ENLR 238

Ilori v Ilori (1983) 1 SCNLR 94

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Lawwal Osula v Lawal Osula [1995] 9 NWLR ,part 419 ,259

Lewis v Bankole (1908) 1 NLR 81

Mobogunje v Adewunmi ALL FWLR ,part 347,770

Mojekwu v Mojekwu [1977] 7 NWLR ,Part 512 ,

Mudasiru v Abdullahi [2011] 7NWLR ,part 1247 ,591

Nezianya v Okagbue (1963) ALL NLR 352

Obi v Obi [2006] 10 NWLR , pt 987 pg ,123

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Olowu v Olowu [1985] 3 NWLR p13, 372

Ogunmefun v Ogunmefun (1931) 10 NLR p82

Oyewunmi v Ogunnesan (1990) 3 NWLR (pt 1137) 182 at 207

Savage Joe v Joe (1994) 10 WACA 144

LIST OF ABBREVIATIONS

AC	Appeal Cases
ALL ER	All England Reports
ALL FWLR	All Federal Weekly Law Report
ALL NLR	All Nigerian Law Report
Ch.D	Chancery Division
ENLR	Eastern Nigeria Law Reports
LLR	Lagos Law Reports
LPELR	Law Pavilion Electronic Law Report
NLR	Nigerian Law Report
NMLR	Nigerian Monthly Law Report
NWLR	Nigerian Weekly Law Report
QB	Queen's Bench
SCNLR	Supreme Court of Nigeria Law Report
WACA	West African Court of Appeal

ABSTRACT

A will is the final testament of a person. It contains directions as to how the person wants their estate to be administered. Prima facie, a person has the freedom to dispose their property in a manner that pleases them. However, there are limitations or restrictions to a person's testamentary freedom. This study aims to identify the various ways a person's testamentary freedom can be limited by law, cultural norms and religious dictates. It is trite principle in law that a person can make a will, but it does not mean that he can freely dispose his estate with no limit to his power of testation. This study examines the relevant judicial precedents and statute with regards to restrictions on testamentary disposition, as well as the challenges that arise with the wrong use of testamentary capacity. This study also examines the how cultural practices can affect testamentary disposition. Using the doctrinal method of research, it specifically investigates the effect of the trite principle of "*nemo dat quod non habet*" on testamentary freedom. The study goes further to identify other areas that affect testamentary freedom such as the effect of family property, the fetters Islamic law places on testators and the position on the law on provision for family members and dependents. This study tries to highlight the various ways, cultural and religious norms places restrictions on the testamentary freedom of a testator. The long essay also tries to identify modern developments in testamentary freedom. The study tries to suggest reforms to clarify the legal process of testamentary freedom and disposition. In conclusion, this long essay provides insight into the legal dynamics that govern testamentary disposition and offers practical solutions to lawyers and individuals especially testators and testatrixes seeking to navigate the murky waters of testamentary freedom and disposition.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

The passing of a person comes with a lot of squabbles over the estate of the person. Some of these squabbles and bickering are easily preventable with the writing of a will by the owner of the estate also known as a testator or testatrix¹. A will is the final testament of a person indicating how they want their estate to be administered after their death. Prima facie, a person is free to give instructions on how their estate is to be administered in any way that they may see fit. This right is also known as testamentary freedom. Testamentary freedom is the right of an individual to freely dispose of their property upon death is an important facet of the law of succession.² This right is widely acknowledged under common law and is entrenched in Nigeria through statutes such as the Wills Act 1837 (as applicable) and the Wills Laws of the various states.

However, this freedom is not absolute. The nature of these limitations vary in the different jurisdictions in Nigeria reflecting the pluralistic nature of Nigeria's legal system. Some of the limitations to testamentary freedom include customary restrictions, religious fetters and legal formalities for making a will. These restrictions are often contentious and may lead to prolonged legal battles, further exacerbating the issues that informed the decision of making a will by the testator or testatrix.³

The aim of this research is to examine the various ways that testamentary freedom can be inhibited by limitations posed by customary norms, religious practices and statutory dictates.

¹ Yusuf Yilzum Dadem *Property Law Practice in Nigeria* (Jos University Press Ltd 2022) 265

² Emeka Chianu *Law of Succession* (New Systems Press Ltd 2019) 308

³ Ibid

This long essay will examine modern trends in testamentary succession as well as ways that the legal system can be advanced to protect the wishes of a testator.

1.2 STATEMENT OF PROBLEM/ RESEARCH QUESTIONS

In Nigerian, while a testator is empowered by law to make a will, by statutory provision, the application of customary and religious norms frequently undermines testamentary freedom. A crucial example under some customary law systems in Nigeria, especially the Benin customary system and the Igbo customary system certain properties known as the 'Igiogbe' under the Benin customary system and Obi under the Igbo customary system, cannot be validly disposed of by will. Also, in many customary systems, ancestral or family land cannot be a valid disposition in a will. Additionally, under Islamic law, fixed shares are reserved for specific heirs, limiting the discretion of Muslim testators. Furthermore, under Section 3 of the Wills Act,⁴ a testator is under an obligation to dispose a portion of his estate to his Similar provisions can be found in the Wills Law of Rivers state.⁵

These limitations create a tension between the desire for individual autonomy and the community or familial expectations entrenched in traditional systems. The resultant legal conflicts often lead to litigation, delays in estate administration, and the invalidation of wills, thus frustrating the intentions of testators and the entire essence of testamentary succession.

Flowing from this premises, the crux of this research is rooted in these salient questions

- I) To what extent is testamentary succession recognized in Nigeria?
- II) What is the current legal frameworks for testamentary succession?

⁴ Wills Act 1837

⁵ Wills Law of Rivers State (Cap 151 Laws of Rivers State 1999)

- III) What are the potential outcomes for limitations on testamentary freedom?
- IV) What are the challenges to testamentary succession?
- V) What are the implications of customary norms and religious dictates on testamentary freedom?
- VI) What are the implications of statutory dictates and judicial precedents on testamentary freedom?

1.3 AIM AND OBJECTIVES

The primary aim of this project is to examine the inhibitions that statute, customary practices and religion can place on a testator's right to disposition. This study further aims to examine the WILLS ACT of 1837 (a statute of general application), the Wills law of various states, the Administration of Estate Law (Enugu state). The objectives of the essay are:

- I) Examine the legal basis for testamentary freedom under Nigerian law
- II) Examine relevant judicial precedents in relation to testamentary disposition and testamentary freedom
- III) Examine the procedural hurdles posed by the law in relation to the formality for writing a will.
- IV) Identify and examining the statutory, customary, and religious limitations on such freedom.
- V) Examine the effects of these limitations on the administration of estates

1.4 SCOPE AND LIMITATIONS OF THE STUDY

This research study seeks to explore the legal landscape of testamentary succession in Nigeria, with a focus on the concept of testamentary freedom. Geographically, the study will use Nigeria as a case study, examining the federal, state laws and Sharia law, as well as various regions and court

In terms of content coverage, this study will delve into three key areas; limitations based on statute, challenges under various customary systems and inhibitions placed by religious dictates. Under challenges placed by statute, the study will examine legal frameworks for making a will, procedures, case law and the challenges faced by testators in exercising their testamentary freedom. For challenges placed by customary systems, the study will examine the limitations placed on testators by customs and traditions with focus on the Benin and Igbo customary systems. Under religious inhibitions, this study will consider the effect of religious dictates on the testator's right to dispose his estate.

The subject matter coverage will focus four areas. Firstly, the legal frameworks will examine current laws, statutes, regulations, the Wills Act 1837, the Wills Law of various states and Administration of Estate Law (Enugu) and other relevant laws. Secondly, case laws will review relevant court decisions, precedents and landmark cases. Thirdly, procedures and practices will investigate court procedures, legal practitioners' practices, and experiences. Lastly, challenges and reforms will analyze the challenges faced by parties involved and potential reforms to improve the legal framework and procedures.

Limitation: One limitation to this research is that it will be limited to two customary practices in Nigeria, which might not be representative of other African countries or regions with similar legal issues. The study's content coverage is limited to testamentary freedom. Another angle of limitation is the subject matter coverage, where the subject matter is limited to the legal

aspects of testamentary freedom, which might not consider social, economic or psychological aspects of succession on families in Nigeria. This study might not be generalizable to other countries due to differences in legal systems and cultural context.

1.5 SIGNIFICANCE OF THE STUDY

This study is significant for the following reasons:

I) **Contribution to Knowledge-** This study is an effort to contribute to existing knowledge relating to freedom of testamentary disposition, providing new insights and perspective on the challenges to testamentary freedom in Nigeria. It will help fill the knowledge gap on the legal aspects of testamentary succession in Nigeria, particularly in relation to the aforementioned concept.

II) **Policy Reforms-** The findings of this study strive to instigate policy reforms and legal changes in Nigeria, in a bid to ensure that the will of a person is not invalidated on grounds of inconsistency with the formality for making a will. This is obtainable as the after-effect of providing recommendations for improving the legal framework and procedures testamentary freedom in Nigeria.

III) **Empowerment-** This study will empower individuals to know how to navigate the waters of testamentary succession in Nigeria and how they can avoid the loopholes that can invalidate their wishes.

1.6 RESEARCH METHODOLOGY

Research methodology denotes the systematic and structured approach utilized in conducting research, which involves the collection, analysis and interpretation of data to address a specific research question or problem. There are two major research approaches; the Doctrinal Approach and Non-Doctrinal Approach.

The Doctrinal Approach, also called library-based research, arm- chair research, pure theoretical research or black letter law research, focuses on the study of legal rules, doctrines and principles while examining the coherence and consistency of the legal system. The non-doctrinal approach is considered the scientific approach. It entails the adoption of an empirical approach through field work. It has a nexus with social sciences as it examines the social, economic and political contexts of law, focusing on the impact of law on the society.

This study will employ a doctrinal research approach, focusing on the legal principles and rules governing testamentary legal issues in Nigeria. The research will be conducted through a comprehensive review of existing literature, analysis of relevant statutes, case laws and experiences of legal practitioners and individuals who are involved in the administration of estates. The justification for the utilization of this approach is embedded in its appropriate nature as it centers on the legal principles and rules governing testamentary succession in Nigeria, enabling a thorough examination of the legal framework and its application in the country.

The types of legal research methods include but are not limited to the Historical method, Analytical method, Descriptive method and Comparative Analysis method. The adopted method for this research is the analytical and to some extent, comparative analysis methods. The analytical research method will enable the examination of the legal principles governing post-divorce in Nigeria, while the comparative analysis will facilitate the comparison of the Nigerian legal framework with other jurisdictions, in the light of examining how international legal frameworks influence Nigeria's approach in post-divorce legal issues.

This research also adopts the use of primary and secondary sources for the purpose of its data collection.

Primary sources

The 1999 Constitution of the Federal Republic of Nigeria (as amended)

Statutes (Wills Act 1937, Wills Law of Lagos State, Wills Law 1959(Western states) etc.)

Case Laws (decisions of Nigerian courts)

International provisions (relevant to limitations to testamentary freedom)

Secondary sources

Books (textbooks on Law of Succession Nigerian Law)

Dictionaries (Black's Law Dictionary etc)

Research Papers/Articles on testamentary disposition, freedom and limitations to testamentary freedom

Lecture Notes (on Law of Succession Nigerian Law) Journals

CHAPTER TWO

2.0 INTRODUCTION

This chapter will establish the foundational groundwork for the examination of the challenges to testamentary freedom, setting the stage for further analysis and discussion in the subsequent chapters. By integrating conceptual clarifications and theoretical perspectives. This chapter of seeks to capture a more sophisticated understanding of the various religious fetters, customs and statutory provision and their intersections.

2.1 MEANING OF KEY TERMS

2.1.1 Succession

Ownership of property is a very old concept. When a person has acquired property, the person would want it to remain within his family. Hence the development of succession. Succession in the loosest sense of the word means to take over from someone. However, in a legal discourse the loose meaning of a word would not suffice. According to the Osborn's Concise Law Dictionary, succession means "Succeeding or following after".⁶ Succession is defined by the Merriam Webster's Dictionary, as "the order in which or the conditions under which one person after another succeeds to a property, dignity, title, or throne".⁷ According to The Black's Law Dictionary, succession is "The fact of the transmission of the rights, estate, obligations, and charges of a deceased person to his heir or heirs".⁸ Succession is rooted in the need to keep property or title within ones family. There are a number of scholars that have defined succession and one of those definitions is the one offered by Allot, he defined succession as "the legal transmission of rights, obligations, and property from a deceased person to their heirs

⁶ Osborn's Concise Law Dictionary (13th Edition Sweet & Maxwell 2013)

⁷ Merriam-Webster, Merriam-Webster's Collegiate Dictionary (11th edition, Merriam-Webster Inc 2003).

⁸ Bryan A Garner Black's Law Dictionary (11th Edition Thomas Reuters 2011)

or beneficiaries, either by virtue of a valid will (testate succession) or according to the rules of law where no will exists (intestate succession).⁹

A definition of the term succession was offered by Penner, as “the mechanism by which the estate of a deceased person is passed to another person or group, ensuring continuity of ownership and the fulfilment of legal duties such as debt repayment or administration of the estate”.¹⁰

These definitions underscore that succession is not just about the estate, but includes legal responsibility, perpetuity, and the seamless transfer of legal status, rights and obligations.

Succession is a concept as old as mankind, in the book of Genesis, a recurring promise of God to Abraham was that he was going to give him and his descendants a land which would be theirs for ages.¹¹ The book of Genesis, also talks about Israel’s promise to Joseph where he was promised a place Israel formerly known as Jacob bought in Shechem. The book of Deuteronomy also outlined rules for inheritance while recognizing primogeniture.¹² Succession could also be used as a synonym for inheritance. The bible is rife with stories of succession of not just property but also of title and office¹³

In ancient times, inheritance in many societies were based on patriarchy and primogeniture. However, there were some instances where succession was based on eligibility or matriarchy.

⁹ A.N Allot *Essays in African Law : with special references to the Law of Ghana* (Butterworth &Co (publishers) LTD)

¹⁰ J. E Penner *Law of Trusts* 10th Edition (Oxford university press 2021)

¹¹ Genesis 13:14-17

¹² Genesis 48:22

¹³ Deuteronomy 31

The word “succession” originates from Latin. Succession in Latin literally means “a coming after” or “following in” from Latin *successio*.¹⁴ The word passed into old French as succession, and then into Middle English in the 14th century. Initially, it referred broadly to the act of following in order, especially in royal, political, or clerical contexts (e.g., succession to a throne). Over time, it developed a more specific legal meaning—the passing of rights or property upon death, as used in modern legal systems. Thus, the word carries both the colloquial idea of something coming next and the legal idea of inheritance.¹⁵

2.1.2 Wills

The living are conscious of death and there is a need to put ones house in order before departing to the great beyond.¹⁶ Hence the need to make a will. A will is a formal document that is drawn up by a testator or testatrix to convey the way their estate should be partitioned upon their passing.¹⁷ It is the final testament of a person indicating how they want their estate to be administered after their death. If a man makes a will, he is known as a testator, if a woman makes a will, she can be referred to as a testatrix.¹⁸ A will is defined by The Black’s Law Dictionary as ‘an instrument by which a person makes a disposition of his or her property to take effect after death, and which by its nature is revocable during the testator’s lifetime’.¹⁹ A will was also judicially defined by the apex court in *Okelola v Boyle*²⁰ as “a document that is voluntarily made by a testator stating how his properties should be distributed after his death”. Legal scholars have also proffered a plethora of definitions to the term “will”. Some of these

¹⁴ George Long, in William Smith's, *A Dictionary of Greek and Roman Antiquities*, (John Murray, London, 1875) 1075-1076
< https://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Successio.html >
accessed Thursday 6 November 2025

¹⁵ Ibid

¹⁶ Ecclesiastes 7:4-14

¹⁷ supra

¹⁸ Supra

¹⁹ Supra

²⁰ [1982] 2 NWLR (pt 539) 533

definitions include the one given by Penner, ‘A will is a legal declaration by which a person, the testator, names one or more persons to manage his estate and provides for the distribution of his property at death’.²¹

Another definition was offered by Guest, which states that “A will is a unilateral, ambulatory, and revocable instrument by which a person disposes of property intended to take effect only upon his death’’.²² Keeton and Sheridan, defined a will as “the expression of a person’s wishes, duly executed according to statute, as to how their property is to be distributed after their death’’.²³

Halsbury’s Laws of England, went further to give a definition that states that, “A will is a declaration in a prescribed form of the intention of the person making it with regard to the matters which he wishes to take effect upon or after his death’’.²⁴

Finally, Hood Phillips, defines wills as, “a document in which a person sets out what is to be done with his property after his death. It is revocable at any time before death and is only effective upon death’’.²⁵

From these definitions, it can be gleaned that

- I) It is a legal document or instrument.
- II) It takes effect only after the death of the testator or testatrix.
- III) It involves the disposition of estate.

²¹ Supra

²² A.G Guest, *Anson's Law of Contract* (Oxford university Press) 49

²³ Keeton and Sheridan *The Law of Trusts* (Sweet and Maxwell) 12

²⁴ Halsbury's *Law of England* (Butterworth's Publishers) Vol 30 Para 1

²⁵ O.Hood Philips *A First Book of English Law* (Sweet &Maxwell 1977) 237

- IV) It is revocable, meaning the testator or testatrix can amend or revoke it any time before death.²⁶

2.1.3 Testamentary Capacity

The term testamentary capacity refers to the ability to make a will. This ability does not refer to just physical ability, it refers to empowerment under the law to make a will. A person must have the mental capacity to make a will. Testamentary capacity refers to the legal and mental ability of a person to make or alter a valid will. It's a crucial element for a will to be considered legally binding. If a person lacks testamentary capacity at the time they make their will, the will can be declared invalid.²⁷

In common law jurisdictions, including Nigeria, the foundational test for testamentary capacity is derived from the English case *Banks v Goodfellow*²⁸. This case established the key criteria that a testator must satisfy to be considered of "sound mind, memory, and understanding" when making a will

There are some factors that determine testamentary capacity.

They are:

- I) Mental capacity
- II) Age
- III) Undue Influence

²⁶ Yusuf Yilzum Dadem *Property Law Practice in Nigeria* (Jos University Press Limited 2022)308

²⁷ Supra

²⁸ (1870)5 QB 549

The testator must understand that they are making a document that will dispose of their property after their death.

2.1.4 Mental capacity

A person that intends to make use of the instrumentality of a will to dispose his estate should be in possession of his mental faculty.²⁹ There is a presumption of sanity on the testator at the time that he makes the will.³⁰ The testator should not be suffering from any mental illness, delusion, or disorder that perverts their sense of right or prevents the exercise of their natural faculties in disposing of their property by will.³¹ If a mental condition influences them to make bequests they would not otherwise have made, the will may be challenged. A testator or testatrix must be mentally alert, of rational thinking faculty, sound in mind, have the normal thinking ability to be able to remember, thinks and discuss when he gives instructions to the draftsman and when he executes the will. Physical incapability such as sickness or feebleness due to age does not count. It is not a marker for mental incapacity.³² In *Dimieari v Jumbo*³³, the court rejected evidence that the testatrix was suffered from loss of memory at the time she executed the will. Testamentary capacity is assessed at the time the will is made or altered. A person might have fluctuating mental capacity due to illness or age, but if they have a "lucid interval" during which they meet the above criteria, a will made during that interval can be valid.³⁴

²⁹ Supra

³⁰ Mobogunje V Adewunmi (2007) ALL FWLR part 347,770

³¹ Yusuf Yilzum Dadem *Property law practice in Nigeria* (Jos University Press 2022) Pg 272

³² Supra

³³ (1966-67) 10 ENLR 238

³⁴ Supra

2.1.5 Age

In Nigeria, age is not just a marker of years, it is an important factor that is responsible for the ability or disability of a person to carry out certain activities. When a person is below legal age, there are certain activities that the person cannot carry out. Some of these activities include driving a car, voting and making a valid will. The minimum age to make a valid will depends on the law being applied. Under the Wills Act (1837) ,21 years old is the statutory minimum age to make a will. Under some jurisdictions such as Lagos state, individuals 18 years and above can execute a will.³⁵ Similar rules apply in Oyo and Kaduna States.³⁶ However, some states differ such as Abia State, the age of capacity to make a will is 15 years.³⁷ Individuals such as active military personnel, sailors, or aircrew (at sea or in service) can make privileged wills regardless of age. The law protects people under legal age to make a will because they lack the prerequisite mental capacity to properly understand will making and its consequences.

2.1.6 Undue Influence

Another factor affecting testamentary capacity is undue influence. The term undue Influence in ordinary terms connotes pressure or bribery. The doctrine of undue influence is an equitable principle designed to protect individuals whose free will have been compromised in the making of a contract or disposition. It arises where one party exerts influence or dominance over another, thereby preventing the weaker party from exercising free will. A plenitude of legal scholars have given definitions to this legal concept, one of these definitions is the one offered by Kerr, he stated that undue influence is “the unconscientious use of one’s power over another

³⁵ Section 3 Wills Law of Lagos State W2, Laws of Lagos State 2015

³⁶ Section 6 Wills Law of Kaduna State Cap. 163 Laws of Kaduna State of 1991, Section 5 Wills Law of Oyo State 1990

³⁷ Wills Law of Abia State Cap. 37 Laws of Abia State 1999.

in order to induce the other to enter into a transaction which, but for such influence, he would not have entered into.”³⁸

The Osborn’s concise law dictionary, defined undue influence as “the improper or wrongful constraint, persuasion, or pressure exercised by one person over another so as to induce a transaction which the person would not have entered into if left to act freely.”³⁹

Similarly, Snell, explains that, “Undue influence arises whenever one party uses his position of influence over another to obtain an unfair advantage. It may involve overt acts of coercion or may be inferred from the relationship of trust and confidence between the parties.”⁴⁰

Finally, Halsbury’s Laws of England, notes that “Undue influence is an equitable doctrine which enables a party to avoid a transaction where he has been induced to enter into it, not by overt coercion or fraud, but by the domination of another person.”⁴¹

A will made under undue influence is invalid. undue influence often arises in challenges to wills where capacity is also an issue. Undue influence occurs when someone coerces or manipulates the testator into making a will that reflects the influencer's wishes rather than the testator's true intentions. In the eyes of the law, persuasion without coercion does not count as undue influence.

In *Banks v Goodfellow*⁴², the court upheld this trite principle that persuasion without coercion does not count as undue influence. The court in *Johnson v Maja*⁴³, held that undue influence arises where there is coercion or domination of the testator’s will, such that the act is not the

³⁸ Supra

³⁹ Supra

⁴⁰ Snell E. H *Snell's Equity* 34th Edition (Sweet and Maxwell London 2020)

⁴¹ Supra

⁴² Supra

⁴³ (1951) 13 WACA 290

free and independent act of the testator. It is not enough to alledge undue influence, the person must be able to prove it beyond reasonable doubt that the testator was indeed under undue influence. The claim of undue influence typically arises when a party feels aggrieved due to a clause in the will. He may feel that he deserved more and was cheated due to the relationship that another party has with the testaor or testatrix. However valid that this position may sound, it is not a ground for the court to invalidate a validly made will. The claim has to be substantiated with evidence and mere close relationship before or during when the will was made is not sufficient evidence. Mere evidence that the testator or testarix had a close relationship with the person that the “offending” devise or bequest was made to does not amount to undue influence. For a claim of undue influence to be upheld, it must be proven that:

- I) There was must be a stronger party and a weaker party: In *Yesufu v Yesufu*⁴⁴, the Supreme Court stated that undue influence exists where the will of a weaker party is overborne by a stronger party, making the transaction not the result of free agency.
- II) The other party clearly has an influence or dominance in the actions of the weaker party.

2.1.7 Testamentary Disposition

The act of distributing an estate through the instrumentality of a will is known as testamentary disposition.

Testamentary disposition has been defined by legal scholars and one of such definitions include the one offered by the erudite Prof. Sagay. He gave a definition reading thus, “Testamentary disposition is a deliberate act by a testator to assign rights in property to beneficiaries, to take effect upon death, in accordance with the formal requirements of the law of will”.⁴⁵ Margaret Briggs defines the term as “A testamentary disposition is a voluntary posthumous gift of

⁴⁴ (1971) 1 All NLR 361

⁴⁵ I.E Sagay *Nigerian Law of Succession* (Malthouse Publishers 2000) Pg 75

property made by a person through a duly executed will, which takes effect only upon the death of the testator and is subject to revocation during his lifetime”.⁴⁶

Utuma, stated that “a testamentary disposition is the legal means by which a person, by will, directs the future ownership of his estate after his demise, evidencing the principle of testamentary freedom within the confines of statutory and customary limitations”.⁴⁷

Nwogugu, in his work enunciated that “testamentary disposition refers to the method by which a testator directs the manner in which his estate is to be distributed after his death, usually by a valid will made in accordance with the provisions of the law”.⁴⁸

Keeton, stated that “A testamentary disposition is a legal declaration by which a person provides for the distribution of his property after death, which is not operative until the death of the testator and may be altered or revoked during his lifetime”.⁴⁹

The Black’s Law Dictionary defines the term as ‘a disposition of property that takes effect upon the death of the person making it, usually contained in a will’.⁵⁰

In *Bankole v. Bankole*⁵¹, the court emphasized that a will is meant to express the free intention of the testator regarding how their estate should be distributed upon death. From these definitions, it can be gleaned that testamentary disposition is the "voluntary", "revocable" and formal wish of a testator on how his estate should be administered upon his demise.

A testamentary disposition is a gift of property made in a will. It becomes operative only after the death of the person making the will and is revocable during their lifetime.

⁴⁶ Margeret Briggs *Law of Succession* (LexisNexis Butterworth's 2006) Pg 102

⁴⁷ O. A Utama *Law of Succession in Nigeria* (Odade Publishers 1990) Pg 63

⁴⁸ E.L Nwogugu *Family Law in Nigeria* (Revised Edition HEBN Publishers 2014) 389

⁴⁹ G.W Keeton *Law of Wills* (6th Edition Stevens and Sons 1990) Pg 6

⁵⁰ Supra

⁵¹ (1964) LLR 158

- I). Voluntary Act: A testamentary disposition is made freely by the testator without coercion.
- II) Takes Effect at Death: The gift or disposition does not transfer any interest until the testator dies.
- iii) Revocability: It can be changed or revoked by the testator any time before death by way of a codicil.
- iv) Formality: It must comply with the legal requirements for making a valid will under the applicable law (e.g., the Wills Act 1837 or the Wills Law in force in the particular jurisdiction that the will is made.

2.1.8 Testamentary Freedom

The term “testamentary freedom” refers to the right a person has to distribute his estate in a way that he seems fit. Prima facie, a person has the liberty or right to distribute his estate in a way and manner that he sees fit, however this freedom is limited by a number of factors. The concept of testamentary freedom gained prominence during the enlightenment period where John Locke, opined that man should have liberty or right to decide how his properties should be treated even in death.⁵² The term testamentary freedom can be quite misleading to the layman as it may sound like he has the liberty to dispose his properties according to his whims, however there are some constraints to this freedom.

⁵² Alexis A.GollinSledge Testamentary Freedom Vs. The Natural Right to Inherit: The Misuse of No-Contest Clauses As Disinheritance Devices
<https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1209&context=law_jurisprudence>
accessed Thursday 14 August 2025

2.1.9 Customary norms

Custom may be defined as a rule of conduct, obligatory on those within its scope, established by long usage and accepted by the community as binding. In law, custom represents the practices and norms which, through continuous observance over time, acquire the force of law. Osborn CJ defines custom as “a rule of conduct observed by people habitually and voluntarily, which is recognized and enforced by the courts when it is reasonable and consistent with statute”.⁵³ In the Nigerian context, Section 2 of the Evidence Act 2011 recognizes customary law as part of the body of laws enforceable in Nigeria, provided it is not repugnant to natural justice, equity, and good conscience, nor incompatible with any written law.⁵⁴ Customs is the living law of a group of people, not a usage of bygone days.⁵⁵ It has also been defined judicially in *Lewis v Bankole*⁵⁶ as a mirror of accepted usage. This definition was reaffirmed in *Oyewunmi v Ogunnesan*⁵⁷. Allot defined Custom as “rules of conduct which are accepted as binding by members of a community, and which evolve from consistent practice”.⁵⁸ Another insightful definition was given by Obilade where he stated that customary law is described as “a body of rules regulating the rights and duties of members of a community which is recognized and applied by that community as part of its system of law”.⁵⁹ Under the Benin customary system, the principal house also known as Igiogbe cannot be given to any other person except the oldest surviving son.⁶⁰ Similarly, under the Igbo customary system, the Obi cannot be disposed to someone else except the eldest son who is known as Okpara.⁶¹

⁵³ (1908) 1 NLR 81

⁵⁴ Evidence Act 2011,

⁵⁵ [1990]3 NWLR (Pt137)182 at 207

⁵⁶ (1908) 1 NLR 81

⁵⁷ Supra

⁵⁸ Supra

⁵⁹ O . A Obilade *Nigerian Legal System* (Spectrum Law Publishing Ibadan ,1979) Pg 65

⁶⁰ Supra

⁶¹ Supra

2.1.10 Religious dictates

Nigerians are deeply religious people. From the day that they are born till the day they return to their creator, almost all activities concerning them is affected by religion. Religion can be defined as a system of beliefs.⁶² There are three major religions in Nigeria; Islam, African traditional religion and Christianity, A person's religion has a direct or indirect effect on the way a person's estate is disposed. Though there are no direct injunctions as to how a Christian should make a will, it is heavily frowned upon if by way of will, a testator or testatrix disinherits his child. Under Islamic law, when a man dies, his estate is divided into 24 parts, his windows receive three parts while his surviving parent(s) receive four parts.⁶³ The residue is shared amongst his children. His sons receive equal shares while his daughters receive half of what the sons receive.⁶⁴ A testator cannot validly make a will to dispose his estate in a manner that contravenes this method prescribed by his religious dictates.⁶⁵

2.1.11 Statutory Provisions

There are several statutory provisions in Nigeria that serve as restrictions to the testamentary freedom of a person. Laws are a reflection of the values of a given society.⁶⁶ According to Roscoe Pound, it is a tool for social engineering.⁶⁷ It is used to adjust societal demands and Interests.⁶⁸ Statutory provisions are put in place to safeguard the values of the Nigerian society. Under the Wills Act,⁶⁹ a person can dispose their estate to anyone; a stranger, a friend or even

⁶² É Durkheim , *The Elementary Forms Of Religious Life* (George Allen & Unwin Ltd , London 1915) 47

⁶³ AB Mahmoud "Succession under the Sharia Law in Nigeria", (1982) *Nigerian current Law Review*, 121

⁶⁴ Ibid

⁶⁵ Wills Law of Kwara State Cap 168, Laws of Kwara State 1991

⁶⁶ Jiaxiuan Ren The Role of Law under the Social Structure *Journal of Education, Humanities and Social Sciences* Volume 42(2024)
<https://www.researchgate.net/publication/387032404_The_Role_of_Law_Under_the_Social_Structure> accessed 11 November 2025

⁶⁷ Roscoe Pound *The Scope and Purpose of Sociological Jurisprudence*. *Harvard Law Review* ,25(6)

⁶⁸ Ibid

⁶⁹ Wills Act 1837 (United Kingdom)

a pet.⁷⁰ This is an acceptable practice in the United Kingdom where the society is more individualistic. However, in the Nigerian society, community and family is the soul of the society. Hence the need for laws to be put in place to protect the interests of the family.

Under the Wills law of certain states, a testator is under obligation to provide for his dependents. Under Section 2 Wills Law (Lagos) a testator is obligated to make a provision for his wife and children.⁷¹ Similarly under Section 2(1) Wills Law (Rivers) dependents were expanded to include parents as well as siblings that the deceased partly or fully maintained before his demise.⁷²

This trilogy poses inhibitions to a person's testamentary freedom as a will that fails to confirm with these requirements is invalid.

2.2 INTERRELATIONSHIPS OF CONCEPTS

The foundation on which the other concepts stand is succession. Succession is the passing of estate or title from one person to another. Succession can either be intestate or testate.⁷³ Intestate succession is the oldest form of succession and it involves the use of informal way to pass property from one person to another. Testate succession which is also known as testamentary succession is the use of a formal document known as a will to dispose an estate.

A will is an instrument that contains the final wishes of a person concerning how their estate should be administered upon their demise.⁷⁴ It is a voluntary document made by a person known as a testator or testatrix as the case may be. A will can be amended during the lifetime

⁷⁰ Supra
⁷¹ Supra
⁷² Supra
⁷³ Supra
⁷⁴ Supra

of the testator or testatrix by means of a codicil. A will takes effect upon the death of the testator or testatrix.

The legal capacity to make a will is known as testamentary capacity. Testamentary capacity refers to the right a person has under the law to make a will. This capacity is affected by some factors which include mental capacity, age and undue influence. A person that is incapable of using his thinking faculty is incapable of making a will. That is to say a mentally unstable person is incapable of making a will. However, if the person has a brief period of lucidity, the person can make a will and this will, will not be invalidated by his periods of mental instability. Old age or feebleness due to sickness does not count as mental instability as held by the court in the case of *Dimieari v Jumbo*.⁷⁵ Age is also a factor in testamentary capacity. Under the Wills Act 1837, a person below the age of 21 cannot make a valid will. However, in states like Lagos, Oyo and Kaduna under their various Wills Law a person below 18 is an infant and therefore the person cannot validly make a will. However, in some cases a person below this age range can make a will. This exception comes to play when the person is a member of the armed forces.⁷⁶

Undue influence on the other hand, refers to coercion to make a disposition in a will. Persuasion no matter how vile the intention is, it is not a ground for the invalidation of the wishes of a testator as expressed in a will.⁷⁷

Testamentary disposition is the act of distribution of an estate by the means of an instrument known as a will. Testamentary disposition has been given several definitions by different legal writers. One of such definitions is the one offered by I.E. Sagay.⁷⁸ He gave a definition reading

⁷⁵ Supra
⁷⁶ Section 6 Wills Law Lagos State
⁷⁷ supra
⁷⁸ Supra

thus, “Testamentary disposition is a deliberate act by a testator to assign rights in property to beneficiaries, to take effect upon death, in accordance with the formal requirements of the law of will. The tangible manifestation of testamentary freedom exercised through a valid will is testamentary Disposition. This term refers to the specific gifts, devises, and bequests made within a will. These dispositions are only effective if the will itself is valid, and this depends on the testator possessing testamentary capacity and acting freely without any form of coercion.

Testamentary freedom on the other hand refers to the testator’s or testatrix’s ability to make a devise or bequest freely. Prima facie, a testator or testatrix has the ability to dispose their estate the way they wish, however there are certain factors that can constitute a challenge to their testamentary freedom. These factors cut across statutory provisions, customary practices and religious dictates.

In conclusion, succession is a process, a will is an instrument for the conveying of the wishes of a testator or testatrix, testamentary capacity refers to the ability to make a will. Testamentary disposition refers to the act of disposing estate to the beneficiaries of a will while testamentary freedom is the ability to freely dispose an estate. Dispositions in a will are only valid if the will that they are contained is valid

CHAPTER THREE

3.1 HISTORICAL EVOLUTION OF TESTAMENTARY SUCCESSION IN NIGERIA

Testamentary disposition is rooted in succession and the historical evolution of testamentary disposition would not be completed without a brief preamble about succession.

Succession is as old as mankind. God gave Adam and Eve the garden of Eden for them and their descendants to enjoy. When they were chased out of the garden due to their disobedience, they were allowed to still occupy other parts of the earth. In the book of Genesis, God promised the patriarch Abraham a land flowing with milk and honey for him and his descendants through Isaac his beloved son to occupy till the end of time.⁷⁹ The bible throughout the books of the old testament records different stories of succession.⁸⁰ This goes to say that succession is divinely ordained and it is the natural order of things that a person would be succeeded by another.

There are two forms of succession, intestate and testate succession.⁸¹ Intestate succession is older than testate succession. It is when a person disposes their estate without the use of a will. In traditional African societies, intestate succession was used to determine who gets what from an estate. Most African societies are patriarchal and primogeniture was recognized as well.⁸² Due to the patriarchal nature of these societies, women were excluded from inheriting the properties of their father (father is used because in those societies, women were often excluded from owning property, therefore a mother usually did not have realty to give).⁸³ The first son was given priority over others in these societies, this practice is known as primogeniture. In

⁷⁹ Genesis 12:7

⁸⁰ Numbers 36:1-12

⁸¹ Supra

⁸² Supra

⁸³ Ekwutosi Etim Essien Effioing; Eyo Itam Eyo ; Assibong Essien Pinisi Journal of Arts , Humanity and Social Studies Vol 1 No 4 2021
<<https://ojs.unm.ac.id/PJAHSS/article/viewFile/26708/13541#:~:text=In%20a%20patriarchal%20system%20such,of%20sex%20to%20an%20end.>> Accessed 17 November 2025

other societies however, women were allowed to hold property, these kinds of societies were usually matriarchal and women had important offices, could carry out trade and participate in public life. Intestate succession is governed by the personal law of the deceased while his landed property is governed by “*lex situs*”, the law of the land that the property is located.⁸⁴ Even with the advent of testate succession, some people still fail to take advantage of modern means of disposing their estate.

Testate succession on the other hand, refers to the use of a valid instrument known as a will to dispose an estate. A will is the final testament of a person indicating how he wants the estate to be administered upon his demise. Testamentary succession has evolved across the ages, cutting across different civilizations. In the Egyptian civilization,⁸⁵ property rights and succession were heavily controlled by religion and royal authority. While there is limited evidence of formal wills, records suggest that property could be bequeathed within families, especially among elites

In the ancient Mesopotamian civilization,⁸⁶ the Code of Hammurabi (c. 1754 BC) recognized inheritance and succession. Property could be transferred through instructions given before death, akin to a will, especially among the ruling and wealthy class. The early Grecian society, was based on family inheritance and testamentary freedom was limited. Over time, especially in Athens, the law evolved to allow citizens (particularly males without children) to make wills. Solon’s reforms (6th century BC) enabled male citizens to dispose estate to non-relatives if they had no direct heirs.

⁸⁴ Olowu v Olowu (1985)3 NWLR (Pt 13)372

⁸⁵ NJ Van Blerk The Basic Tenets of Intestate (Customary) Succession Law in Ancient Egypt (2019) *Fundamina*,25,1

⁸⁶ Richard N Frye, Wolfram Th Von Soden *An Article on the History of Mesopotamia Encyclopedia Britannica* < <https://www.britannica.com/place/Mesopotamia-historical-region-Asia>> accessed 14 August 2025

Rome,⁸⁷ had the most influential testamentary system in antiquity. Testamentum (will) was a formal, legally binding document. Testamentary succession was regulated under the Twelve Tables (450 BC) and later under Justinian's Corpus "Juris Civilis". Roman law introduced the concept of testamentary freedom allowing a testator significant control over estate disposition. Roman wills could appoint heirs (heredes) and legatees, and even liberate slaves or adopt heirs.

During the medieval era, feudal Europe inheritance was largely governed by Customary law and primogeniture (eldest son inheriting).⁸⁸ Testamentary freedom was limited, especially for landed property. Church courts played a major role in administering wills and probate. In England, wills of personal property were allowed earlier, while land was tied to feudal obligations.

For Muslims, the Qur'an provides detailed rules on inheritance.⁸⁹ Testamentary freedom is restricted to one-third of the estate, the rest being distributed mandatorily according to Islamic inheritance rules (fara'id).⁹⁰

In contemporary times, under the English Common Law,⁹¹ The Statute of Wills (1540, under Henry VIII) was enacted to Englishmen to devise land by will. The Wills Act of 1837 standardized will-making procedures in England and influenced other common law jurisdictions. Testamentary freedom became a hallmark of English succession law, though subject to limits such as the Inheritance (Provision for Family and Dependents) Act 1975.

Nigeria was colonized by the British and the application of the Wills Act in Nigeria is a product of colonial legal influence and the subsequent integration of received English law into Nigeria's

⁸⁷ Jane F Gardner *Family and Familia in Roman Law and Life* (Oxford, Clarendon Press 1988) Pg 84-112

⁸⁸ Marc Bloch *Feudal Society* Vol 1 (Routledge and Keagan Paul, 1961) Pg 187-210

⁸⁹ Surah 4:11-12

⁹⁰ Supra

⁹¹ J H Baker *An Introduction to English Legal History* (Oxford University Press 2019) Pg 282- 291

legal system.⁹² The foundational legal basis for the introduction of the Wills Act into Nigeria is rooted in the of application of statutes of general application in force in England as at 1 January 1900, as provided for under colonial instruments such as the Supreme Court Ordinance 1876 and later under section 45 of the Interpretation Act.⁹³

The Wills Act 1837,⁹⁴ was part of the received English statutes in Nigeria. This Act set out the formal requirements for the making of a valid will, such as writing, signature, and attestation by witnesses. It was brought into Nigerian legal landscape through colonial legislation allowing the application of English laws that were of general application and not repugnant to natural justice, equity, and good conscience. The Wills Amendment Act 1861 (Lord Kingsdown's Act). The Wills Amendment Act 1861, commonly referred to as Lord Kingsdown's Act, was also made applicable. This Act permitted a British subject domiciled in a colony to dispose of movable property in accordance with the law of their domicile, rather than English law. This became relevant in Nigeria, especially for colonial administrators and settlers. After independence, many states in Nigeria enacted their own Wills Laws, which retained the framework of the Wills Act 1837 but included modifications to accommodate local customs and religious realities. For example, the Wills Law of Lagos State 1991,⁹⁵ and the Wills Law of Western Nigeria 1959, (applicable in states like Oyo, Ondo, and Osun) regulate testamentary disposition within those jurisdictions.⁹⁶

⁹² AO Obilade *The Nigerian Legal System* [Spectrum Books 2005]120-125

⁹³ section 45 of the Interpretation Act, Cap 123, Laws of the Federation of Nigeria 2004.

⁹⁴ Ibid

⁹⁵ Supra

⁹⁶ Supra

Nigerian courts have consistently affirmed the application of the Wills Act and its local adaptations. The judiciary has upheld testamentary freedom subject to limitations imposed by statute, religious dictates and customary demands.

Despite the widespread application of the Wills Act, customary law remains significant, particularly in relation to the devolution of family property or ancestral land. Some customary practices do not recognize the absolute freedom of a testator to dispose of such property by will. In *Nezianya v Okagbue*⁹⁷, the court held that property subject to customary law could not be freely devised contrary to customary norms.

In conclusion, Nigeria operates a plural legal system, English law, customary law, and Islamic law due to its colonial history.⁹⁸ The sources of Nigerian law are many due to colonial rule, therefore the common law rules, the doctrines of equity and statutes of general application up to the 1990 are applicable in Nigeria.⁹⁹ Due to this trite principle, the extant law that governs testamentary succession in Nigeria is the Wills Act of 1837 as well as the various state Wills law. In states that made up the old Western region, the extant legislation is Wills law of Western region 1959, this law is applicable to all states that made up the former Western region excluding Lagos. Lagos states also have their Wills law. In states where there is no Wills law then, the Wills Act being a federal law will apply.

Testamentary succession has evolved over the years, from being controlled by religion and the royal class, to slight freedom to dispose property freely. It has evolved to its present form, a matter that an individual can do voluntarily.

⁹⁷ (1963)1 All NLR 352

⁹⁸ *supra*

⁹⁹ *supra*

3.2 PRINCIPLES UNDERPINNING TESTAMENTARY SUCCESSION

Testamentary disposition, primarily through a will, is underpinned by several fundamental principles that aim to balance testamentary freedom with customary norms, statutory provisions and religious dictates. These principles, while generally consistent in Nigeria, can have limitations depending on the specific jurisdiction (that is the influence of customary/religious laws as seen in Nigeria).

TESTAMENTARY FREEDOM

This is the most fundamental principle. It asserts the right of the testator or testatrix to freely dispose of their property as they see fit after their death. They have the liberty to choose their beneficiaries, the share each receives, and even to disinherit certain individuals (though this freedom can be limited by legal provisions for dependents as seen in the Wills law of some states like Rivers and Lagos). The logic behind this is the promotion of individual autonomy, encouragement of estate creation and preservation, while allowing them to provide for their dependents. While this freedom is broad, it is not absolute. It is often curtailed by:

- I) Religious laws (like Islamic law in Nigeria), certain family members (e.g., children, wife or wives have a legal right to a fixed portion of the estate, regardless of the provisions of a will.¹⁰⁰
- II) Statutory Provisions: In Nigeria, the Wills Laws of Lagos state and the Wills law of Rivers state, courts can override a will if it fails to make "reasonable financial provision" for certain dependents (spouses, siblings, parents and children). In the case of *Bankole v Bankole*¹⁰¹, The Supreme Court of Nigeria upheld the principle that a person has the right to dispose of their property as they please under a valid will, subject to statutory limitations.

¹⁰⁰ Supra
¹⁰¹ (1969)All NLR 385

III) Customary norms: Under the Benin customary system, a person cannot validly will his principal house known as the "Igiogbe " to anyone asides from his eldest surviving son.¹⁰² Similarly under the Igbo customary system, a testator cannot will his "Obi" to anyone else asides his first son. In the case of *Lawal Osula v Lawal Osula*,¹⁰³ the will was invalidated on the ground that the testator willed the principal house to someone else instead of his eldest surviving son.

REVOCABILITY

A will is revocable, the testator or testatrix can revoke a will validly during their lifetime as it takes effect after their death. This preserves the testator's autonomy and allows them to adapt the will to changes in their lives.

Revocation can occur through:¹⁰⁴

I) Making a new, valid will or codicil (an amendment to a will). The intention to revoke the will must be clear. In the case where the words of revocation are not clear, the earlier will remains valid.¹⁰⁵

II) Physical destruction of the will with the intention to revoke it. The destruction can be through burning, tearing, or otherwise destroying the will with intention to revoke it. For the destruction of a will to be valid, two conditions must be satisfied; acts of sufficient destruction and the intention to destroy the will. Both conditions must be satisfied for the will to be deemed as destroyed.¹⁰⁶ In *Cheese v Lovejoy*¹⁰⁷, the testator drew a line across the will and wrote

¹⁰² Supra

¹⁰³ [1995]9 NWLR part 419 ,259

¹⁰⁴ Yusuf Yilzum Dadem *Property Law Practice in Nigeria* (Jos University Press Limited 2022) Pg 308-310

¹⁰⁵ Ibid

¹⁰⁶ Supra

¹⁰⁷ (1938) 2 ALL ER 345

"revoked" then squeezed it and threw it into the bin. His maid found it and returned it to the table where it remained until his death. The court held that there was no destruction of the will.

- II) In Nigeria, a statutory marriage generally revokes a previous will, unless made in contemplation of that marriage). In *Adekoya v. Adekoya*¹⁰⁸, the revocability of a Will by the act of a statutory marriage was affirmed. A will can be revoked during the testator's lifetime by specific means.

TESTAMENTARY CAPACITY

For a disposition to be valid, the testator must have the mental capacity to understand the nature and effect of their act when they make the will.¹⁰⁹ This means they must:

- I) Understand that they are making a document to dispose of their property after death.
- II) Know the extent of the property they are disposing of.
- III) Know the beneficiaries of the will
- IV) Not be suffering from any delusion or disorder of the mind that influences their disposition.

Old age or weakness due to illness does not count as mental illness.¹¹⁰ Also a person must be an infant, under the Wills Act a person below 21 cannot make a valid will while under the Wills law of Lagos state, a person below 18 cannot make a will. Besides mental capacity, a person making a will should be of full age to make a will. The testator must be of age as approved by the relevant wills Law. Under the Wills Act, the legal age is 21, however under the Wills Law

¹⁰⁸ [2004]6 NWLR (870)476

¹⁰⁹ Supra

¹¹⁰ Supra

of different states, the age varies.¹¹¹ In Lagos State, the legal age is 18, In Kaduna, Abia and Oyo, the legal age is 18.¹¹² There are other factors that can impinge capacity:

I) Lack of knowledge and approval: The testator must be aware and approve of the contents of the will before its execution.¹¹³ In *Okelola v Boyle*, the court noted that "it is essential to the validity of will that the testator should know and approve of the contents of the will".¹¹⁴ Where it can be proved that the will was made without the knowledge of the testator, then the will can be declared invalid.¹¹⁵

II) Suspicious circumstances: Circumstances which may appear suspicious can affect the validity of a will.¹¹⁶ Some of these circumstances which arise to raise suspicion include a substantial gift made to a solicitor who prepares a will raises serious suspicion.¹¹⁷ Also where a will is made for the benefit of the relative of the solicitor can raise suspicions.¹¹⁸ In *Thomas v Jones*¹¹⁹, the will failed because substantial benefits were given to the daughter of the solicitor who prepared the will.

FORMALITIES OF EXECUTION

To ensure authenticity, and reflect the solemn nature of a will, specific legal formalities must be strictly adhered to during its execution. These formalities are

I) Writing: The will must be in writing.

¹¹¹ Section 7 Wills Act

¹¹² Section 3 Wills Law Lagos State, Section 6 Wills Law of Kaduna State, Section 5 Wills Law of Abia State and Section 5 Wills Law of Oyo State

¹¹³ Supra

¹¹⁴ Supra

¹¹⁵ Supra

¹¹⁶ Supra

¹¹⁷ Supra

¹¹⁸ Supra

¹¹⁹ (1928) Ch.126

II) Signature of Testator: The will must be signed by the testator or testatrix.

III) Attestation by Witnesses: The testator's signature must be made or acknowledged in the presence of witnesses usually two, who then sign the will in the testator's presence.

In *Okelola v. Boyle*¹²⁰, the Supreme Court affirmed that failure to comply with formalities under the Wills Law renders a will invalid. Section 4 Wills Law of Lagos State requires the will to be in writing, signed by the testator, and witnessed by at least two persons.¹²¹ However, the court in some cases can uphold a will if there was a clear intention to make a will.

VOLUNTARINESS

A will must be made voluntarily, without undue influence, fraud, duress. This principle ensures the true intentions of the testator are reflected in the will. In *Obi v Obi*¹²², the Court of Appeal emphasized that undue influence vitiates a will and makes it void. The general rule under the law of wills (common law and equity) recognizes that fraud and undue influence invalidate a will. There must be a genuine intent to make a testamentary instrument as held by the court in *Okafor v Okafor*¹²³.

These principles, particularly testamentary freedom and the strict adherence to formalities, form the bedrock of testamentary disposition in modern legal systems. In Nigeria, the application of these principles is further influenced by the co-existence of statutory law (largely based on English common law), customary law, and Islamic law, each with its own specific rules and limitations on testamentary capacity and freedom, the Wills Law of Lagos State (1991)

¹²⁰ [1982] 2 NWLR (pt 539) pg 533

¹²¹ Section 4 Wills Law of Lagos state

¹²² [2006] 10 NWLR (pt 987) Pg 123

¹²³ (2016) LPELR-41066

and the Wills Law of Western Nigeria (1959) (applicable in states like Oyo, Ondo, and Osun) regulate testamentary disposition within those jurisdictions.

Nigerian courts have consistently affirmed the application of the Wills Act and its local adaptations. The judiciary has upheld testamentary freedom subject to limitations imposed by statute, religion and customary practice.

Despite the widespread application of the Wills Act, customary law remains significant, particularly in relation to the devolution of family property or ancestral land. Some customary practices do not recognize the absolute freedom of a testator to dispose of such property by will.

In *Nezianya v Okagbue*¹²⁴, the court held that property subject to customary law could not be freely devised contrary to customary norms. The application of the Wills Act in Nigeria has evolved from colonial imposition to local adaptation. While the core elements of the Wills Act 1837 remain central to testamentary law in Nigeria, its operation is often subject to modifications through local statutes and tempered by the enduring influence of customary law.

Nigeria operates a plural legal system, English law, customary law, and Islamic law due to her colonial history. The sources of Nigerian law are many due to colonial rule, therefore the common law rules, the doctrines of equity and statutes of general application up to the 1990 are applicable in Nigeria.¹²⁵ Due to this trite principle, the extant law that governs testamentary succession in Nigeria is the Wills Act of 1837 as well as the various state Wills law. In states that made up the old Western region, the extant legislation is Wills law of Western region 1959, this law is applicable to all states that made up the former Western region excluding Lagos.

¹²⁴ Supra

¹²⁵ Supra

Lagos states also have their Wills law. In states where there is no Wills law then, the Wills Act being a federal law will apply. Testamentary succession has evolved over the years, from being controlled by religion and the royal class, to slight freedom to dispose property freely. It has evolved to being a matter that an individual can do voluntarily.

These principles, particularly testamentary freedom and the strict adherence to formalities, form the bedrock of testamentary disposition in modern legal systems. In Nigeria, the application of these principles is further influenced by the co-existence of statutory law (largely based on English common law), customary law, and Islamic law, each with its own specific rules and limitations on testamentary capacity and freedom.

CHAPTER FOUR

WILLS LAW IN NIGERIA

4.0 THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (AS AMENDED):

The 1999 Constitution of the Federal Republic of Nigeria is the grundnorm or the foundation of other laws.¹²⁶ It is from the Constitution that other laws derived their validity. Section 1(1)

This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.¹²⁷

This opening subsection provides the foundation for the constitution as the primary and supreme law of the Federal Republic of Nigeria. Subsection (2) further emphasize on the primacy of the constitution by stating that "The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution".¹²⁸

Subsection 3 lays down the inconsistency rule.¹²⁹ It states that 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'.

This section established the basis of the superiority of the Constitution. Any other legislation made that is inconsistent with the constitution is to the point of its inconsistency void. The constitution entrenches inalienable human rights, these rights guarantee certain freedoms. These rights are contained in Section 33-46 of the 1999 Constitution.¹³⁰ Section 33 specifically

¹²⁶ Section 1(1) 1999 Constitution Of The Federal Republic of Nigeria

¹²⁷ Ibid

¹²⁸ Section 1 (2) 1999 Constitution Of The Federal Republic of Nigeria

¹²⁹ Section 1(3) 1999 Constitution Of The Federal Republic of Nigeria

¹³⁰ Section 33-37 1999 Constitution Of The Federal Republic of Nigeria

provides for the right to life.¹³¹ Only a living person can acquire property. Section 43 provides for the right to own movable and immovable property.¹³²

Only a person that has title to an estate can successfully make a devise. This directly relates to section 43 of the constitution .¹³³

4.1 WILLS ACT (1837)

The Wills Act is a statute of general application. It is the bedrock of testamentary succession in Nigeria. It introduced the use of will making in the the determination of an estate upon the death of a person known as a testator or testatrix. The Wills Act as well as the common law and doctrines of equity are colonial legacies in the Nigerian Legal system.¹³⁴

The Wills Act as well as other statutes of general application were received by virtue of Interpretation Act, Cap. I23, Laws of the Federation of Nigeria 2004, Section 45(1).¹³⁵ The Wills Act gives the first framework for testamentary disposition in Nigeria. Section 3 states that,

"It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to at the time of his death'.¹³⁶

This section bestows testamentary freedom on anyone that decides to make a will subject to the requirements of a valid will. This freedom as granted by the act bestows power to devise or bequest property both personalty and realty.¹³⁷ Testamentary freedom as guaranteed by

¹³¹ Section 33 1999 Constitution Of The Federal Republic Of Nigeria

¹³² Section 43 1999 Constitution of The Federal Republic of Nigeria

¹³³ Supra

¹³⁴ Supra

¹³⁵ Interpretation Act ,CAP 123,Laws of the Federation of Nigeria,2004.

¹³⁶ Wills Act 1837(United Kingdom)

¹³⁷ Ibid

section 3 however subject to adherence to the formalities stated in Section 9 and Section 11.¹³⁸

Section 9 (as amended by the Administration of Justice Act 1982). “No will shall be valid unless:

- (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction;
- (b) it appears that the testator intended by his signature to give effect to the will;
- (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) each witness either—
 - (i) attests and signs the will; or
 - (ii) acknowledges his signature,

in the presence of the testator (but not necessarily in the presence of any other witness).”

By the provisions of this section, it can be gleaned that a will is valid if it is

I) It is written: A valid will has to be written. It may be handwritten or typed. The requirements of writing is one of the distinguishing characteristics between a will and a nuncupative will.

II) It is signed: A signature may be an initial, cross, a rubber stamp, a name, signature or full name by which a person uses in signing a document and letter. A signature should be complete, however if the court is satisfied that a partial signature represents the wishes of the

¹³⁸

Ibid

testator, it will still be valid. This rule was judicially upheld in *Chalcraft, Charcraft v Giles*¹³⁹, where the testator signed as 'E Chal' instead of 'E. Charcraft'. This was accepted by the court as a signature. Originally, the signature must be made at the foot or end of the will and any will that did not comply with this requirement was invalid. However, this was modified by the Wills Act Amendment of 1852 and also other legislation of the states in Nigeria that have enacted their Wills Laws. But in all cases the testator must sign before the witnesses. In order to prevent fraud, any disposition which is underneath a signature is void.

III) It is attested to by two or more witnesses: Attestation is an integral aspect of drafting. The signature of the testator must be made or acknowledged by him in the presence of at least two witnesses who must be present at the same time.¹⁴⁰ The minimum number of witnesses is two and there is no limit on the maximum number. In *Ize Iyamu v Alonge*¹⁴¹, the court held that the attestation clause in a will is the clause where the witnesses to the will certify that the will has been executed before them and state the manner of the execution same. Where the testator does not make his signature in the presence of the witnesses, he could acknowledge his signature in their joint presence. No definite words are needed to acknowledge the signature. Where the testator or testatrix makes a signature in the presence of witnesses, the witnesses must be present at the same time even though they may not be present when each of them is signing. This means that both witnesses may not sign at the same time but they must attest to the signature of the testator or testatrix at the same time, it is a joint and simultaneous process.¹⁴²

¹³⁹ (1948) 1 AC 700

¹⁴⁰ Yusuf Yilzum Dadem *Property Law Practice In Nigeria* (Jos University Press) Pg283

¹⁴¹ (2007) ALL FWLR ,part 371, 1570

¹⁴² Supra

There is an exception to the rule in Section 9.¹⁴³ Section 11 is an exception to the rule stated in Section 9, this section allows a special set of persons to make wills that fall short of the requirements in section 9.¹⁴⁴ The section reads thus

"Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

This section makes an exception for certain individuals from following the strict process stated in Section 9 of the Act. It applies to:

- I) Soldiers in actual military service (e.g., on the battlefield), and
- II) Mariners or seamen being at sea.

This type of will as provided for in this section is known as a privileged will. The privilege according to Dadem, means that such persons can make wills without the required formalities that is required of a normal will.¹⁴⁵ The rationale for this privilege is that due to the nature of the job of this class of people, they may not have the time to make a proper will.¹⁴⁶

The Wills Act formed the basis for will writing in Nigeria and it would be rather uncanny to downplay its relevance in the Nigerian Legal system on the basis of it's being received English law.

4.2 WILLS LAW OF LAGOS STATE

The Wills Law of Lagos state is a statute that governs the act of testamentary succession in Lagos state. It was enacted by the House of Assembly in Lagos state to regulate will making.

¹⁴³ Section 9 Will Act (United Kingdom)

¹⁴⁴ Section 11 Wills Act 1837 (United Kingdom)

¹⁴⁵ *supra*

¹⁴⁶ *Supra*

Section 1 of this act recognizes the power of the testator to make wills.¹⁴⁷ The section states that

“Subject to any customary law relating thereto, it shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with this Law, all property to which he is entitled, either in law or in equity, at the time of his death: Provided that the provisions of this Law shall not apply to the will of a person who at the time of his death is subject to Islamic Law.”

The section recognizes the right of individuals to dispose of their property by will, in accordance with the law.

It also goes further to covers both legal and equitable interests in property while recognizing customary limitations. It expressly excludes Muslims whose personal law (Islamic law) governs succession matters at death.

Section 15 of this act provides for the provision for Family and Dependents) states:¹⁴⁸

If a person dies and is survived by any of the following:

the wife or wives or husband, children, parents, and the court is satisfied that the disposition of the deceased’s estate (by will or otherwise) does not make reasonable provision for them, the court may order that such reasonable provision be made out of the deceased’s estate for their maintenance.

The main objective of this section is social justice and family welfare. It tries to ensure that dependents of a testator are not left impoverished by the decision of the testator. A person who

¹⁴⁷ Wills Law of Lagos State, Cap W2, Laws of Lagos State 2015

¹⁴⁸ Section 15 Wills Law of Lagos state Cap.W2, Laws of Lagos State,2015.

was previously maintained by the deceased can apply to the court to make reasonable financial provision for them from the estate. This section covers for spouses, parents and children of the deceased. The court can override the intentions of the testator only to the extent of making reasonable financial provisions for his dependents. This section limits testamentary freedom by forcing the hand of a testator or testatrix to make reasonable provisions for their dependents upon their demise.¹⁴⁹

4.3 WILLS LAW OF WESTERN REGION (1959)

The Wills Law of Western Region was enacted by the regional parliament of western Nigeria pre independence in a bold attempt to enact their own laws instead of just receiving English law directly. This act covers states formerly under the Western region of Nigeria and they are all Western states in Nigeria as well as Edo and Delta states, however this law is not applicable in Lagos as it was not part of the old Western region. Section 2 of this statute, recognizes testamentary freedom.¹⁵⁰

It states that

"It shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with this law, all property to which he is entitled, either in law or in equity, at the time of his death:

Provided that the provisions of this law shall not apply to the will of a person who agrees the time of his death is subject to Islamic law."

¹⁴⁹ Yusuf Yilzum Dadem *Property Law Practice in Nigeria* (Jos University Press Limited 2022)

¹⁵⁰ Wills Law of Western Region of Nigeria (Cap 133, Laws of Western Region 1959)

The provisions of this section recognizes freedom in testamentary disposition. It covers both legal and equitable interests. However, it excludes persons subject to Islamic law at the time of death.

Section 18 provides that

Where a person dies leaving a wife or wives or husband or a child ,or a parent and the court is of the opinion that the disposition if the deceased estate effected by his will is not such as to make a reasonable provision for the maintenance of that wife or those wives or husband ,or that child or that parent ,the court may order that such reasonable provision as it thinks fit shall be made out of the deceased 's estate for the maintenance of that wife or those wives or husband or that child ,or that parent ."¹⁵¹

This section protects dependents of the deceased. The dependents included in the section includes spouses (wife/wives or husband), children, and parents. Just like similar provision in the Wills Law of Lagos state, the law tries to protect the interest of the people that depended on the testator or testarix before their demise.¹⁵²

4.4 WILLS LAW OF RIVERS STATE

The Wills Law of Rivers state is the extant law governing will making in Rivers state. It preserves testamentary freedom under Section 1 which is similar to the Wills Law of Lagos state and the Wills Law of Western Region.¹⁵³

Section 1 states that

¹⁵¹ Wills Law of Western Region of Nigeria (Cap 133, Laws of Western Region 1959)

¹⁵² Supra

¹⁵³ Wills Law of Rivers State Cap 151, Laws of Rivers State 1999

"Subject to any customary law relating thereto, it shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with this Law, all property to which he is entitled, either in law or in equity, at the time of his death. Provided that the provisions of this Law shall not apply to the will of a person who at the time of his death is subject to Islamic law."

Just like similar provisions in the Wills Law of Lagos state and the Wills Law of Western Region, this legislation protects testamentary freedom to dispose of property by will.

It covers both legal and equitable interests while making customary law applicable in relevant cases. Finally, it excludes Muslims whose succession is governed by Islamic law.

Just like similar provisions in the Wills Law of Western Region and the Wills Law of Lagos state, this statute tries to ensure that the dependents of the deceased are amply cared for in the will. Section 18 of the Wills Law of Rivers State provides,¹⁵⁴

“Where a person dies leaving a wife or wives or husband, or a child, or a parent, and the court is of the opinion that the disposition of the deceased’s estate effected by his will is not such as to make reasonable provision for the maintenance of that wife or those wives or husband, or that child, or that parent, the court may order that such reasonable provision as it thinks fit shall be made out of the deceased’s estate for the maintenance of that wife or those wives or husband, or that child, or that parent.”

This section operates as a statutory limit on testamentary freedom. It protects spouses, children, and parents from inadequate provision in a will. It gives the court discretion to order reasonable

¹⁵⁴ Section 18 Wills Law of Rivers State Cap 151, Laws of Rivers State 1999

financial provision. It is worded identically to Section 18 of the Wills Law of Western Region and mirrors Section 15 of the Wills Law of Lagos State.¹⁵⁵

4.5 ADMINISTRATION OF ESTATES LAW OF ENUGU STATE

Although Enugu State does not have a specific Wills Law, it relies on the Administration of Estates Law, Cap. 4, Revised Laws of Enugu State 2004.¹⁵⁶ This law primarily governs testate succession but becomes relevant when certain parts of the estate fall outside the scope of a will or where the will is contested. Under this law, Section 49 provides a distribution framework for estates not effectively disposed of by will. Furthermore, the law supports equitable distribution and upholds the interests of the surviving spouse, children, and other dependents. By implication, this restricts a testator's freedom where a will is found to be invalid or does not cover all the estate.¹⁵⁷

From the provisions of the aforementioned statutes, a recurrent factor is reasonable financial provision, the test for determining reasonable financial provisions is objective "from the point of view of the court and not subjectively from the point of view of the deceased". In *Re Coventry*¹⁵⁸, the court held that the provision is not intended to keep the applicant above the "breadline" but must be one that is reasonable in all circumstances of the case to enable the applicant maintain himself in a manner suitable to those circumstances.

Due to the cultural realities of the Nigerian society, it would be out of touch if the law does not guarantee a form of protection for the dependents of a deceased person under his or her will. Law in most cases reflects the wishes of the society that it governs and it would be misguided if there is no law that guarantees ample provisions for dependents. From the foregoing statutes,

¹⁵⁵ Section 18 Wills Law of Rivers State Cap 151, Laws of Rivers State 1999

¹⁵⁶ Administration of Estates Law, Cap 4, Revised Laws of Enugu State 2004

¹⁵⁷ Supra

¹⁵⁸ (1980) CH 461

it is clear that while Nigerian laws are rooted in English legal tradition which emphasizes testamentary freedom, they impose important restrictions to protect the welfare of dependents. Statutory provisions across the Wills Act 1837, Wills Laws of Lagos, Rivers, and Western Region, as well as the Administration of Estates Law in Enugu State, reflect a unified policy goal: the prevention of disinheritance of vulnerable family members.¹⁵⁹

¹⁵⁹

Supra

CHAPTER FIVE

CHALLENGES TO ENFORCEMENT AND APPLICATION

5.1 CHALLENGES ASSOCIATED WITH TESTAMENTARY FREEDOM

Like every legal rule, there are exceptions to testamentary freedom like other legal rules have exceptions to it. Testamentary freedom is not an absolute freedom. There are essential factors that checks its absoluteness. These factors aim to balance individual autonomy and compliance with statutory provisions, religious dictates and customary norms. One may wonder, are these fetters to testamentary freedom necessary? Shouldn't a person be allowed to freely make their will the way they see fit? This chapter explains the various restrictions to testamentary freedom and the reason why testamentary freedom should not be absolute and why it should be regulated.

5.1.1 CULTURAL BARRIER

To the layman, culture can be defined as a whole way of life of a group of people. It consists of their language, food, customs, dressing and laws. An important aspect of cultural influence on the legal system is seen in customary law. The term customary law has been defined by legal scholars and jurists alike. In *oyewumi v Ogunnesan*¹⁶⁰, customary law was defined as " the organic living law of the people regulating their lives and transactions". In *Lewis v Bankole*¹⁶¹, customary law was defined as "the unwritten law recognized by the members of the community". Obilade defined customary law as, the body of customs accepted by members of a community as binding among them and regulating their relations with one another".¹⁶² Allot also defined customary law as, the body of rules which are accepted as binding by members of

¹⁶⁰ [1990] 3 NWLR (PT 137) 182 at 207

¹⁶¹ (1908) 1 NLR 81

¹⁶² Supra

a community in their dealings with each other and which are usually transmitted from generation to generation.¹⁶³ From these definitions, it can be gleaned that customary Law is

- I) Binding on members of the community that subscribes to it.
- II) Organic and it derives its validity from the people.
- III) Taken as a mirror of accepted usage not a custom of days gone by.

Custom is one of the fetters on testamentary freedom. The Benin and Igbo cultural practices will be used to illustrate this point. Under the Benin customary system, the principal house also known as the "Igiogbe" is a sacred and cannot be deposed in a manner inconsistent with the Benin cultural practice. The term Igiogbe refers to the principal house of the deceased. The eldest surviving son must perform the second and final burial rites before he can inherit the principal house. It cannot be validly disposed to anyone else except the first son as prescribed by custom, this custom was given judicial blessing in the case of *Lawal Osula v Lawal Osula*¹⁶⁴, where it was held that a person cannot validly dispose the "Igiogbe" to anyone else besides the eldest surviving son. The gifting of the Igiogbe to one of the wives by the deceased testator was held to be invalid as it contravened the Benin customary practice. The wishes of the testator do not matter, the principal house must go to the eldest surviving son. However, in *Aiguokunrueghian v Imaruagheru*¹⁶⁵.it was stated that for the Igiogbe to be fully vested in the eldest surviving son, it matters that the son must have performed not just the first burial rites but the second and final burial rites of the deceased testator. If the first son is unable to perform

¹⁶³ Supra
¹⁶⁴ Supra
¹⁶⁵ [1995] 9 NWLR PT 419 p 259

this burial rites before his death, the Igiogbe will vest on the second son who performs the final burial rites being the eldest surviving son and not on the children of the first son.¹⁶⁶

Among the Igbos, the rule of primogeniture exists. The eldest son also known as the Okpara inherits the estate and holds it in trust for his siblings. His siblings have to depend on his magnanimity. This culture most times disinherits the female children of the testator. In *Asika v Atuanya*¹⁶⁷, the decision of the court mirrored the mind of the court towards a culture that disinherits a person on the basis of gender. This culture was said to be in direct contravention of Section 41 of the constitution that grants the right to freedom from discrimination on the basis of gender.¹⁶⁸ Similar decision includes the decision of the court in *Mojekwu v Mojekwu*¹⁶⁹. This culture of primogeniture was held to be against equity, good conscience and public policy hence the need for the court to put its iron foot down against it.

Also, in some customary societies in Nigeria,¹⁷⁰ a father is forbidden from selling the family homestead without the consent of his children. This custom prevents the father from depriving the children of their inheritance by making a sale during his life time.

5.1.2 RELIGIOUS FETTERS

Religion has a major impact on the life of an average Nigerian. From the day he is born till the day he dies, religion dictates how he carries out certain life functions. From the way he is named to the way he is buried, religion determines how his life will go. Religion like other areas of life has been subject to erudition by different scholars. According to Tylor, religion is the belief in spiritual beings.¹⁷¹ To Frazer, a comparative religious scholar, religion consists of

¹⁶⁶ Ibid

¹⁶⁷ (2014) AFWLR, part 710, p1251

¹⁶⁸ Section 41 1999 Constitution of The Federal Republic Of Nigeria

¹⁶⁹ [1997] 7 NWLR ,Part 512,p 283

¹⁷⁰ Supra

¹⁷¹ E.B Tylor Primitive Culture (London, John Murray) 1871

a propiation or conciliation of powers superior to man which are believed to direct and control the course of nature and human life.¹⁷²

Religion can be defined as a system of beliefs that guides human actions towards the supernatural.¹⁷³

There are three major religions in Nigeria; Christianity, Islam and African traditional religion (ATR). These religions guide the attitude of their adherents. In Christianity, the Bible mandates that a man should take care of his family. The Bible also mentions in the Old testament how property should be shared. It also tries to factor in women in the equitable sharing of inheritance.¹⁷⁴

Islam on the other hand, especially as practiced among the Muslims of the Maliki school, a man's estate upon his death, is divided into twenty-four parts. His widow or widows as the case maybe receive three parts while his surviving parents receive four parts. The remaining estate is distributed among his children. His sons receive equal shares while the daughters receive half of what the sons receive. In *Adesuobokan v Yinusa*¹⁷⁵, a Muslim testaor from Lagos state that was subject to the Maliki school of Islam, his will according to the Wills Act. The will was challenged for not making certain dispositions to certain members of the testator's family. At the trial court, it was held that the testator could not validly dispose more than one - third of the estate to persons who were not his heirs and the Wills Act could not override Islamic inheritance laws. The Supreme court however overruled this judgement and held that stated that the Wills Act prevailed over any native law and custom (which Islamic law was equated with).

¹⁷² James Frazer The Golden Bough, *A Study in Magic and Religion* (Macmillian London)

¹⁷³ Ibid

¹⁷⁴ Numbers 27:1-11 New International Version

¹⁷⁵ (1971) 1 ANLR 225

Dadem posits that it is perhaps in response to this unfettered right of disposing properties as approved in *Adesuobokan v Yinusa*¹⁷⁶, that the current restriction based on Islamic law emerged to curtail the right of a person subject to Islamic law to freely dispose his estate as he wishes.¹⁷⁷

In the Wills law of different states of the federation particularly in states where Muslims are predominantly found,¹⁷⁸ you can find this restriction in Section 2 Wills Law of Kaduna State which reads thus¹⁷⁹

"It shall be lawful for every person to bequeath or dispose of by his will executed in accordance with the provisions of this law, all property to which he is entitled either in law or in equity, at the time of his death, provided that the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic law."

From the provisions of this section, it can be gleaned that

- I) A person has the right to make a will under the Act.
- II) This right however does not extend to a person who immediately before his death was subject to Islamic law.

From this section, it can be gleaned that a person may not have been a subject to Islamic law earlier but immediately before his death he was subject, then the restriction will apply. Dadem further posits that if on the contrary, a person is subject to Islamic law most of his life but "immediately " before his death he ceased to be a Muslim then the restriction will not apply.¹⁸⁰

¹⁷⁶ Ibid

¹⁷⁷ Supra

¹⁷⁸ Section 2 Wills Law of Kaduna State, Section 3(1)(B) Wills Edict Oyo State, 1990, The Jigawa State Wills Law, Cap 155, Laws of Jigawa State

¹⁷⁹ Ibid

¹⁸⁰ Supra

In *Ajibaiye v Ajibaiye*¹⁸¹, the Court of Appeal decided on the restriction on Muslim testators. In the case, Alhaji Disu Ajibaiye a Muslim from Kwara state made a will under the Wills Act and disposed his estate in a manner that was inconsistent with Muslim tenets. In the will, he directed his estate be shared in accordance with English law, as contained in his will having chosen English Law to guide his transactions and affairs in my life time notwithstanding the fact that he was a Muslim.

The Will was challenged on the basis that being a Muslim from Kwara state, the Wills Law of Kwara State applies to his will including the provisions of the law which provides for restrictions on Muslim testators.¹⁸² He could therefore not make a will and dispose the estate as he wished. The Court of Appeal upheld the position of the court of first instance and voided the will and held among other things that

I) The will was void ab initio as it was contrary to the extant Wills law of Kwara state. The court went further to state that with this local legislation in place, the testator could not have validly made a will under the Wills Act 1837, a statute of general application which is no longer applicable in Kwara State.

II) The estate of a Nigerian Muslim in Kwara state after his death are subject to the dictates of Islamic law of inheritance.

III) Having loudly declared that he was a Muslim, the testator had subjected himself to the application of the Wills Law of Kwara state "notwithstanding his erroneous belief that he could still while being a Muslim, elect to be governed by English law in this regard".

¹⁸¹ (2007) All FWLR part 359 ,1321

¹⁸² Wills Law of Kwara State Cap .168, Laws Kwara State 1991

From this judgement from the Court of Appeal, the position of the law is that a person that is subject to Islamic law (in states where the restriction applies) cannot dispose of his estate in any manner he pleases, he must comply with the dictates of Islam while making a will.

5.1.3 STATUTORY PROVISIONS

Under the Wills Act 1837, there is no provision that directs the testator to make adequate financial provisions for his dependents. In *Banks v Goodfellow*¹⁸³, the court affirmed the right of a testator to make a will freely. He could deprive his blood relatives and he could even make a devise to a pet. Overtime, the need to curtail the freedom of a testator as his "absolute right occasioned hardship on his beneficiaries."¹⁸⁴ Also, the cultural realities of Nigeria and the United Kingdom are very different. The Wills Act was imported into Nigeria without the recognition of the cultural differences between both societies. Nigerians are very communal and family orientated, the provisions of the Wills Act do not match the communal nature of the Nigerian psyche. This gave need for the various states to come up with their own Wills Law that took into account the dynamics of the Nigerian society. In the Wills Law of different states of the country,¹⁸⁵ there are clauses that mandate a testator to make adequate provisions for his family. From the Wills Law of Lagos state,¹⁸⁶ a person is expected to make reasonable financial provision for the following persons

- I) The wife or wives or husband of the deceased person.
- II) The child of the deceased person.

Reasonable financial provision in this case refers to the application made by the husband or wife or wives of the deceased for financial provision as it would be reasonable for a husband

¹⁸³ Supra

¹⁸⁴ Supra

¹⁸⁵ Section 27 Kaduna State Will Law, Section 4 Abia State Wills Law and Section 4 Oyo State Wills Law

¹⁸⁶ Section 2 Wills Law of Lagos State

or wife or wives to receive whether or not that provision is required for his or her maintenance.¹⁸⁷ The right to make an application is exercisable for within a period of six months from when probate is granted.¹⁸⁸ Similarly, Section 2 (1) (C) Wills Law of Rivers State, makes provisions for the dependents of the deceased.¹⁸⁹ This law expands dependents to include the widow of the deceased, children of the deceased, parents and siblings whom he either partially or wholly catered for.

For states under the former Western region, Section 18 of the Wills Law of Western Region provides for adequate provision for dependents of the deceased.¹⁹⁰

“Where a person dies leaving a wife or wives or husband, or a child, or a parent, and the court is of the opinion that the disposition of the deceased’s estate effected by his will is not such as to make reasonable provision for the maintenance of that wife or those wives or husband, or that child, or that parent, the court may order that such reasonable provision as it thinks fit shall be made out of the deceased’s estate for the maintenance of that wife or those wives or husband, or that child, or that parent.”

This law mandates a testator to make adequate financial provisions for his dependents in his will, in a situation where the testator does not make adequate financial provisions for them, the court is empowered to make an order that reasonable financial provisions should be made for them.¹⁹¹

Under of the Wills Law of Kaduna state,¹⁹²

¹⁸⁷ Section 2(2) Wills Law of Lagos State
¹⁸⁸ Section 2 (3) Wills Law of Lagos state
¹⁸⁹ Section 2 (1) (C) Wills Law of Rivers State
¹⁹⁰ Wills Law of Western Region
¹⁹¹ Supra
¹⁹² Section 27 Wills Law of Kaduna State

"Persons who can apply for reasonable financial provision include the parent, brother or sister of the testator who immediately before the death of the testator was being maintained either wholly or partially by the deceased and in the case of such persons, 'reasonable financial provision ' as it would be reasonable for the applicant to receive for his maintenance".

For a person to be able to apply for "reasonable financial provision "

- I) The testator must have failed to make reasonable financial provision
- II) The application must be made by someone that legislation provides for.
- III) The deceased was responsible for the maintenance of the applicant before their death.

These statutory provisions try to reflect the spirit of the people. Nigerians believe in familial ties and the need to take care of family. By inserting clauses that mandates a testator to take adequate care of his family, the law reflects the spirit of the people. A person ought to take care of their family and upon their death, their estate is expected to continue catering for such person. These statutory provisions are probably influenced by the Holy bible which states that a man that doesn't care for his family is worse than an infidel.¹⁹³

5.1.4 NEMO DAT QOUD NON HABET

You cannot give what you do not have. Whilst the preceding statement sounds like general knowledge, it is a very important tenet in the law of succession. "A will can only transfer the title that a testator had in a property he devises or bequeaths".¹⁹⁴ The law does not allow a person to transfer what the person does not own. A person cannot also devise a property to another person that he has successfully agreed to devise to another person.¹⁹⁵ This principle

¹⁹³ 1 Timothy 5:8 Kings James Version

¹⁹⁴ Supra

¹⁹⁵ Supra

was given judicial blessing in *Savage - John V Joe*¹⁹⁶. An extension of the nemo dat quod non habet principle is that a single person cannot effectively devise family property that is jointly held by themselves. In *Ogunmefun v Ogunmefun*¹⁹⁷, the testatrix made her will when her three siblings were dead and so she thought that she could devise the property in a way that suits her. The family property was unpartitioned as at the time of the death of her siblings. In the will, she devised the property to her paternal half sister and her nieces. She made her two sons executors of the estate. The elder of the two sons obtained a declaration that the devise was invalid as the property was unpartitioned family property.

Another angle to this trite principle is that spouses cannot devise each other's property. In religious and social circles, husband and wife are one but in property law, the difference between husband and wife is clear as day and night. This principle has been given judicial blessing in a plethora of cases including *Daniel v Daniel* as well as *Oke v Oke*¹⁹⁸. In plain terms a person cannot bequeath what they do not have title to. A husband cannot bequeath his wife's property and a wife cannot do so either.

5.1.5 LEGAL AND INSTITUTIONAL CHALLENGES

Wills Formality

Will making is a delicate legal process. It involves formalities that must be cautiously observed so the will is not thrown into the dustbin of history. Section 4(1) of the Wills Law of Lagos state,¹⁹⁹ states that a testator must sign a will in such a place that it is apparent on its face that he intended to sign. In *Mudasiru v Abdullahi*²⁰⁰, one of the basis that the will was challenged

¹⁹⁶ (1944) 10 WACA 144

¹⁹⁷ Supra

¹⁹⁸ *Daniel v Daniel* [1956] SCNLR, *Oke v Oke* (1974) NMLR 351

¹⁹⁹ Section 4(1) Wills Law of Lagos State

²⁰⁰ [2011] 7 NWLR (Pt 1247) 591

was that it was signed in a place other than where the testator ought to sign. The formality for making wills has a significant effect on testamentary freedom.

For a will to be valid, such formalities as

- I) Writing
- II) Signature,
- III) Attestation

As provided for under the Wills Act 1837 or the Wills law of the various states imposes limits on testamentary freedom. If these conditions are not met, the will is invalid, regardless of the testator's true intentions. Thus, freedom of disposition is restricted by the law's insistence on will making formalities.

While these formalities seem harsh and restrictive of testamentary freedom, they also safeguard it. They serve as a protection to ensure that a will genuinely reflects the wishes of the testator or testatrix, free from forgery, coercion or undue influence. This promotes the integrity of testamentary freedom by preserving authenticity.

These formalities also try to balance out with flexibility,

Formalities create certainty in succession law, but they can frustrate the wishes of the testator when technical flaws (such as improper attestation) invalidate a will that otherwise reflects the testator's wishes. Some jurisdictions, however, allow "substantial compliance" to reduce rigidity and protect the spirit of testamentary disposition.²⁰¹

²⁰¹ Supra

In conclusion, the formalities for will making both limit and protect testamentary freedom. They limit it by invalidating wills that fail to meet statutory conditions, even where the testator's intentions may be clear. Yet they protect it by ensuring the will is genuine, reducing foul play and providing certainty in succession. Thus, the effect of formalities is a balance between restricting absolute freedom and preserving the integrity of testamentary intention.

RECOMMENDATIONS

1. Harmonisation of the legal framework for testamentary disposition

Nigeria's plural legal system results in multiple and albeit conflicting laws on succession. Statute law, customary dictates, and Islamic law crisscross and intertwine thereby creating uncertainty for both testators and beneficiaries. This long essay recommends that the legal framework should be harmonised through the adoption of a uniform Wills Act applicable throughout the federation. This Act should recognise heterogeneous cultural landscape and religious diversity while establishing clear guidelines to guide the murky waters of succession. The legal framework should make restrictions clear and uniform so testators can make clear dispositions and the beneficiaries can be saved litigation time.

2. Codification of Customary laws

One of the primary characteristics of customary law in Nigeria is its unwritten nature. This leads to inconsistencies in judicial application. Codifying customary inheritance rules would help maintain certainty and predictability, while ensuring that such codification aligns with the 1999 Constitution (as amended) as well as the extant Wills law, particularly provisions ensuring gender equity and non-discrimination. Such codification should also provide maximum protections for vulnerable members of the society who are often disadvantaged under existing customary practices.

3. Legislative Reforms for Family Provision

Nigeria can borrow a leaf from other comparative jurisdictions. Such jurisdictions include the Inheritance (Provision for Family and Dependents) Act 1975 as well as the New Zealand Testator's Family Maintenance Act 1938 which empowers courts to grant reasonable financial provisions for dependents. In Africa, several jurisdictions have also enacted legislations to protect dependents. A worthy example is the Malawi Wills and Intestate Succession ordinance 1964 which provides that where a testator dies leaving a spouse, minors or children who due to physical or mental disabilities cannot take care of themselves and the testator did not make adequate provisions in his will, the affected person may apply to the local court to which the copy of the will is lodged for an order for the making reasonable financial provisions as the court may seem fit. Similarly, Section 20 of the Zambian Wills and Administration of Testate Act 1989 gives the courts the power to order that reasonable provision should be made out of a testator's estate if the testator failed to make adequate financial provisions for them.

4. Judicial Activism

The courts should adopt a more liberal and purposive approach to interpreting succession laws. By prioritizing, justice and fairness over rigidity and technicalities, judges can ensure that vulnerable family members are not denied adequate provision. Matters of succession should be quickly dispensed with so as to save litigation time. The judiciary should be more proactive in matters of succession. This would reduce the incidence of protracted family disputes, which drag on for years and sometimes the original parties would be long dead before judgement will be passed which often arises when strict adherence to testamentary freedom leaves dependents without support. Judgements should echo the doctrines of equity and fairness while striking a balance with the provisions of the law.

5. Promotion of Estate Planning Awareness

Many Nigerians remain unaware of the implications of testamentary restrictions or the benefits of proper estate planning. Lawyers should strive to properly educate their clients on the restrictions on testamentary freedom. Academics can also put out opinion articles in media (traditional and social) that are easily accessible to the lay-man. Policymakers should not just formulate policies but should embark on public sensitisation programs to encourage responsible estate planning. Such campaigns could highlight the importance of balancing personal wishes with legal obligations to dependents.

The major excuse of ignorance should be eliminated. The lay man should be made to properly educated to avoid this outcome.

5.3 CONCLUSION

The concept of testamentary freedom is a vital aspect of the law of succession, as it accords individuals the right to determine how their property should devolve after their demise. This liberty is often presented as a hallmark of private ownership and autonomy, since it empowers a person to exercise control over their estate even after death. However, the Nigerian legal system demonstrates that such freedom is not absolute. Rather, it is restricted by statutory enactments, judicial interpretations, customary law, and religious injunctions, each of which tempers the otherwise unfettered discretion of the testator.

Statutory restrictions originate from the influence of English succession law. The Wills Act 1837, which laid the foundation for formal requirements of wills in Nigeria, provides detailed conditions for validity, such as the necessity of the formality of writing, signing, and attestation by witnesses.²⁰² These formalities are not merely technical; they act as safeguards against uncertainty, fraud and undue influence. More importantly, state houses of assembly have

²⁰² Supra

domesticated aspects of the Act in form of Wills Laws of the various states which, in certain cases have inserted protective provisions for dependents. For example, the Wills Law of Lagos State permits the court to make reasonable financial provision for a spouse or child left without adequate support.²⁰³ The Wills Law of Rivers state also has similar provisions that mandates a testator to make adequate provisions from their estate for their dependents. In effect, statutory law recognises that the wellbeing of family members is a matter of public concern that can override private testamentary wishes.

Judicial decisions have also reinforced the limits of testamentary freedom. In *Ilori v Ilori*²⁰⁴, the Supreme Court underscored the fact that while an individual may dispose of his property by will, such disposition is subject to statutory and customary law qualifications. Similarly, in *Olowu v Olowu*²⁰⁵, the court gave effect to customary law principles in determining the validity of a will, showing that testamentary freedom cannot extinguish family entitlements grounded in communal norms.

Customary law represents another strong barrier to absolute testamentary freedom. In many Nigerian communities, land and certain properties are treated as family property. They are individually but in trust for the lineage.²⁰⁶ Thus, even if a testator attempts to will such property to outsiders, the family may successfully challenge the will on the ground that he had no authority to alienate it. A testator can only grant title when he has title. This principle is evident in several cases where courts have refused to uphold wills that contradict entrenched customary inheritance rules.

²⁰³ Supra
²⁰⁴ (1983) 1 SCNLR 94
²⁰⁵ [1985] 3 NWLR (Pt 13) 372
²⁰⁶ Supra

Islamic law imposes an even stricter limitation. Under the Sharia, a Muslim testator is permitted to dispose of only one-third of his estate by will, and even then, such disposition cannot be made in favour of Qur'anic heirs unless they consent after the death of the testator. The remaining two-thirds of the estate devolves mandatorily in accordance with the detailed rules of succession as found in the Quran. This arrangement effectively places the principle of testamentary freedom beneath divine command, prioritising the testator's duty to fulfil religious obligations over personal wishes.

In sum, testamentary freedom in Nigeria is a qualified freedom. While it exists theoretically, in practice it is restricted by statutory, customary, and religious restrictions. These restrictions serve a wider social purpose: ensuring that the testator's dependents and family members are protected, communal or family property is preserved, and religious norms are observed. Nigeria, therefore, maintains a system that combines and reflects both modern legal ideals of autonomy and traditional values.

The Nigerian succession framework demonstrates a delicate balance between individual freedom and collective responsibility. Testamentary freedom is acknowledged as a legal right, but it is continually tempered by the need to protect family members, uphold communal traditions, and observe religious dictates. While these restrictions are justifiable, their fragmented and sometimes inconsistent application has fostered uncertainty, litigation, and inequality.

It is, therefore, necessary for Nigerian succession law to undergo reform. A harmonised and modernised legal framework, supported by judicial activism and public awareness, would better safeguard the interests of both the testators and the beneficiaries. Ultimately, such reforms would ensure that testamentary freedom operates not as an instrument of injustice or exclusion, but as a tool of fairness, family protection, and social stability.

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