



Nigerian intestacy law: Appraising the impact of the pluralist system

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Abstract

Nigerian legal system with regard to intestacy is pluralistic in nature, that is it allows the application of the customary rules which include the Islamic law and native traditions alongside the received English laws (common law, statutes of general application, doctrines of equity), and Nigerian domestic statutes. This is because succession is a matter within the residual legislative list in Nigeria. The application of these several laws which includes customary law is plausible. However, the application of these laws is not without challenges. This paper examines the impact of the pluralistic nature of the of the Nigerian legal system in relation to intestacy with a view to proffering solutions to the challenges posed by the system.

Keywords: pluralist, Nigerian, pluralistic, Appraising

1. Introduction

Generally, the law of succession involves the transmission of the rights and obligations of a deceased person in respect of his estate to his heirs and successors. It deals primarily with the distribution of a deceased person's estate to his heirs and successors^[1]. It also includes the rules governing the administration of a deceased person's estate by personal representatives of the deceased person including state participation in respect of real estate situate within its territory and personal estate of the deceased person subject to its jurisdiction. Intestacy occurs where a person dies without making a legally valid will in respect of his estate. While it may be easy to have or articulate a unified law of wills, such efforts may be elusive in connection to succession on intestacy^[2]. This is particularly true in Nigeria. It has been said that the principles of succession and inheritance of property is the subject of individual, as opposed to property held under family ownership or other form of group ownership^[3]. It is nearly impossible for such rules of intestacy not to interact with or intersect these group ownership structures under customary law. This paper outline the rules which have been recognized by the courts over time or which have been documented by scholarly works over time under customary law and in the Administration of Estates Laws. It is impossible to articulate the rules in all customary law areas in the country, therefore we adopt a representative approach. Since the rules are fairly uniform amongst areas in major ethnic groupings in the country, applicable rules in these major groupings are outlined. We have selected the rules amongst the Yoruba (South-West), Bini, (South-South) Ibo (South-East) and Non-Islamic and Islamic regions (North).

This paper is divided into five sections. Following the introduction, part II conceptualizes the rules of intestacy, highlighting the basic principles of the English law of

succession, part III is the General overview of the intestacy law in Nigeria, part IV examines the impact of the pluralist nature of the Nigerian intestacy law, and finally, part V is the conclusion.

1.1 Conceptualising the Rule of Intestacy

The concept of succession involves the transmission of the rights and obligations of a deceased person in respect of his estate to his heirs and successors. It deals primarily with the distribution of a deceased person's estate to his heirs and successors^[4]. It also includes the rules governing the administration of a deceased person's estate by personal representatives of the deceased person including state participation in respect of real estate situate within its territory and personal estate of the deceased person subject to its jurisdiction. Intestacy occurs where a person dies without making a legally valid will in respect of his estate. It appears that most scholars take the above description as a given and do not toil to engage any conceptual analysis of the terms. In the words of Osondu "succession is a means by which the living enters into possession of the property of the dead. In other words, it is a means by which the living inherits the property of the dead"^[5]. To him, there is no difference between succession and inheritance. Apart from stating that the law of succession (in England and Wales) is based on the principle of freedom of testation and that it relates to rules governing the disposition of property on death, Lowe and Douglas do not expend any effort on the concept^[6]. Kerridge and Brierley considers the law of succession to be concerned with the transfer or devolution of property on death^[7]. Importantly they note that not all transfers on death are covered by the law of succession, that is, the law of intestate succession and the law of wills – the

¹ TOG Animashaun & AB Oyenyin *Law of Succession, Wills and Probate in Nigeria* (Lagos: MJ Professional 2002), 3

² S Roberts "The Malawi Law of Succession: Another Attempt at Reform" [1968] (12) *Journal of African Law* (1968) 81, 83

³ J. Fenine Fekumo *Principles of Nigerian Customary Land Law* (Port Harcourt: F&F 2002) 330

⁴ TOG Animashaun & AB Oyenyin, *Law of Succession, Wills and Probate in Nigeria* (Lagos: MJ Professional 2002) 3

⁵ AC Osondu, *Modern Nigerian Family Law and Practice* (Lagos: Printable Publishing 2012) 201

⁶ Nigel Lowe and Gillian Douglas *Bromley's Family Law* (11th edn Oxford: OUP 2015), 960-961

⁷ Roger Kerridge and AHR Brierley Parry and Clark *The Law of Succession* (12th edn London: Sweet & Maxwell, 2009)1

two principal topics into which succession is divided ^[8]. This is because there are a number of ways in which property which belongs to, or which may appear to belong to, an individual during his lifetime may pass on his death other than by his will or in accordance with intestacy rules ^[9]. A ready example is the right of survivorship (*jus accrescendi*) applicable to a beneficial joint tenancy. As each joint owner dies, his rights are extinguished and vest in the surviving joint owner or owners. They are of the view that the creation of joint ownership and the failure to sever a joint tenancy (so as to create a tenancy in common) are both acts or omissions which are part of the law of succession in the wider sense ^[10]. Other examples include property held on trust (the beneficial interest will remain vested in the beneficial title holder upon trustee's death); and nominations under say a pension scheme or under a life insurance policy.

Miller hold the view that the law of succession is traditionally regarded as being concerned with the transmission of property vested in a person at his death to some other person or persons ^[11]. He notes that the person or persons beneficially entitled will be those specified by the law of intestate succession except and in so far as the deceased has made a valid will. He argues that a more "realistic" view of succession must take account of gratuitous *intervivo* transfers as well as of testamentary dispositions ^[12]. However, one must regard with caution his view that the law of succession presupposes the existence of private property; that is, property owned or possessed by individuals. He claimed that "the question of succession does not arise in a society in which articles or the right to possession thereof, is regarded as vested in a group such as a clan or tribe or family of which individual is a member and which, unlike him, does not die. Membership of the group changes over time, but no provision for the transmission of property on the death of an individual member of the group is necessary ^[13] Ikpeze supports this view; citing *Oke v Oke* ^[14] where the Supreme Court held that where a testator build a house on unpartitioned family land, he could not dispose of it by will ^[15]. Our disagreement is because, in Africa where group ownership is a norm, most group ownership regimes can be terminated resulting in immediate private property. Therefore even while the group ownership structure subsists, African legal system preemptively protects such individual rights until they ripen in fact. In the circumstance of the facts in *Oke v Oke*, there is no rule that the descendants of the testator would not have a right to remain in the building pending when the family land was partitioned. Nonetheless, Miller seems to suggest that there is a subtle distinction between succession and inheritance: while succession is seen from the view of the private property owner, the idea of inheritance is perceived from the view of successors. In raising queries on the limits of rules of succession, he asked "to what extent should the law of succession determine the

successors? To what extent should the freedom of the individual holder of property to dispose it on his death be curtailed by rights of *inheritance* that is, fixed rights of other people to receive his property?" ^[16].

Ikpeze while positing that inheritance and succession are essentially the same, she notes the "minor difference" between them. She states that "while inheritance connotes the possession of a dead person's property or interest by a living person or persons, succession is more elaborate and includes the act or right of legally or officially taking a predecessor's office, rank and duties. It involves the absorption of rights and liabilities of the deceased in respect of the estate of the deceased ^[17].

1.2 An Overview of the Nigerian Intestacy Law

Nigeria operates a pluralist system of law in relation to intestacy, this includes received English law, (common law, statutes of general application, doctrines of equity), legislations by the National Assembly and state Houses of Assembly and byelaws made by local government councils. On the other hand, there are as many customary laws as there are distinctive areas or groupings of peoples. These customary laws are generally unwritten. The Constitution of the Federal Republic of Nigeria 1999 (as amended) recognises and preserves these sources of laws in Nigeria and projects a policy of keeping them segregated. The law of intestate succession is impacted by a variety of laws from the two broad systems of laws. It is a residual matter over which all levels of government can make laws. A good number of states have legislations regulating qualification for and scheme for distribution of and benefiting from a deceased property-owner's estate. Specifically, there are Wills laws of states created out of the former Western Region, Administration of Estate Laws in the same states and similar laws in other states the Administration and Succession (Estates of Deceased Persons) Law of Anambra State and Others rely on English statutes. In many other situations (and where written laws fail), principles of customary law apply. The customary laws of succession govern persons who were subject to the native law and custom of their community before their death. Where the person was a Muslim, Islamic law applies. These include those that marry under customary law and not under the Marriage Act 1914. In other situations where there are no local enactments on intestate succession especially in the Northern and Eastern states and the deceased married under the Marriage Act 1914, the common law rules on intestacy including any applicable statutes of general application (such as the Statute of Distribution and the Intestates Estates Act 1890) will apply ^[18]. A broad summary of the categorization of these laws was done by Sagay as follows:

1. if a person contracts a monogamous marriage outside Nigeria, the common law of England governs the distribution of his estate
2. if he contracts a statutory marriage in Nigeria, then if he dies domiciled in Lagos or any of the states created out of the former Western or Mid-Western Regions, then the Administration of Estates Law will govern
3. if he contracted a statutory marriage but dies domiciled in the states created out of the former Eastern or

⁸Ibid.

⁹ Ibid

¹⁰ Ibid,

¹¹ JG Miller, *The Machinery of Succession* (Oxon: Professional Books 1977) 1

¹² Ibid

¹³ Ibid, 1-2

¹⁴ [1974] 3 SC 1

¹⁵ *Ogugua V.C Ikpeze Gender Dynamics in Inheritance Rights in Nigeria: Need for Women Empowerment* (Onitsha: Folmech 2009) 7, 18

¹⁶ Ibid, 3. Emphasis added.

¹⁷ Ikpeze (n 11) 7

¹⁸ Animashaun & Oyenyin (n 1) 9

- Northern Regions which are yet to enact their own law on non-customary succession, then the common law will also govern the distribution of his estate
4. If the intestate was an indigenous Nigerian and did not contract a statutory marriage (or where he did and no spouse or issue survived him), his estate will be distributed in accordance with the relevant customary law or Islamic law as the case may be.
 5. With regards to non-customary succession to real property, the *lex situs* applies; otherwise if he was subject to customary law or Islamic law, the personal law of the intestate applies regardless of the *lex situs* [19].

Patterns of inheritance in Nigeria are generally divided into patrilineal and matrilineal. Fekumo identifies a third – bilineal. In patrilineal communities, inheritance is through fathers and all those descended from a common ancestor form a patrilineage. The heirs are the paternal next of kin which include children, uncles, brothers and sisters from the father's line. Inheritance is through mothers in matrilineal communities. In this case a child belongs to his mother's rather than his father's family. In the bilineal or double-descent pattern, each of the two lineages succeed to different parts of the estate. The latter is less common in Nigeria as most societies are patriarchal.

Under Yoruba customary law, the mode of distribution of a deceased estate depends on whether the property owner is a man or a woman. Where a woman dies, her husband inherits all her property except her share of family property which reverts to her natal family [20]. Where she has no husband, then her property devolves on all her children together [21]. However, where a man dies, his children inherit his estate irrespective of gender [22]. Other factors that do not generally affect the right to inherit include absence from the family home and minority or even majority (age). As such, the eldest surviving who becomes the head of family where the property is family property is not also entitled to a greater share than the other children [23]. A woman cannot inherit her deceased husband's property [24]. The customary rule is that intestate devolution follows the blood [25].

The pattern of distribution of estate of a deceased who died intestate is based on the doctrine of primogeniture. The eldest surviving son inherits the house where the deceased lived during his life time called the *Igiogbe*. Aigbovo explains that the *Igiogbe* concept is based on ancestor worship. The medium of ancestor worship is a wooden staff known as “*ukhure*” that is taken by the eldest son to enable the children communicate with the spirit of their deceased father [26]. It is possible for more than one house to constitute the *Igiogbe*. This is possible where the contending parties or the children of the deceased agree that the buildings constitute the “principal house” [27]. Otherwise, where a compound consists of more than one building it is likely that only one of the building will be regarded as the

principal house [28]. The ruins of an ancestral home or bare land cannot be *Igiogbe* [29]. However, the children are prevented from administering the deceased estate until the second burial rites are concluded [30]. The eldest surviving son inherits the deceased estate to the exclusion of his brothers and sisters. In order to maintain peace, he holds the estate (except the *Igiogbe*) on trust so as to maintain his brothers and sisters and other dependents. It is possible that the deceased may have acquired other properties in his life time. In such cases, while the eldest son inherits the principal house, he holds the other properties in trust for himself and the other children of the deceased [31].

The Ibos rules of succession varied among different communities, general attributes are discernible. The Ibo customary law of succession also projects the attribute of strict primogeniture. Here the eldest surviving son (*Okpala*) inherits all properties of a deceased property-owner [32]. However, he manages and administers the whole estate for the benefit of the entire family but especially for his brothers. The properties particularly include the *obi* (where the father resided and died) traditional symbolic items for worship and titles (such as the staff – *ofo*) and immediate surrounding compound [33]. In *Asaba*, these properties transmit from brother to brother until the eldest surviving grandson inherits. The customary principle is that whoever becomes *Okpala/diokpa* steps into the shoes of their father. He however enjoys only a life interest on the land [34]. Where the property owner did not have children, his brother or uncle will inherit but only as a trustee or custodian to administer the deceased's estate for the benefit of his family [35]. Where a woman acquires property, her natal family will inherit those acquired prior to marriage but her husband will inherit those acquired during marriage. A widow cannot inherit her husband's estate; indeed she is sometimes regarded as part of the estate to be inherited. Where this is the case, levirate marriage is the norm. In *Nezianya v Okagbue* [36] the Supreme Court upheld the contention that a married woman has no right to succeed to the property of her deceased husband under the Onitsha Customary Law. In the Northern Nigeria, both customary and Islamic rules of succession are applicable. Islamic law governs and is applicable to Muslims who subject themselves to *Sharia* law. Where this is the case, a property owner must have shown a clear intention that Islamic law should apply to the administration of his estate when he dies, otherwise the native law of the community may apply. Generally, Islamic law of succession of the *Maliki* School is applicable in Nigeria as part of the personal law of Muslims. Ismael and Oba observed that the application of Islamic legal norms in the country is generally limited by the parameters set by the state [37]. In *Shittu v Shittu* [38] the Kwara State Sharia Court

¹⁹ IE Sagay *Nigerian Law of Succession Principles, Cases, Statutes and Comments* (Lagos: Malthouse 2006), 73

²⁰ *Caulcrick v Harding* (1926) 7 NLR 48

²¹ *Johnson v Macaulay* (1961) 1 All NLR 773

²² *Adeseye v Taiwo* (1956) 1 FSC 84; *Adisa v Ladokun* (1973) 9& 10 SC 55

²³ *Salami v Salami* [1957] WNLR 10; *Lopez v Lopez* (1924) 5 NLR 43

²⁴ *Akinubi v Akinubi* [1997] 2 NWLR (Pt. 486) 144

²⁵ *Fakoya v Ilori* [1983] 2 F.N.R 402

²⁶ O Aigbovo “The Principal House in Benin Customary Law” [2005] (8)(1) *University of Benin Law Journal* 16, 17-18

²⁷ *Idehen v Idehen* [1991] 6 NWLR (Pt. 198) 382

²⁸ *Ugbo v Asemota* (Unreported) Suit No. B/49/70 of 30th March 1974, High Court Benin City; *Arase v Arase* (1981) 5 SC 33; *Agidigbi v Agidigbi* [1996] 6 NWLR (Pt. 454) 300

²⁹ *Imade v Otabor* (1998) 56/57 LRCN 3116

³⁰ *Ovenseri v Osagiede* [1998] 11 NWLR (Pt 577) 1

³¹ *Osazuwa v Osazuwa* (1991) 7 SCNJ 231-232

³² Where he has more than one wife, the eldest sons of the wives inherit jointly. See Animashaun & Oyeneji Law of Succession, 17

³³ *Ezeokafor v Ubah* (1975) 5 UILR (Pt II) 162

³⁴ *Odiachi v Odiachi* (1980) FNR 372

³⁵ *NgwoNwojie v Onyejana* (1964) 1 All NLR 352

³⁶ (1963) All NLR 358

³⁷ IS Ismael & AA Oba “Legal Challenges Concerning Some Beneficiaries of Estates Governed by Islamic Law in Nigeria” (2017) 25(1) *Illum Law Journal* 64

of Appeal stated that once a person professes Islam, Islamic law becomes his or her personal law. However, Ismael and Oba observe that “this is not always strictly observed especially in the Southern part of Nigeria where there are no Islamic courts and customary courts often apply customary law to estates of Muslims^[39]. A core principle of Islamic law of succession is that a deceased’s property should be used to support those persons whom he was obliged to first support during his lifetime. For this reason, Islamic law accommodates women in the distribution scheme^[40]. Concepts and practices such as primogeniture and alien under Islamic law.

1.4 The Impact of the Pluralist System

Where a man dies intestate, the factors that determine the means and mode distribution of his estate are: whether the man is married and under what law the marriage was contracted, whether the man has children or spouse(s), whether the man is subject to the received English law, whether the man is domiciled in Nigeria, and whether the man contracted his marriage under Nigerian law or foreign law^[41]. The pluralistic nature of the Nigerian legal system in relation to intestate allows every ethnic-group to apply their customary law to issue of intestacy. This paradigm seems plausible as it respect the customs and traditions of the citizens as long as it can be proof that such custom exist and same is not contrary to nature justice, equity and good conscience. However, the pluralistic system create serious challenges. Some of these challenges includes uncertainty as to the application of a particular law. Where a man dies intestate the problem has always been, which of the several law will apply. In the Northern part of Nigeria where Islamic law is practiced, the argument has been that once an individual professes Islam as one’s religion, when one dies the applicable law with regard to the distribution of one’s estate is the Islamic law^[42]. However, this position is different in the southern part of Nigeria. Ismael and Oba observe that the Islamic law of intestacy is not always strictly observed especially in the Southern part of Nigeria where there are no Islamic courts and customary courts often apply customary law to estates of Muslims^[43]. Even in the north where Islamic law is practiced, it is not in all cases that Islamic will apply. The application of the Islamic is dependent on the readiness of the deceased heirs to decide; however, the challenge is where the heir fails to reach a consensus as to which law to apply. Even among people subject to customary rules of intestacy, the law are not always certain. This is based on the unstable nature of customary law. What is applicable in a particular case at a particular time, may not be applicable in other case and time. Customary law is not static, it keeps changing.

The application of the native laws and customs is subject to the received in English, this has led to several native laws been declared repugnant to natural justice equity and good conscience. However, using the received English law as a yardstick to determine the legality or otherwise of the native

law and custom without due consideration is demeaning. This a serious challenge to the Nigerian pluralist system.

2. Conclusion

The Nigerian pluralist system though allows the application of customary law of intestacy along the received English law and Nigerian domestic statutes and Law made by several states on matter relating to succession. The discourse on intestate succession and its dynamics will continue both legislatively, judicially and constitutionally because human behaviour is fluid and despite what the law says, some will rather disregard it than obey it. The law must keep in step with these developments in the intestate succession context. We believe that the greater understanding gained in this study will be useful in facilitating cross-cultural dialogue that fosters rights of vulnerable classes while respecting the living laws and structures of the people.

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³⁸ (1998) Annual Report Sharia Court of Appeal (Kwara State) 126, 130-131

³⁹ Ismael & Oba (n 66) 66

⁴⁰ See the Holy Quran Chapter 4

⁴¹ IE Sagay Nigerian Law of Succession Principles, Cases, Statutes and Comments (Lagos: Malthouse 2006), 73

⁴² *Shittu v Shittu*(1998) Annual Report Sharia Court of Appeal (Kwara State) 126, 130-131

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