SUCCESSION, TRUSTS AND ESTATES

2-06-14

"Writing a will or establishing a living Trust is simple and prevents family feuds" Barrister B.V Enwesi.

EDITOR'S NOTE

In this quarter's newsletter on Succession, Trusts and Estates, we take a close look at some emerging legal issues in this area. Succession in itself is quite encompassing, as it raises tax issues, Human rights issues, especially Childs' rights, estate/property issues, and constitutional issues, the latter being very controversial in recent times, with the fight for child rights on the rise globally.

Succession affects everyone in diverse ways, be it as a husband, wife, child, or extended family member. The emerging trends have produced significant shifts in the traditional family structure, therefore causing change in the laws of succession.

In some jurisdictions, the courts did not wait for legislative reform to align with modern trends but rather propounded judge made laws, on various grounds, such as that a country's ratification of an international treaty means it is under an obligation to abide by the provisions of such treaty, or a particular practice is repugnant to natural justice or against public policy.

Being a member of a family, and therefore having a right to property under succession, is now possible outside the affinity and consanguinity connections, for as was held by the court in EJILEMELE V OPARA (1998) 9 NWLR (PRT 567) 597 'The fact that he was born into the family, grew up in the family, took the family name, participated fully in family meetings, died and buried on family land, is sufficient to have assimilated him into the family'.

An authentic family member is competent to bring an action to protect the interest of the family in respect of family property, even when it's not brought on the family's behalf, nor with their authority.

More often than not, Marriage precedes the start of a new family, succession, trusts and estate management. There are three types of marriages recognized in Nigeria, One done under customary law, one done under Islamic law and one done under the applicable statute, which is the Marriage Act. A marriage under the Act may be celebrated in a licensed place of worship or before a licensed registrar.

S. 33(2) of the Marriage Act provides that;

A marriage shall be null and void if both parties knowingly and willfully acquiesce in its celebration –

(a) in any place other than the office of a Registrar of marriage or a licensed place of worship (except where authorized by the licence issued under Section 13 of this Act) or

(b) under a false name or names or

(c) without a Registrar's certificate or notice or licence issued under Section 13 of this Act duly issued or

(d) By a person not being a recognized Minister of some denomination or body or a Registrar of marriage".

The key word is 'knowingly", therefore it was held by the high court in Enugu in OBIEKWE V. OBIEKWE(1963) ENLR 196, that the couple did not knowingly and willfully acquiesce in the marriage without the requisite licence, thus their marriage was not null and void. The court went further to state however that "there is only one form to monogamous marriage, and that is marriage under the Ordinance. Legally, a marriage in a Church (of any denomination) is either a marriage under the Ordinance or it is nothing" , the officiating minister has a duty to make themselves familiar with the Ordinance and to sees that people who come to them to be married understand their legal position.

The case of ANYAEGBUNAM V. ANYAEGBUNAM1963 ANLR 320 is decisive in that the Supreme Court held that the church marriage was not a marriage under the Act, because of the absence of the required licence of the Registrar of Marriages, and the certificate issued by the church was not in the form prescribed by the Act.

We have provided diverse views on the controversial topics, and seek balance, we therefore are not pitching our tent with any side. We wish you an interesting read.

LEGAL RIGHTS OF CHILDREN AND PARENTS

Prior to recent times, children's rights were subsumed in the rights of their parents or guardians, under customary law in Nigeria, parents have the right to inflict tribal marks on their children, circumcise their female children, and receive dowry for their female children of any age. Also an illegitimate child that is one born outside wedlock was denied maintenance and inheritance rights.

The 1989 United Nations Convention on the Rights of the Child, gave the force of international law to children's rights, thereby setting the stage for the development of respect for the child as a human being to the point where an adopted child or a child conceived by artificial insemination by a donor now has the right to know its genetic identity, as this will provide a proper guide to its medical history and personality.

In addition a child can no longer be subject to corporal punishment in schools or at home in line with its right to human dignity and bodily integrity.

Furthermore today in countries like Germany, South Africa, Zambia etc., illegitimate children have equal rights to maintenance and inheritance, in fact they are no longer referred to as illegitimate, but simply children whose parents are un married.

In Nigeria, the Supreme courtis however, yet to rule on the matter, and the Court of Appeal has given different decisions on the matter. No child should pay for the acts or omissions of its parents, as having access to maintenance and inheritance will not undermine the sanctity of marriage.

The Nigerian Supreme Court way back in 1963 in the case of ABISOGUN V ABISOGUN (1963) NSCC Volume 3 page 198 made an obiter statement that the children born out of the deceased associations outside his marriage under the Act where illegitimate even though they were acknowledged by the deceased in his lifetime. The court however, still ruled that they were entitled to letters of administration to their deceased father's estate in conjunction with his lawful widow, which is in line with the Nigerian Constitution which provides that no one can be discriminated against on grounds of the conditions of their birth or any other ground.

Another issue that has arisen in recent times in Nigeria in relation to the legal rights of children, is the issue of 'child brides'. In July 2013, word spread like wildfire in Nigeria through news websites, blogs, Twitter, and Facebook that the Nigerian Senate had voted to legalize child marriage.

As part of its review of some sections of the Constitution of the Federal Republic of Nigeria, the Senate took a vote on July 16, 2013 concerning the removal of clause 29 (4) (b), which states that "any woman who is married shall be deemed to be of full age", basically making child marriages legal, by establishing that any girl younger than 18 is automatically mature enough to handle the responsibilities and realities of marriage by virtue of her involvement in the act of marriage itself.

Although the majority of the Senate voted against it, with 60 voting for removal and 35 voting for retention, the total fell short of the 73 votes required to change the Constitution.

S. 21 Child's Rights Act 2003 states "No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatsoever".

It is humbly submitted that the Marriage Act and the 1999 Nigerian Constitution be amended to include a suitable age for marriage. In S. 23 Child's Right Act 2003, A person-

(a) who marries a child;

(b) to whom a child is betrothed;

(c) who promotes the marriage of a child or;

(d) who betroths a child;

commits an offence and is liable on conviction to a fine of N500, 000, or imprisonment for a term of five years or to both such fine and imprisonment. A child under the Child's Rights Act is defined as a person under the age of Eighteen. Almost all the Southern States and about ten of the Northern States have adopted and passed into State Law, the provisions of the Child Right's Act.

WILLS, SUCCESSION, TRUSTS AND ESTATES

Succession refers to the body of laws governing the distribution of a deceased person's property. It is intrinsically woven with the concept of inheritance, and raises issues such as primogeniture (this is where property devolves on the eldest child), Ultigeniture (this is where property devolves on the youngest child), Paritable Inheritance, (this is where every child inherits equally), patrilineal succession (this is where only male children inherit property) and matrilineal succession (this is where only female children inherit).

As regards succession and inheritance, the general approach of the court, is that the surviving spouse and children are entitled to letters of administration of the estate of a deceased who has dies intestate, that is without a will, and who in his life time conducted himself in a manner that would allow the court infer that he would want his estate to be subject to the Marriage Act, despite the fact that he may have not married his spouse under the Marriage Act.

Instructively in OBUSEZ V OBUSEZ (2001) 15 NWLR (PRT 736) 385 the Court of Appeal Lagos held that, it is not compulsory that a surviving spouse is automatically entitled to a grant of letters of administration in respect of the estate of an intestate, for the court has discretion in the matter, and a spouse guilty of moral misconduct may be passed over.

When the surviving spouse is acceptable as an administrator, he/she may appoint a co-administrator, who need not be related to the deceased.

Whilst it is correct to say that a Testator has complete freedom to give his property to whomever he desires, the various Wills Act put certain restrictions. For instance S. 1 of the Wills Law of Lagos State with similar provisions in the old Western Region reads as follows:-

"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, or at the time of his death – Provided that the provision of this Law shall not apply to any property which the Testator had no power to dispose of by Will or otherwise under customary law to which he is subject".

This provision prevents a Testator from disposing by Will his share of un-partitioned family property which is subject to customary law, and this was upheld by the court in the cases OF IDEHEN V. IDEHEN (1999) 6 NWLR (Pt. 198) 382 and OGUNMEFUN V. OGUNMEFUN (1931) 10 NLR 83

Another restriction of the full testamentary power of a Testator is as found in Section 2 of the Wills Law of Lagos State and it is worth quoting;

"Notwithstanding the provision of Section 1 of this Law where a person dies and is survived by any of the following persons –

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

(b) a child or children of the deceased.

That person or those persons may apply to the Court for an order on the ground that the disposition of the deceased estate effected by his Will is not such to make reasonable financial provision for the Applicant.

"(2) In this section "reasonable financial provision" in the case of an application made by virtue of Subsection (1)(a) of the Section by the

husband or wife or wives of the deceased (except where the marriage with the deceased was subject of a decree of judicial separation in accordance with any customary law) and at the date of the death the decree was in force and the separation was continuing, means such financial provision as it would be reasonable in all circumstances of the case for husband or wife or wives to receive, whether or not that provision is required for his or her maintenance.

"(3) An application under this section shall be exercisable only within a period of six months from the grant of the Probate".

The above provision is relevant in that it places a limitation period within which a will can be contested on the grounds of lack of reasonable financial provision giving by the testator to the beneficiaries of the will.

S.4 of Wills Act of Lagos State provides that to be valid a will must have the following: a) It must be in writing;

(b) It must have been signed by the Testator or by another person in his presence and by his direction;

(c) The Testator's signature must be made or acknowledged by him in the presence of at least two witnesses present at the same time.

In Apatira V. Akanke 1994 17 NLR 149, the Testator had already signed the Will before witnesses were brought in and he acknowledged his signature in the presence of one witness. The court held that the will was invalid. The witnesses must also sign the Will in the presence of each other and the Testator;

(d) The Testator must have the mental capacity to comprehend his actions as at the time the Will was made;

(e) There should not be evidence of undue influence on the Testator from any quarters.

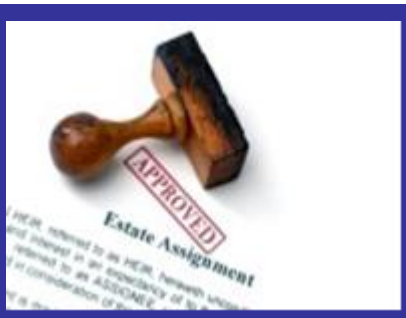
The general trend in Nigeria is that most people do not write wills, neither do they organize their estate before they pass away.

This practice has resulted in a series of cases in court, with family members at each other's throat, with each person trying to get a piece of the deceased estate. For instance in the case of SUBERU & ORS V SUNMONU & ORS (1957) NSCC Page 5 Vol 1 the Supreme Court held that it is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property since she herself is like chattel to be inherited by a relation of her late husband.

I humbly submit that in modern family law the court decision above would be seen to be a violation of the widow's right to dignity of the human person, as entrenched in section 34 of the 1999 Nigerian Constitution.

When a person dies leaving behind property, he or she either dies testate, in that he or she made a Will by which he or she disposes of his or her property or he or she dies intestate in that he or she made no Will or the Will he or she made is invalid for any reason recognized by the law. In either case there are detailed laws that govern the administration and distribution of the property of the deceased, in Nigeria the laws governing wills/ testate succession vary from state to state.

While the laws governing intestate succession are divided into The Common Law (applies to deceased of a statutory marriage domiciled in, Northern and



Eastern states of Nigeria and outside Nigeria), The Administration of Estate Law (applies to deceased of a statutory marriage domiciled in England, Lagos and states of the former western region of Nigeria) and Customary Law which includes Islamic Law (applies to deceased of customary law marriage domiciled in Nigeria, living either as a traditionalist or Muslim.

HUMAN RIGHTS AND INTIMATE PARTNER VIOLENCE

The above topic raises the issue of violation of human rights, both adult and children in the family setting. The law and courts in Nigeria frown on domestic violence and as such it was held in OBAYEMI V OBAYEMI (1967) NSAA VOL 5 Pg. 176 by the supreme court that as a ground for divorce the test of cruelty is an objective one, and conduct held to be cruel need not be aimed at the spouse. Therefore even without an intent to injure, if the inexcusable conduct of a spouse, knowing the damage he/she was doing reduced the other to ill-health then that conduct amounted to cruelty.

It's my humble submission that the Nigerian courts ought also to take into consideration, not just physical cruelty, but emotional cruelty, and the threat of emotional cruelty.

Recently in the state of Maine, United States of America Ellen J. Clark filed a complaint requesting that an order for protection from abuse be entered against John Brian McLane in a District Court (similar to our high courts in Nigeria). The prayer was granted and McLane appealed. The issue on appeal was whether threats to publicly publish "revenge porn" on the Internet established abuse authorizing a Maine court to issue a protection order.

The background of the case was that Clark and McLane had an intimate relationship for several months during 2011 to 2012. On January 13, 2013, after their relationship had ended and after Clark had notified McLane's wife of the affair, McLane sent an email to Clark containing a litany of insulting and derogatory remarks. McLane told Clark:

- that he had created a website in her name
- that he planned to post nude photographs of her on the website, and
- that he was also setting up accounts with three major search engines so that any search of her name would easily lead folks surfing the Net to the website he'd created.

-that he was creating an account on a video-sharing website in her name

-that he would be sharing the websites with her friends

-that he had already gathered eighteen or more email addresses from her work colleagues to share the websites with them, and

-that potential employers would see the websites as well.

- that "guys will have your cell number, as well as your work number to get a hold of you and ask you out."

In his email to Clark, McLane provided a link to the described website that he had already set up. Basically, it was a one-page "Under Construction" notice that promised that "The naked pictures of EJ Clark will be coming soon.... along with her cell phone number and her work number for you to call and arrange a date."

At a hearing on the petition. Clark testified that she was fearful that McLane would follow through with his stated intentions, and that his actions would adversely affect her career and her employability

The trial court determined that McLane's conduct constituted abuse and granted Clark a protection order for a period of one year prohibiting McLane from having contact with Clark, and also ordering McLane to "immediately disable any site designed to disseminate information about plaintiff to others" and "not undertake further efforts to do so."

The Maine Supreme Court upheld the trial court decision, stating that McLane's actions and statements meet the definition of "abuse" in the statute as a matter of law.

19-A M.R.S. § 4002(1)(C) defines "Abuse" in relevant part as follows:

1. Abuse. "Abuse" means the occurrence of the following acts between family or household members or dating partners or by a family or household member or dating partner upon a minor child of a family or household member or dating partner:

C. Compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage.

The Maine Court found that "abuse comes in many forms, and neither the plain language of the protection statute nor our prior interpretations of it requires evidence of physical harm or the risk of physical harm to sustain a finding of abuse." So finding, the Maine Court upheld the trial court's issuance of the protection order.

This type of non-physical cruelty and emotional abuse carried out by a spurned spouse or lover occurs all over the world, in Nigeria, as in other countries there should be protection orders given in these cases.

The emerging trends in succession, trusts and estates has the advantage of:

- **Protecting the welfare of women and children at risk of abuse and domestic violence**
- **Creating an avenue for ways of exercising human rights.**
- **Providing solutions to handling complex relationships.**

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