

# PRINCIPLES AND PRACTICE OF SUCCESSION UNDER CUSTOMARY LAW

BY

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## Protocols

It is always a pleasure to be here at the National Judicial Institute, the Premier Judicial Institution in Nigeria. I thank the Administrator, My Lord, the Hon. Justice RPI Bozimo, OFR for inviting me to present this paper. I hope as usual, I am able to justify the confidence reposed in me at the end of this paper.

## INTRODUCTION:

From the beginning of time, transition from one generation to another has been one of the characteristic of human existence. Such transition includes assets and in some cases, liabilities which are handed down to succeeding generations. It is imperative to note from the onset that African communities had their own laid down rules and established culture and customs governing their affairs, succession inclusive. In other words, despite the absence of legislations for the regulation of successions in those early communities, for any such act of succession to be valid, there must have been some sort of assent by the natives. Such successions are what today are known as *Customary Succession* and it is the focus of this paper presentation i.e ***Succession under Customary Law.***

## WHAT IS SUCCESSION?

The Oxford Advanced Learner's Dictionary<sup>1</sup>, defines succession in the context of this topic to mean the act of taking over an official position or title. According to Kerry

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<sup>1</sup> 8<sup>th</sup> Ed. 2015

R., succession is concerned with the transfer or devolution of property on death<sup>2</sup>. Succession therefore can be loosely defined to mean inheritance, the right to inherit, the order in which inheritance is bequeathed and the condition precedent under which one can succeed another. The law of succession therefore is all about the transfer or devolution of property on the death of an owner to another, his heir<sup>3</sup>. The law is the rule by which such devolution occurs.

The law governing succession in Nigeria is generally headed under two broad headings, namely: **Testate and Intestate Successions**. While Testate Succession is primarily governed by Wills and the applicable Wills Law, Intestate Succession on the other hand is that condition where a man dies without leaving behind a valid Will. Intestate Succession can be divided into Intestate Succession (Non Customary) and Intestate Succession under Customary Law. For the purpose of this paper however, we shall dwell more on the ***Intestate Succession under Customary Law***.

## **SUCCESSION UNDER CUSTOMARY LAW**

Customary Law embodies customs as practiced by the people which they regard as binding on them<sup>4</sup>. It is any system of law different from Common Law and a Law enacted by legislation, but which is enforceable and binding within Nigeria as between the parties subject to its way<sup>5</sup>. Customary succession therefore, is succession that is not in accordance with the common law or statute, but in accordance with the traditions, customs and practices of the local people which are enforceable and binding between the parties which are subject to it<sup>6</sup>. Customary succession therefore, being succession that is according to customs, beliefs and traditions of the people, is mainly intestate (without a Will).

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<sup>2</sup>Kerridge R. Parry & Kerry: The Law of Succession, 12Ed (London, Swwet & Maxwell 2009) Pg.1

<sup>3</sup> Ibid

<sup>4</sup> Onokah, M.C, Family Law (Ibadan-Nigeria, Spectrum Books Ltd. 2003).

<sup>5</sup> Kharie Zaiden v. Fatima K. Mohassen (1974) UILR 283 at 284.

<sup>6</sup> BBIH I.O, Esq., Customary Succession Law in Mordern Ibo Land; Judicial and Legislative Dimension in Focus (UNIBEN Seminar Paper) 2008/2009

The patterns of intestate inheritance and succession under Customary Law in Nigeria have almost as many variations as there are ethnic groups in the country. In fact it could be said that the law of succession and inheritance reflects Nigeria's plural legal system. The resultant effect of this state of affairs therefore is the absence of a uniformity of rules of succession under Customary Law.

The question that therefore comes to mind flowing from the above realization is: *How does one determine the correct law to apply in the case of intestate succession under Customary Law?*

Essentially, the deceased's Customary Law is the appropriate law to be applied in such situation. The law, that is, the deceased's Customary Law will be applicable even though the deceased died outside his ethnic locality or leaves properties outside his hometown. It is important to note that while it is true that with respect to land matters generally, the Customary Law of the place where the land is situate (*lex situs*) is applicable, with respect to inheritance, the appropriate Customary Law is the Customary Law of the deceased<sup>7</sup>.

The general principle of law is that a person carries his Customary Law with him, hence regardless of the Customary Law of the place of his residence or abode, his personal law shall prevail<sup>8</sup>. However, our customary jurisprudence arrived at a departure from this position when in the case of **Adeniyi Oluwo & Ors v. Olabowale Oluwo & Ors**<sup>9</sup> the Supreme Court was invited to determine whether a man can give up his own personal law and acquire the Customary Law of his place of abode. The facts of the case are as follows:

*One Adeyinka Olowu, a Yoruba man from Ijesha, having lived most of his life in Benin City, married Benin women and birthed his children in Benin, applied to the Oba of*

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<sup>7</sup> Tapa v. Kuka (1945) 18 NLR.

<sup>8</sup> Osuagwu v Soldier (1959) NRNLR 39

<sup>9</sup> (1985)3NWLR (pt. 13) 372

*Benin to be naturalized as a Benin citizen. His application was granted and he attained the status of a Benin man and he lived his life as such, enjoying all the privileges of a Benin citizen and acquired landed properties as a result. He died intestate and his estate was distributed in accordance with his acquired Benin native law and custom but some of his children were dissatisfied and challenged the distribution. It was their contention that his original Ijesha Customary Law should be applicable in the distribution. The trial High Court held in favour of the Benin Native Law and Custom on the grounds that the deceased though a Yoruba man by extraction, his naturalization conferred on him, the rights of a Bini man, which rights he enjoyed considerably. This position was upheld by the Court of Appeal, prompting the plaintiffs to approach the Supreme Court for a determination on the matter.*

The Supreme Court in holding that his personal law and law governing the distribution of his estate is the Benin Customary Law, held thus:

“It follows therefore that by virtue of his change, his personal law changed to the Benin Customary Law; distribution of his estate on intestacy must necessarily be governed by Benin Customary Law. He married Benin women who had children for him; he carried on various business activities in and around Benin City. The change of his status endowed him with the rights and privileges of a Bini indigene and his change in status accords with Benin Customary Law<sup>10</sup>.

The legal effect of this judgment therefore is that any Nigerian can change his personal Customary Law of origin in preference for another one which he acquires as a result of acculturation/assimilation. Generally speaking therefore, the law applicable for the distribution of a deceased's estate on intestacy is his **preferred** personal law and not his personal law of origin.

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<sup>10</sup> Per Coker, JSC

## **BENEFICIARIES UNDER CUSTOMARY LAW**

Unlike the situation under Wills where a man can bequeath all his assets to total strangers, children are the exclusive beneficiaries to the estate of a deceased person under the Customary Law. While some tribes do not discriminate between the sexes of the children, some other tribes do. For instance, while the Yoruba of south western Nigeria do not distinguish between male and female in the distribution of their father's property, some other tribes like the Binis and the Ibos does.

## **PRIMOGENITURE RULE**

The general rule of Customary Law where a land owner dies intestate is that his self-acquired property devolves on his children as family property<sup>11</sup>. The head of the family is the eldest male child of the deceased who occupies the family house and holds same as a trustee of the other children, male or female. However, the rule is different in certain localities.

In Bini and Onitsha communities for instance, the deceased's property devolves to the eldest son exclusively, in accordance with the rule of *primogeniture*, under which the eldest son is expected to look after the younger children<sup>12</sup> and may sell the house over the wishes of other children or treat it as his own property<sup>13</sup>. Among the Markis group of the Verbe of Northern Nigeria, the rule of *ultimogeniture* applies, whereby inheritance is by the youngest son, which applies to bar other heirs of the deceased landowner.

The rule of primogeniture though viewed in some quarters to be unfair to the younger children of the family, it has been argued that the system accords with

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<sup>11</sup> *Suberu v. Sumonu* (1957) 2 FSC p. 33, *Abeje v. Ogundairo* (1967) LLR p. 9

<sup>12</sup> *Modern Nigerian Land Law* (Evans Brothers) 1989 p. 153.

<sup>13</sup> T.O. Elias: *Nigerian Land Law* (1971) 4 th edn., Sweet & Maxwell London

native ideas, particularly the role of the eldest son as the “father of the family”<sup>14</sup> who has a legally binding obligation towards the children<sup>15</sup>.

The right of the eldest surviving son to succeed his father in the headship of the family is automatic and arises from the fact of seniority. Only the father, as the owner and creator of the family property, can deprive the eldest son of this right, by a valid direction made with the aim of ensuring that the affairs of the family are properly managed by a person qualified on the grounds of intelligence and education to do so. In the absence of any such direction by the father, the right of the eldest son cannot be taken away without his consent.

Generally speaking however, certain modes of inheritance are a common feature under almost all the various customs, to wit:

- i. Mode of Succession/Distribution Technique
- ii. Qualification for succession/Inheritance Rights

## **MODE OF SUCCESSION/DISTRIBUTION**

This deals with the fundamental premise on which claims to inheritance are based. In most Nigerian cultures, succession is Patrilineal and/or Patrilocal<sup>16</sup>. In other words, the right of succession is traced through the male descent or father’s lineage. This practice acquires different variants like the Primogeniture and Ultimogeniture .

Under the various Customary Laws in Nigeria, mode of distribution is almost certain and fixed. Under the Yoruba customs for instance, two methods of distribution are settled to be in place. These are the **Idi-Igi** method where property is shared per stripes. (i.e. according to the number of wives) and the **Ori-Ojori** method where by property is distributed per capita ( i.e. according to the number of children). It has

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<sup>14</sup> *Ehigie v. Ehigie* (1961) 1 NMLR p. 307 at p. 309

<sup>15</sup> S.N. Obi: **Family Law in Southern Nigeria** (1966)

<sup>16</sup> CMG Yakubu, Property Inheritance and Distribution Under Customary Law

however been held that the universally accepted mode of distribution in Yoruba land is the Idi-Igi method. See **DAWODU v. DANMOLE**<sup>17</sup> where it was held that this method is not repugnant but that the modern method of the Ori-Ojori is only used to avoid litigation.

In some other cultures, the mode of inheritance is clearly stated by way of customs such that particular assets of a deceased can only be inherited by a particular class of successors. Under the Benin Custom of **Igiogbe** for example, the eldest surviving son of a deceased inherits the house where the deceased lived and died to the exclusion of all others. This right enjoyed by the eldest son of the deceased, cannot be taken away from him not even by way of a will.

According to Benin Customary Law, an “Igiogbe” that is the house in which the deceased lived and died and usually (though not always) where he was buried, automatically devolves on the eldest son of the deceased<sup>18</sup>. The Igiogbe is so important in the life of a Bini man because of the traditional values that are attached to it. It also serves as the traditional family seat.

Customary succession amongst the Ibos is such that the eldest son of the deceased succeeds to his estate. This mode is known amongst the Ibos as “**Okpala**” or “**Diokpa**”<sup>19</sup>. The Okpala who is the eldest son, steps into his father’s shoes upon the death of the latter and becomes head of the family. Where however, the deceased father had more than one wife, the eldest sons of each of the wives takes part in the sharing of the estate. The rights of the Okpala is however exercised in trust for his younger siblings.

Where however, the deceased is not survived by a son, his estate is inherited by his surviving brothers of full blood or his father in that order. It is therefore unfortunate

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<sup>17</sup> (1958) 3 FSC 46

<sup>18</sup> A supplement to the Hand Book on Some Benin Customs and Usages: Property Sharing issued by the Benin Traditional Council, on the authority of the Omo N’ Oba Erediauwa, Oba of Benin. (Vol. 2, 1996)

<sup>19</sup> Ezeilo Joy, Law and Practice relating to women’s inheritance rights in Nigeria: An overview

to note that under this system, wives and daughters of a deceased have no right to inheritance under the Ibo Customary Laws. It is however gratifying to note that our courts have in a plethora of cases upheld the rights of the woman to inherit her father's estate.

In **ONYIBOR ANEKWE & ANOR. vs. MARIA NWEKE**, the issue was whether a widow who had no male child could inherit the property of her late husband? The Supreme Court Clara Ogunbiyi, JSC, in deciding this issue, held thus:

*“I hasten to add that the custom and practices of Awka people upon which the appellants have relied is hereby out rightly condemned in very strong terms. A custom of this nature in the 21st century societal setting will only tend to depict the absence of the relatives of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetuation of male dominance which is aimed at suppressing the right of the women folk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively dealt with., “The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning”*

## **QUALIFICATION FOR INHERITANCE**

The qualification for inheritance is generally traced or dependent on blood relationship. A person cannot qualify to inherit from a deceased on any basis under Customary Law outside being of the same blood. As stated earlier, the primary

heirs to a man's estate under the Customary Law are his children. Unfortunately however, as we have seen from practices in some climes, the customs seeks to discriminate amongst the male and female children.

Under the Yoruba Customary Laws, the Courts have held that both the male and female children of a deceased have equal rights to inherit their father's estate. See **AMUSAN v. OLAWUNMI**<sup>20</sup> where the Court even upheld the rights of a woman to be family head in Yoruba Customs.

In Ibo culture, the strict application of the primogeniture rule operates to exclude women from inheriting their father's estate. In **MOJEKWU v MOJEKWU**<sup>21</sup> the court held that a Customary Law that allows only males to exercise a right of inheritance and denied female children of a deceased the right of inheritance while conferring the right on a distant male relative is not only discriminatory, it is equally repugnant and unconstitutional as it conflicts the provision of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

See **LOUS CHITURU UKEJE & ANOR. vs. CLADYS ADA UKEJE SC.224/2004**. The judgment was on the appeal filed by Mrs. Lois Chituru Ukeje (wife of late Lazarus Ogbonna Ukeje and their son, Enyinnaya Lazarus Ukeje against Mrs. Cladys Ada Ukeje (the deceased's daughter).

Cladys had sued the deceased's wife and son at the Lagos High Court, claiming to be one of the deceased's children and sought to be included among those to administer their deceased father's estate. The trial court found that she was a daughter to the deceased and that she was qualified to benefit from the estate of their father who died intestate in 1981. The Court of Appeal, Lagos to which the Defendantsn at the trial court appealed, upheld the decision of the trial court, prompting them to further appeal to the Supreme Court.

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<sup>20</sup> (2002) 12 NWLR (pt 780) 30

<sup>21</sup> (1997) & NWLR (pt 512) 283

The Supreme Court per Bode Rhodes-Vivour, JSC, held:

*“No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father’s estate. Consequently, the Ibo Customary Law, which disentitles a female child from partaking in the sharing of her deceased father’s estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian”.*

## **THE RIGHTS OF SPOUSES**

It has been established that any Nigerian may make a Will whether married under the Act or under Customary or Islamic Law subject however, to restrictions imposed by law<sup>22</sup>. Where the marriage was celebrated under the Act, both husband and wife may inherit each others estate on intestacy. Where however, the marriage was contracted under the Customary Law, a widow, on the intestacy of her husband, is completely disinherited despite any contributions to the man’s success. No system confers on such a widow any beneficial rights of inheritance save of course for benefits she may enjoy through her children’s right. Such a widow is infact often times considered as an asset for inheritance.

The Court however attempted a departure from this practice when the Court of Appeal held in *Nzekwu v Nzekwu*<sup>23</sup> that under the Onitsha Custom, the widow is entitled to certain rights in the husband’s property even when she is childless. In the instant case, the deceased husband had died intestate leaving a wife and two children. The late husband’s family sold the house and the new owner opted to put the house on rents without catering for the widow’s needs.

## **CONCLUSION**

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<sup>22</sup> *Yinusa v Adesubokan* (1971) NNLR 77

<sup>23</sup> (1989) 2 NWLR

As stated in the introductory part of this paper, African traditional institutions have had their own way of devolving property since the beginning of time. This paper is an attempt to highlight some of the practices of the Nigerian traditional communities with respect to succession. While it is imperative to note that customary succession is an important tool for resolution of disputes which inevitably arise from issues of inheritance, I will not shy away from the fact that some of these practices are indeed not in tune with contemporary practices. On this note I must pay tributes to the judiciary for their role in nullifying some of these discriminatory practices.

Before I end, I must again place on record, my profound gratitude to my Lord, the Administrator, for inviting me to deliver this paper.

My Lords, distinguished participants, Ladies and Gentlemen, I thank you for your kind attention.

**HON. JUSTICE MOSES A. BELLO (JP) OFR, FICMC**

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