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Critique of the Legal Dialectics Vis-A-Vis the Appraisal of the Rules of Construction of Wills in Nigeria

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Abstract

The article examines and critique the legal dialectics vis a vis the appraisal of the rules of construction of wills in Nigeria, the specific rules of construction of wills, general rule of construction of wills, reformation: allowing extrinsic evidence to resolve ambiguities, the nature and validity of testamentary contracts and promise, validity of testamentary contracts and promises, remedies for breach of testamentary contracts and promises, when to file a claim, enforceable types of testamentary contracts and promises. The power of the court looks at the circumstances around the case and take evidence as to what was said or done but this is with a view to the proper interpretation of the Will itself, not in order to see whether it could be improve upon. The article concludes and recommend the adoption of the South African Law Commission empowering the court to declare a will revoked in part or in whole, where it is satisfied that the testator intended such a revocation, especially where the testator's intention is apparent from the will or other document.

Keywords: Succession, Testate, Intestate, Will, Testator and Beneficiaries

Introduction

From the beginning of time, transition from one generation to another has been one of the characteristics of human existence. Under the Nigerian legal system, succession means the devolution of a man's estate to other persons called the beneficiaries. Succession means taking the rights of another as his or her successor. It usually denotes the transmission of rights and obligations of the deceased to his legal heirs. Succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. Finally, succession signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be.[362] The word succession is also used to refer to the rights, estate and charges left by a person after his or her death, irrespective of whether the value of the property is more or less than the charges. It may also signify the right of the heir to take possession of the estate of the deceased. Succession not only includes the rights and obligations left by the deceased

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[362] Law of Succession Definition: Everything You Need to Know" https://www.counsel.com/lawofsuccession (accessed on 29-01-2020).

at the time of his or her death, but it also includes new charges, rights and obligations that accrue to the existing ones after opening of the succession. Succession is the order in which or the conditions under one person after another succeeds to property, dignity, title or throne. It is also the right of a person or line to succeed. It could also be referred to as the act or process of person's becoming beneficially entitled to a property or property interest of a deceased person[363].

The law of succession therefore, is all about the transfer or devolution of property on the death of the owner to another called his heir. Thus, even before the colonisation of Nigeria, her indigenous people had their own established cultures, customs, practices and way of life which regulates relationship between these communities, including succession.

Succession is also the devolution of title to the property under the law of descent and distribution. The act of official investment with a predecessor's office, dignity, possession or function; also the legal or actual order of succeeding from that which is to be vested or taken[364]. Succession may either be testate or intestate.

Testate succession occurs where a deceased person writes a Will before he died. On the other hand, intestate succession takes place where there is no Will.[365] The nature of marriage celebrated by a deceased person is usually a determining factor. Where the deceased who is subject to customary law contracts a monogamous marriage under the Marriage Act,[5] his estate would be governed by the Administration of Estate Law or its equivalent in the State. In *Obusez v. Obusez,*[366]the Supreme Court held that the deceased who was subject to Agbor/Igbo native law by contracting the marriage under the Marriage Act, intended that the succession to his estate to be governed by English Law and not Customary Law.[367]

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[363] Definition of Succession by Merriam-Webster https://www.merriam-webster.com/dictionary/succession (accessed on 29-01-2020).

[364] David Folorunsho Tom, *Succession to the Estate of a deceased who marriage under the Marriage Act in the States that formed the former Western Region of Nigeria*, in Delsu Reading in Law, (ed) M.O.U. Gasioku (Enugu: Chenglo Limited, 2004), 256.

[365] S. O. Tonwe and O. K. Edu, Customary Law in Nigeria (Lagos: Renaissance Law Publishers Limited (2007), 179. [5] Cap. M6 Laws of the Federation of Nigeria, 2004.

[366] [2017] All FWLR (Pt 374) 227 at 224-225 para A-H.

[367] The Court relied on section 49(5) of the Administration of Estate Law, Cap 2, Laws of Lagos State, provide thus: "where any person who is subject to customary contracts a marriage in accordance with the provisions of the Marriage Act and such a person died intestate after the commencement of this law leaving a widow or widower or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this law, any customary law to the contrary notwithstanding. See also *William v. Dalade*(1971) 2 All NLR 194. Similar provisions are contained in section 51(5) Administration and Succession (Estate of Deceased Persons) Law Cap.4 Laws of Anambra State, 1991 and section 3(2) of the Administration of Estate Law of Abia state.

However, where the deceased died intestate and did not contract a monogamous marriage under the Marriage Act or he/she is not survived by a widow/widower or any issue of the marriage contracted under the Marriage Act or the Will made by him or her is invalidated, the estate will be governed by customary law.

Testate succession is primarily governed by the Wills Law. In Nigeria, there is no uniformity of applicable laws relating to Wills. Therefore, among the States created from the former Western Region[368], the applicable law is the Wills Law[369]. However, by virtue of the provisions of the applicable Law Edict of Lagos State,[10] adopted the Western Nigeria Law for the rest of the country[370], consisting of states from the former Northern and Eastern Region, the applicable statute is *English Wills Act 1837* and the *Wills Amendment Act 1852*[371]respectively.

A critical analysis of the provisions of the Wills Law shows that the legislation basically re-enacted the provisions of the Wills (Soldiers and Sailors) Act 1918. In addition, it includes some provisions that incorporate the prevailing customary laws principles which regulates succession under customary law in affected states. For example, *section 3(1) of the Wills Law* provides that real and personal estate, which cannot be effected by testamentary disposition under customary law, cannot be disposed of by Will.

Intestate succession occurs where a man dies without writing his Will. In this situation, there are likely to be disputes among the deceased family as to who shall inherit and the applicable laws that should govern the distribution of the testator's estate. This study will show that every man or woman should try as much as possible to have a record of how his or her estate should be distributed during his or her life time. This will enable the testator to be very sure of what each of the beneficiaries get after his demise. This will also make the testator to have peace of mind during his life time because he will be in control of the distribution of his estate and not a third party.

Succession is the devolution of title to the property under the law of descent and distribution. It is also the act of official investment with a predecessor's office, dignity, possession or function, also the legal or actual order of succeeding from that which is to be vested or taken. Persons who take by Will or inheritance and exclude those who take by deed, grant, gift or any form of purchase or contract.[372]

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[368] Oyo, Ondo, Ogun, Ekiti, Osun, Edo and Delta States.
[369] Cap. 133, Laws of Western Nigeria 1959.
[10] No. 11 of 1972.
[370] With the exception of some few states that have enacted their own Will Laws in line with the laws of Western Nigeria, 1959.
[371] This statute qualifies as Statute of General Application in Nigeria.
[372] David Folorunsho Tom, "Succession to the Estate of a deceased person who married under the Marriage Act in the State that formed the Former Western Region of Nigeria" in *DELSU Reading in Law, (ed)* M. O. U. Gasioku (Enugu: Chenglo Limited, 2004), 256. [14] (1951) Ch. 407.

1. The Specific Rules of Construction of Wills,

The function of the court in constructing a Will is not to improve upon what the testator has said, it is only to give effect to what is in the Will itself. The fundamental rule is that the intention of the testator must be obeyed, however, informal the language may be. As held by Jenkins L. J. in *Re Bailey*[14], the function of the court is to ensure that "the dispositions actually made as appearing expressly or by necessary implication from the language of the Will is applied to the surrounding circumstances of the case". Thus, in some situations, a court will look at the circumstances around the case and take evidence as to what was said or done but this is with a view to the proper interpretation of the Will itself, not in order to see whether it could be improve upon.

2. General Rule of Construction of Wills

The courts always give effect to the intention of the testator. The object of the rule of construction employed by the courts is to ascertain the testator's expressed intention. The rules of construction are rules on how to construe the Will itself. The court cannot also interfere with what the Will actually say, even if it appears likely that it would achieve a better result. The only way a court can alter the provisions of a Will is under the Inheritance (Provision for Family and Dependent Act, 1975) and what it does then is not to alter the provisions of the Will as to amend its effects, but the Will itself still remains. What changes is that the implementation of its provision is partly undone by the implementation of the subsequent court order. The court will generally construe the Will as a whole, Lord Halsbury in *Higgins v. Dawson*[373]stated thus:

> *Where you are construing either a Will or any other instrument … you must look at the whole instrument to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the explanation of the particular clause that you are expounding.*

English courts had to employ rules and principles referred to as cannons of interpretation which originally were applied to the construction of statutes and contracts. The first step in attempting to construe the words used by a testator is to read them (i.e. the words) in their ordinary and natural sense. The two main rules that have been employed by the courts are the *Plain Meaning Rule* and the *Armchair Principle.*

a. Plain Meaning Rule: This principle, which is also known as the literal objective, or grammatical approach connotes that ordinary words will be given their ordinary meaning, the same goes for ordinary phrases. This principle can, however, be unhelpful where the ordinary word has more than one meaning and is thus ambiguous or where the testator has used words which appear ordinary and unambiguous but which he is known to have used

[373] (1902) AC 1

in a particular way that was out of the ordinary. It also became apparent that the wishes of a testator cannot be interpreted solely from a literal approach.[374]

Lord Denning in *Re Allsop*[375] also held thus:

> *The object of the court in construing a Will is to discover the intention of the testator. I do not think his intention is to be discovered by looking at the literal meaning of the words alone. This has led times, without number, to the frustration of his intentions. You must look at the Will in the light of surrounding circumstances.*

Numerous arguments support allowing only a plain meaning interpretation to a Will:

(a) If a Will can be amended with extrinsic evidence, then how can any testator be sure that his/her intention will be carried out?

(b) Extrinsic evidence can sometimes be unreliable;

(c) Extrinsic evidence can be fraudulently created;

(d) Extrinsic evidence may alter the testator's scheme, especially since many years may have passed since the Will was drafted and witnessed.

However, the modern trend is to abolish the plain meaning rule, because more often than not, the plain meaning rule frustrates the testator's intent rather than preserves it. As a result of the unreliability of the literal approach in construing the provisions of a Will, the courts permitted extrinsic evidence and surrounding circumstances as a means of construing the intention of the testator. The use of extrinsic evidence as a principle of construction is known as the Armchair Principle.

b. **Armchair Principle**: This principle allows for the admission of circumstantial extrinsic evidence where there is uncertainty or ambiguity in the Will. In order to arrive at the correct intention of the testator, the construer places himself, in the testator's armchair, so to speak, and considers all the circumstances by which he (the testator) was surrounded when he made the Will. This principle of construction is usually used to ascertain the identity of the object of the gift, that is, the person to whom it is given. In *Charter v. Charter*[376], the testator had appointed his son, Foster Charter as executor and left him his residuary estate. The testator had a son of that name, but he died some years before the Will was made, something

[374] According to Roger Kerridge in his book Parry and Kerridge: The Law of Succession, 12th Edition at pages 246, he stated as follows "A particular problem with the literal approach was that lawyers who talked about giving words their ordinary meaning seemed sometimes not to realize that what they were really doing was to give them a lawyer's meaning.

[375] (1968) Ch. 39 at 47.

[376] (1874) LR 7 364 HL

[19] (1856) 23 Beav 195.

> of which the testator was obviously aware. At the date of the Will, he had two sons, William Forster Charter and Charles Charter. William obtained common probate form, and Charles successfully applied for the grant to be revoked, showing that, in the circumstances, the Will readily referred to himself.

The armchair principle may however also be used to ascertain the identity of the subject matter of the gift. In *Kell v. Charmer*[19], the testator left "to my son William the sum of i.x.x, to my son Robert Charles the sum of o.x.x". Evidence as to the system of symbols used by the testator in his jeweler's business was admitted to show that these symbols meant £100 and £200 respectively. However, this principle does not have its own limits. Circumstantial evidence may clarify the meaning of ambiguous or uncertain words, but it may not give them a meaning which they are incapable of bearing. In *Higgins v. Dawson*[377], Lord Davey held as follows:

> *The testator may be been imperfectly acquainted with the use of legal language… he may have used language the legal interpretation of which does not carry out the intentions that he had in his mind… That fact should not induce the court to put a meaning on his words different from that which the court judicially determines to be the meaning which they bear.*

In *Re Williams*[378]Nicholls J. also sounded a note of caution in applying this principle wherein he held that:

> *If, however liberal may be the approach of the court, the meaning is one which the word or phrase cannot bear, I do not see how in carrying out a process of interpretation … the court can declare that meaning to be the meaning of the word or phrase. Such a conclusion, varying or contradicting the language used, would amount to rewriting part of the Will…*

It is to be noted that the armchair principle will only be used when there is an ambiguity in the provisions in a Will. The armchair principle, as a canon of interpretation in construing the provisions of a Will, uses extrinsic evidence and surrounding circumstances in determining a testator's intention.

3. **What is Extrinsic Evidence?**

Extrinsic evidence is evidence which comes from outside the Will. It may be direct or circumstantial. Direct evidence will refer to the provisions the testator intended to make by his Will. Circumstantial evidence will not refer directly to testamentary provisions but will assist in

[377] (1902) AC 1.
[378] (1985) 1 All ER 964.

ascertaining what they mean. For example, where the testator has made a gift "to my beloved daughter", that will be a latent ambiguity, since it becomes clear that it is ambiguous once it is discovered that the testator had three daughters. The testator may have said to other persons that he intended to benefit his daughter Linda; that is direct extrinsic evidence, which can be given to the court by those other persons. If the same testator always referred to his daughter Linda as his beloved, and never referred to any other daughter that way, evidence of that may be circumstantial evidence of the meaning of the words in his Will.

A court will always hear evidence as to whether the property in the Will or the beneficiary who is to receive it exists. The kind of extrinsic evidence the court will admit as to the testator's intention depends on whether the ambiguity arises on the face of the Will (patent ambiguity) or whether it is apparent only in the light of surrounding circumstances (latent ambiguity). In respect of patent ambiguity where the testator died before 1983, direct extrinsic evidence would be admissible only where there is equivocation[379].

With the promulgation of the Administration of Justice Act, 1982, section 21 of the Act has widened the areas in which extrinsic evidence is admissible. In respect of testators who died after 1982, direct and circumstantial extrinsic evidence of their intention is admissible to assist with the interpretation of the Will in 3 situations viz:

a. Where any part of a Will is meaningless i.e. where a word used by the testator has no meaning in the context it is used[23];

b. Where the language of any part of the Will is ambiguous on the face of it. Circumstantial extrinsic evidence only would be admissible before 1983, after 1982, direct extrinsic evidence is also admissible;

c. Where evidence other than evidence of the testator's intention shows that the language used in any part of a Will is ambiguous in the light of surrounding circumstance.

Since the Administration of Justice Act, 1982 came into force, both direct and circumstantial evidence is admissible whether the ambiguity is apparent on the face of the Will. Direct extrinsic evidence is admissible under the common law where there is equivocation or to rebut particular presumptions of equity. However, there is no equivocation where the testator's meaning can be ascertained by using the armchair principle. Direct extrinsic evidence of the testator's declaration of intention is also admissible to rebut certain equitable presumptions. Therefore, equitable

[379] Extrinsic evidence is only admissible when there is a latent ambiguity, that is where the subject matter of a gift or the beneficiary is described in terms which, when surrounding circumstances are looked at, are found to be applicable to two or more persons or things. In such a scenario, extrinsic evidence may be admitted to show which person or thing is intended. [23] (1856) 23 Beav 195.

presumptions are not themselves of construction. They are presumptions which include: a. that a legacy satisfies a debt

b. that a legacy satisfies another legacy

c. that a legacy satisfies a portion debt

4. Patent Ambiguity

A patent ambiguity is an ambiguity or contradiction that is evident from the Will itself. Examples of patent ambiguities include identifying a beneficiary, but failing to mention the gift, giving a gift to one beneficiary, then later repeating the same divestment to the same beneficiary but with a different proportional interest. Patent ambiguities may arise from the testator or from Scrivener's Error[380], where the ambiguity arose because of a mistake in drafting the document, or from the indiscriminate use of language in constructing the Will. Jurisdictions differ as to whether they will admit extrinsic evidence to resolve patent ambiguities. Many courts do not admit any extrinsic evidence at all, and this was the predominant ruling of courts in the past. However, courts are increasingly allowing extrinsic evidence, especially when the ambiguity has arisen because of a scrivener error, although they differ as to what kind of evidence is admissible. For instance, many courts allow evidence to show the testator's intent, while others specifically exclude such evidence, ruling that the testator's intent should only be found in the Will itself.

5. Latent Ambiguity

A latent ambiguity is one that is not evident from the Will itself, but becomes evidence when the fulfillment of the ambiguous clause is attempted. Most latent ambiguities involve beneficiaries of property that have been misidentified or where the identification is ambiguous. Latent ambiguities can be classified as either an equivocation or a mis-description.

An equivocation is a description that may describe more than one object. For instance, a testator leaves a specific to his nephew, but he has more than one nephew. A mis-description is a description where part of it is incorrect. A common example of this type of ambiguity is devising property identified by a specific address but the address is incorrect, or a beneficiary is identified by a nickname instead of a legal name. The way the court resolve latent ambiguities was only to delete the ambiguous words to see if a plain meaning can be given to the resulting sentence. If a plain meaning without the crossed out words does not resolve the ambiguity, then the courts treat the gift as a failed gift, in keeping with their rule that extrinsic evidence will only be admitted only to resolve ambiguous wordings, but not to rewrite a Will.

[380] Scrivener's Error is a mistake while copying or transmitting legal documents. For example, where the parties to a contract makes an oral agreement, that when reduced to writing is mis-transcribed, the aggrieved party is entitled to reformation so that the writing corresponds to the oral agreement.

However, the courts have allowed a personal usual exception, where the testator has habitually used the same words to connote a specific meaning. The most common example of this is the use of nicknames. When the testator bequeaths a gift to a person identified by their nickname, the courts will generally admit extrinsic evidence to determine the actual identity of the person. Another common example is using the wrong word technically in referring to something, such as a testator who commonly referred to his stepchildren as his children. In the case of latent ambiguities, the admittance of evidence is a necessity, since the ambiguity is not evident to the court without someone bringing the ambiguity to its attention.

6. Reformation: Allowing Extrinsic Evidence to Resolve Ambiguities,

The modern trend in the law is towards reformation, in which extrinsic evidence is admitted to resolve any type of ambiguity, even if it is necessary to reform the Will. Hence, no consideration is given to the plain meaning rule or the distinction between patent and latent ambiguities, or to whether the error was caused by the testator or the drafter of the Will. The arguments for allowing reformation are several, namely: -

a) Courts admit evidence when there is fraud, so why should it be different for mistakes in drafting?
b) An ambiguity is an ambiguity – why provide different remedies simply because they are classified differently?
c) Since most courts allow a person usage exception, allowing extrinsic evidence to resolved personal usage ambiguities but not for other ambiguities is incongruous.
d) If the testamentary intent is the primary objective in a Will, then why frustrate the testator's intent because of an error that may be resolved with extrinsic evidence?

Since the courts have stressed the prime importance of the testator's intent, ambiguities are usually resolved by determining testamentary intent. Hence, the courts will readily admit evidence that specially shows intent such as the overall testamentary scheme of the testator, and remarks that the testator made at the time the Will was made. Then the ambiguities are interpreted so that they are best aligned with what the testator intended. Another application of reformation is to change a Will when something that the testator could not have foreseen frustrates his intent. Courts apply the probable intent scheme,[381] then reforming the Will to conform to that intention. Indeed, it even allows the court to reform the Will when some of its provisions do not conform to the testamentary scheme, even without any ambiguity, but only with clear and convincing evidence.

[381] This principle was applied in *Re Estate of Payne* 186 N.J. 324, 335 (2006) where the principle was expounded by the New Jersey Supreme Court that – *in interpreting a will, our aim is to ascertain the intent of the testator and when we say we are determining the testator's intent, we mean his probable intention. In determining the testator's subjective intent, the courts should focus on the dominant plan as expressed in the entire will and considered in the context of relevant circumstances*.

Conclusively, the court will generally apply all the rules which have evolved from past cases, as well as statutory rules of interpretation in attempting to ascertain the testator's actual intention. However, it cannot step completely outside the boundaries of the law just to save a Will from failing. The court will also not readily read words into a Will. The main objective of the court is to discover the intention of the testator and the rules of construction are put in place to construe a Will and to help the court discover what the testator's intention truly was. It is suggested that the plain meaning rule should be abandoned, and the armchair principle be adhered to, since the use of extrinsic evidence can be used when trying to construe the words used in a Will. Applying the plain meaning rule has led to instances where the testator's Will had to be rewritten by the court. To go behind the words used in a Will to the extent of passing over them as the fundamental expression of his testamentary wishes would be to deprive the testator of the ability to do exactly as he wished.

7. The Nature and Validity of Testamentary Contracts and Promise,

A Will is a testamentary and revocable document, voluntarily made, executed and witnessed according to law by a testator with sound disposing mind wherein he disposes of his property subject to any limitation imposed by law and wherein he gives such other directives as he may deem fit to his personal representatives otherwise known as his executors, who administer his estate in accordance with the wishes in the Will[382]. On the other hand, a contract has been defined as an agreement with specific terms between two or more persons or entities in which there in return for valuable consideration[383].

Though a Will, person may give directives on the management of his properties after he is no longer alive. This makes a Will very important as it is a document that speaks after the death of the testator[384]. A testamentary contract between two persons where one person commits to waive his/her succession rights or grant the right of succession to some other person or promises not to revoke. Testamentary contracts can be oral, written, by deed or by Will. Testamentary contract would arise in a situation where a testator can enter into a contract to provide for someone in his Will or not to revoke or change a Will. For example, valid contract to make certain provisions in a Will or not to revoke a Will is generally enforceable and valid. The contract must satisfy the legal requirements of a contract including an offer, acceptance consideration, legal capacity, intention to create legal relationship and absence of vitiating elements.

[382] Kole Aboyomi, *Wills Law and Practice*, Lagos Nigeria, Mbeyi & Associate (Nig.) Ltd, 2004, 6.
[383] www.google.com, The Free Dictionary.com, accessed 10th August, 2020.
[384] Y. Y. D. Dadem, *Property Law Practice in Nigeria*, 2009, at 227.

However, a contract is defined as an arrangement which the law will enforce or recognize as affecting the legal rights and duties of the parties.[385] In the course of this work, there is no fundamental difference between contracts and promises so long as the law can enforce them.

To prevent fraud, the contract must be in writing.[386] A testamentary contract can be oral or written. However, oral contracts may be enforced by clear and convincing evidence. It is usually advisable that such a contract should be written. If the gift was for services rendered or some consideration, then an oral contract may be enforced under the principle of equitable estoppels, especially if the gift is an appropriate remuneration for the consideration.

In order to reduce the incidence of fraud with oral contracts, *sections 2-514 of the Uniform Probate Code* requires that:

A provision of the Will must state material provisions of the contracts.

i. There must be an express reference in the Will to the contract and extrinsic evidence usually in writing or testimony to prove the terms of the contract;

ii. It must be in writing, signed by the testator, evidencing the contract[387].

8. Validity of Testamentary Contracts and Promises,

The determinants of the validity of a testamentary contracts or promises should be the nature of the contract itself be it oral or written; formal or informal; backed by proof of clear and convincing evidence. Thus, a promise or contract to device or bequeath any property to someone must satisfy the terms of a valid contract. So, first there must be offer and acceptance as well as consideration. There must also be an implied intention by the persons to enter into such contract.

The validity of such contracts is to the extent that customary law of which the testator is subject, is not violated. This is because, generally, the Wills laws of the Former Lagos State and States which were part of the old Western Region, including Edo and Delta States subjected their laws to customary law. By implication then, any testamentary contract or promise that may be subject of a Will should adhere to this principle. The fact of customary law being respected by Wills law is stated in *Lawa-Osula v. Lawal-Osula*[388].

Section 3(1) of the Wills law, makes the making of a Will subject the "Customarylaw relating thereto" so that a person can make a Will, but the devise, bequest or disposition therein shall not

[385] Sagay, I. E. *Nigeria Law of Contract,* (Spectrum Books, 2nded) 2003 at p.1.
[386] www.google.testamentary.contractandpromises, accessed 9th August, 2020.
[387] Is a uniform Act drafted by National Conference of Commissioners on Uniform State Laws (NCCUSL) governing inheritance and the decedents estate in the United States?
[388] (1993) 2 NWLR (pt. 274) 158.

be inconsistent with the established customary law and shall at any rate be governed by the relevant customary.

However, according to Bini Customary Law[389], a bini man can sell his igiogbe while he is still alive and such sale is valid in the eyes of the law. The same condition applies in respect of a muslim who the law says must dispose of his property in accordance with Islamic law, as was proclaimed in *Adesubokan v. Yinusa*[390], Ademola CJN held that a Muslim man cannot in that Will deprive any of his heirs of his entitlement under Muslim Law that the Will must conform with the distribution under the Muslim law; if it does not, the scheme of distribution laid down by the Muslim law shall prevail.

In other words, there must not be fraud, undue influence or threat that could have forced the testator to make such promise or enter into such testamentary contract. Under influence in contract has also been referred to as "Inequality of Bargaining Power" by Lord Denning in *Llyod's Banks Ltd v. Bundy*[391], the formally narrow doctrines of duress (common law) and undue influence (equity), have been considerably widened into the flexible doctrine of "inequality of bargaining power" categorized vis-à-vis:

(a) Duress of goods e.g. bailor holding on to goods when the bailer urgently needs them.

(b) Unconscionable transaction – a money lender or supplier of goods taking advantage of a hard – pressed expectant heir.

(c) Undue influence – someone in a position to obtain an advantage or an unfair bargain over the other.

(d) Undue pressure – putting a pressure on someone in a relatively weak position (whether due to financial, educational, intellectual, physical or legal causes) in order to obtain an unfair advantage over that person.

(e) Salvages cases – e.g. when a ship is in danger of sinking and a rescuer uses his strong bargaining position to obtain an unfair advantage from the person in the ship[392].

Equally, undue influence can be deduced if there exists a special relationship between the people involved in the contract in the strict sense. Cases in which undue influence may be implied in this regard include parent and child, guardian and ward, doctor and patient, religious adviser and disciples, solicitor and client, as well as teacher and student.

In the instance cited above, contract under such circumstances may be invalidated by the courts.

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[389] Igiogbe is the house where a Bini man (deceased) lived and died and usually, though not always where he was buried automatically devolves on his eldest surviving son.

[390] (1973) 3 UILR (Pt. 1) p.22.

[391] (1975) Q.B. 326.

[392] Cited in Sagay I. E. *Nigeria Law of Contract.* Ibadan, Spectrum Book, 1999, 74.

But the onus rest on those alleging to prove through evidence that the contracts were wrongly or invalidly entered into. It is worthy of note that some of these circumstances could be difficult to prove. Hence, a clear and convincing evidence is needed to establish a good case. Such difficulty was experienced in *Ezenwere v. Ezenwere*[393], which a testator after making a Will, sold the subject matter in the Will to the sole beneficiary of the property in the Will. The sale of the property (an estate) was done three months after the Will was made. The other children of the deceased brought an action to contest the validity of the Will as well as the sale to the only beneficiary of the Will on the ground of fraud and undue influence. The lower court granted all the relief sought by the plaintiffs. The defendant appealed. On appeal, the court held that the action of the testator was suspicious in devising the entire estate to just one beneficiary. The appeal therefore failed as both the sale and the Will were set aside. The court stated that at the time of the sale, there was no property to sell, while the Will was not properly executed. It may be that the court found evidence to convince it that the beneficiary unduly influenced the testator to both make the Will and enter into the contract of sale.

The judgment is somewhat controversial and some legal scholars have attempted to examine the judgment. For instance, Attah[394] submits that –

> *The learned trial judge in Ezenwere v. Ezenwere was in error in setting aside the sale and the power of attorney for the reason he gave; namely that at the time of sale, the property had been disposed of by Will and that having devised the property, there was nothing to transfer under the sale.*

It is therefore important for any testamentary contract to be well established, entered into and executed for such contract to be valid, on the death of the testator.

9. Contract Breach

A breach of testamentary contract or promise depends on the wording of such a contract or promise. For instance, if a contract stipulates that a Will must not be altered, then a change or alteration of that Will is a breach. Equally, a Will may stipulate that the revocation of a contract is a breach. A Will therefore can cause potential problems for probate. These problems result from two basic principles regarding Wills and contract:

(i) A creditor is paid before any beneficiary, and

(ii) A beneficiary under a breach of contract becomes a creditor.

[393] [2003] 3 NWLR (Pt. 807) 238.

[394] Attah, M. O. "Intervolves Dispositions of Property Subject of a Will: A Critique of *Ezenwere v. Ezenwere*(2006) 9 (1) UBLJ 181.

10. Remedies for Breach of Testamentary Contracts and Promises,
If A commits a breach of his contract with B to leave specific property, a pecuniary legacy, or the whole or part of his residuary estate to B, after A's death, B is entitled to recover damages from A's estate for loss of promised benefit[395]. In the real sense, in a claim for specific performance of the contract, the court may order A's personal representatives to transfer the property bound by the contract (e.g. A's house) to B.

In a case where A commits breach of his contract with B, not to revoke A's existing Will, if A intentionally revokes it, B cannot stop A form revoking his Will by bringing claim for specific performance or an injunction, but B is entitled to recover damages from A or after his death from A's estate for loss of the promised benefit under his Will.

11. Claim under the Law Reform (Testamentary Promises) Act 1949 of New Zealand A person can challenge a Will under the Law Reform (Testamentary Promises) Act, if the Willmaker breached a promise to leave him something in the Will in return for work or services that he may have taken for work or services that he may have taken care of for the Will-maker when he or she was alive. For example, a person who took care of the Will-maker when he or she was alive or looked after the Will-maker's property and the Will-maker had promised to include the person in the Will. Where he fails to so include such a person, the Will may be liable to be changed in favour of the claimant. For this claim to succeed, the claimant must establish the following to be present:

(a) There must have been a promise: The Will-maker must have promised to reward the claimant by leaving him something in his Will. It could have been by implication of what he said or did. It is necessary for the Will-maker to have made promise before the work or service was by the claimant. Sometimes, it can be difficult to prove that a promise was made. The claimant will need to provide evidence; such as letters to him from the Will-maker or a witness who head the Will-maker make an oral promise to him. A previous Will can also be evidence of the Will-maker's intentions.

(b) The Work or Services: The work or services provided by the claimant for the Will-maker must have been during his life time not after he died.

What will the Court consider with regards to the work or services?

With regards to the work or services the claimant may have alleged to have performed or rendered. The court will consider the following:

i. The circumstances in which the work or services was provided and in which the Willmaker made the promises

[395] *Hammersley v. De Biel* (1845) 12 Cl. & F.45.

ii. The value of the work or services provided iii. The value of what the Will-maker promised (if he promised a specific amount or property).

iv. Any claims that other people have against the estate (beneficiaries under the Will and creditors).

After taking these into consideration, the court may award the claimant out of the estate a payment that is reasonable, taking into account all the circumstances.

12. **When to file a claim**

The claimant must file the claim within twelve (12) months after grant of probate on the Will. The court may however extend the time limit, but not if the estate has already been distributed.

By *section 3(1) of the Act*[396],

> *...where in the administration of the estate of a deceased person, a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his life time, the claimant proves an express or implied promise by the deceased to reward him for the service or work by making some testamentary provision for the claimant whether or not the provision was to be a specific amount or was to relate to a specified real or personal property, then subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary promise or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and for the same content as if the promise of the deceased were promised for payment by the deceased in his lifetime of such amount may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or the work, the value of the testamentary provision promised, the amount of the estate, and the nature and amount of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, civil union, partner, children, next of kin, or otherwise.*

There is a crucial principle in contract law which also guides testamentary contracts and promises. It is called mutuality and obligations which states that both parties have to be committed to giving up something, if either party reserves an unqualified right to bail out, that person's promises is not enforceable.

[396] The Reform (Testamentary Promises) Act.

13. **Enforceable Types of Testamentary Contracts and Promises**

a. **A Contract to make or not to make a Will**: A contract to make or not to make a particular testamentary disposition or to die intestate is not against public policy in some jurisdictions.[397] The property included in such a contract is determined under usual rules of contracts. Where there is a breach, the remedy is a suit against the descendant's personal representatives for breach of contract. Most contracts and promises specified property on death and the court grants an order of specific performance in such situations where a promise brings a claim. A contract not to revoke a Will does not make the Will irrevocable. A Will is an ambulatory instrument that may be revoked at any time before the testator's death[398]. However, such a contract is still enforceable and breach of it raise claim for damages enforceable against the estate. The contract may be a separate agreement or evidenced by the terms of the Will as a joint or mutual Will.

b. **Contract not to revoke a Will.** A contract not to revoke or change a Will naturally arises in joint Wills or mutual Wills. It has been held that where there is a contract not to revoke which is enforceable on the face of it, there is a breach of that contract only where the testator undertakes a voluntary revocation. There will be no breach where the testator subsequently marries and therefore by operation of law, the original Will is revoked. This was decided in *Re Maryland*: *Lloyds Banks Ltd v. Marsland*[43]. On the apparent basis that a breach of contract could be imputed to a party only where he or she had undertaken a voluntary act. But the question I asked was, why is the act of a subsequent marriage itself, not a voluntary act capable of involving a breach of contract in an appropriate sense. Why is it referred to as an operation of law? Technically, a contract by parties to mutual Will,

not to revoke could be made in any of the various ways a valid contract would be made. It may be oral or in writing in a separate document or in the Will itself. Since it is a cordial principle of law of Wills that a Will may always be revoked. Even where is a contract against the effect, such revocation may give rise to an action for breach of contract.[399]In a mutual Will for example, it may be difficult to establish that a contract exists not to revoke the Will voluntarily unless the agreement is recorded in a recital in the Will itself. The fact is that an obligation is created on one of the parties not to revoke the Will thereby transgressing the agreement which was entered into at the time the mutual Will was made.[45]

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[397] Washington State in USA.

[398] Section 18 Wills Act 1837 (Parry &Carridge, *Law of Succession)*, 33.

[43] http./scholarship.law.won.edu/MULR accessed 10th August, 2020.

[399] The first reported decision involving a joint Will was *Dufour v. Pereira*, 1 Dick. 419, 21 Eng. Rep. 332 (1769), in which a husband and wife executed a joint Will pursuant to a contract not to revoke. The court upheld the right of the beneficiaries under the Will when the wife later attempted to revoke it and make a different testamentary disposition. The court was impressed "more from the novelty of the thing than its difficulty". [45] (1951) ch. 148.

Where the surviving party purports to do so, a constructive trust will be imposed to remedy the injustice which might arise from breach of the original contract. In such a case, it has been held that it makes no difference whether the revocation by the surviving party was a voluntary or involuntary revocation. In *Re Green*[400], it was held that the correct position is to say that the constructive trust arose before the revocation and because there has been a breach of an equitable obligation.

c. Contracts Relating to Jointly Owned Property: As relating to husband and wife, the law authorizes spouses to enter into an agreement concerning the status or disposition of jointly owned property to take effect upon the death of either spouse. Such contract must be witnessed, acknowledged and certified as in joint mutual Will. Assets covered by contract are disposed by the contract in accordance with its terms and are not parts of the deceased contracting party's estate. It is right to say that where a valid contract between spouses relating to a jointly owned property converting all separating owned property into jointly owned property, the contract conveys all properties to a surviving spouse, the contract even defeats a joint tenancy. A later inconsistency does not defeat an effective contract as a jointly owned property because the assets covered by the contract no longer form part of the estate and are not subject to administration. A surviving spouse who act as executor of the deceased spouse's Will, and elects to probate the Will and accept its benefit, it stopped from claiming benefits under the conflicting contract as to jointly owned properties.

14. Conclusion

In conclusion, it has been stated that one of the attributes of a Will is that it is ambulatory in nature and this gives rise to its revocability. A Will can be revoked by a testator either voluntarily or involuntarily. A testator can either alter his Will at any time before his death, this he can do by making the alteration in his Will and re-executing the Will so as to be valid or by using a codicil to make any alteration in the Will.

Furthermore, a testator can also revive a revoked Will by re-executing the revoked Will, or by using a codicil. If an alteration in a Will is not total or complete, or the altered Will is not reexecuted by the testator with at least two witnesses or the testator has no intention to alter his Will, then the Will is invalid and thus revoked. Again, for a Will to be revoked, the Will must be in existence. Thus, a Will revoked by destruction cannot be revived. There must also be an intention to revive a Will for it to be revived and as such attaching a codicil to a revoked Will does not revive it and mere revocation of a Will does not revive the revoked Will. In the absence of these principles, a Will shall be revoked.

This section was a product of the recommendation of the South African Law Commission. The Commission in its report recommended that provision should be made to empower the court to

[400] (1951) ch. 148.

declare a will revoked in part or in whole, where it is satisfied that the testator intended such a revocation, especially where the testator's intention is apparent from the will or other document.[401] The commission clarified whatever uncertainty that might have existed prior to its recommendation by stating categorically what constitute a valid revocation apart from the recognized methods[402].

Revocation can be of two types; partial and conditional or absolute revocation.

15. **Recommendation**

From the foregoing, it hereby recommended that:

A. That the revocation provision of the Will Act should allow the Court to give effect to the testator's intent where destruction is incomplete.

B. The Will Act should enact a provision recognizing the inheritance rights of any child in the womb at the date of the testator's death who is born alive after the testator's death as it is in the intestate and dependents reliefs legislation

C. That revoked will be revived by a will meeting the requirements of the Will Act. While the Will Act should not provide for revival by re-execution, it should expressly state that a will that is executed for more than once may be admitted to probate.

D. Proper education and public enlightenment on will drafting to enhance will drafting in Nigeria and make it less educating and more attractive venture to an average Nigeria and prospective testator.

[401] Ibid.

[402] Which were marriage, subsequent will, destruction and ademption.