



**CONCEPTION AND MISCONCEPTION ABOUT THE
ROLES OF NEXT OF KIN, ADMINISTRATORS AND
EXECUTORS IN THE MANAGEMENT AND CONTROL
OF THE ESTATE OF A DECEASED PERSON UNDER THE
LAW**

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Abstract

In all nooks and crannies of Nigeria people heard of next-of-kin and where necessary people appointed next-of-kin in schools, places of employment, hospitals, banks and a host of others. A next-of-kin is usually a blood relative, though not always. A person who died testate is the one who wrote and executed a Will before his death while the one who died without a Will is called died intestate. Upon the death of a testator (person who made a Will), the Will would be read and there would be a grant of probate to be applied for by the executors from the probate registrar / high court of the state while someone who died without a Will, the relations had to obtain Letters of Administration from the probate registry having fulfilled some conditions which said act may be facilitated by the next of kin and / or relations. Will is an important document in the administration of the estate of a testator. This research is doctrinal of which primary data is the Administration of Estate Law, Cap A5, Laws of Lagos State, 2015, Wills Act, Wills Law of Lagos State 2015 and secondary data are text books, journal articles, per-review journals, newspapers and works downloaded from the internet. The study looked at the legality or otherwise of appointing a next of kin, the purposes of a Will, factors that made a Will to be valid and who benefits from the estate of a deceased person. The work looked at the roles and duties of administrators and executors in the estate of a deceased person. The work exposed that a next-of-kin has no recognition under the law but a mere paper or mouth appointment. The theory adopted for this study is the pure theory of law. The concluding part of the work summarised the findings and stated that makers of valid Wills make things easier for their family members after death and that things are less cumbersome compared to a person who died intestate or appointed a person called

next-of-kin. The paper encouraged persons to make Will before death to discourage manipulation of their estates after death.

Keywords: Next of kin, administrators, executors, estate, will and intestate

Introduction

The term next of kin have been constantly misunderstood by the ordinary public. It appears, though erroneously, that many people think that once you are appointed the next of kin of a person, it automatically gives you the right to inherit the person's estate upon his demise. In fact, many people think that, a next of kin gives an exclusive right over a person's property. The term next of kin simpliciter, does not confer the right of inheritance on the person so named. If so, of what use is the term, meaning and the legal implication of the term next of kin? The importance of a Will cannot be overemphasized in the administration of the estate of a testator.

The erroneous belief and understanding of the term next of kin has made many people to shy away from the need to make a Will. This is because, they think appointing a next of kin, is a way of naming a beneficiary. However, the above assumption is not in conformity with the law. It must be noted that, ignorance of the law is not an excuse. The theory applicable to this work is the pure theory of law which was propounded by Hans Kelsen⁷ which aimed at cognition focused on the law alone and this purity serves as its basic methodological. It is about reality or objectivity of what the law says and what it is and not what it ought to be.

Meaning and Purposes of Will under the Law

Wills are important and useful social, economic and legal documents. The Wills Act of 1837 defined a Will as a testamentary document voluntarily made and executed according to law by a testator with a sound mind, where he disposes of his properties (real or personal) to the beneficiaries to take effect after his death. It is a document written by a person wherein he or she gives detailed instructions on how all properties acquired during his or her lifetime should be distributed to persons of his choosing and who should administer such distribution. The instructions of the testator or testatrix does not cover next of kin under the law except if the name of the next of kin is mentioned or stated in the Will as a beneficiary.⁸

⁷ 1881-1973.

⁸ J. L. Angel, (2008). *Inheritance in contemporary America: The social dimensions of giving across generations*. Baltimore, MD: The Johns Hopkins University Press.

The law governing Wills in Nigeria is not uniform. There are similarities between the various laws in terms of the form and contents of the Will. The differences lie in the restriction of testamentary freedom and age of individual who can make a Will. A testator or testatrix is a man or woman who intends to dispose of his or her assets and instructs to that effect in the Will. Estate refers to the entirety of the assets of the testator whether included in the will or not.⁹

There exists this scepticism or feeling of foreboding in writing a Will in Nigeria. This arises from a reluctance to accept that death is inevitable. Its importance far outweighs this reluctance and they include the followings:

1. It prevents the application of certain customary rules or statutory rules where a person dies intestate.
2. It enables one to give directions on how his affairs should be handled after death. This could be in terms of his assets, setting up a foundation, handling his social media accounts among others thereby avoiding uncertainty.
3. It enables a person to appoint trusted persons to administer the disposition of his estate which makes the grant of probate easier.
4. It enables a person to give specifics in terms of guardians for his children, funeral arrangements and so on.
5. It is more cost-effective to obtain probate compared to letters of administration.

There are types of Wills which include the followings:¹⁰

1. **Nuncupative Will:** these are oral directives given by a person in anticipation of death. To be valid it must be made in the presence of at least 2 credible witnesses, must have been made voluntarily and adequately describes the properties and the beneficiaries of same.
2. **Statutory Will:** These are wills that comply with the preconditions to a valid Will as provided by the Wills Act 1837 and Wills Laws of various states.
3. **Privileged Wills:** these wills are privileged in the sense that they apply to certain persons wherein strict compliance as to form, testamentary capacity, execution and attestation are disregarded and it also applies to only personal properties. The category of persons this privilege is extended to include:
 - a. soldiers in actual military service,

⁹ C. Tilse, L. Rosenman, J. Peut, J. Ryan, J. Wilson, D. Setterlund, (2006). Managing older people's assets: Does rurality make a difference? *Rural Society*, 16, 169-185.

¹⁰ C. Baker, M. Gilding, (2011). Inheritance in Australia: Family and charitable distributions from personal estates. *Australian Journal of Social Issues*, 46, 273-289.

- b. mariner or Seamen at sea and
- c. a crew of the commercial airline.

For a Will to be validly made the following conditions must be fulfilled:

1. The testator must have acted voluntarily.
2. It must be in writing.¹¹
3. It must be duly executed and attested to by at least two (2) witnesses. Duly executed in the sense that the testator must append his signature in the presence of the at least two (2) witnesses and the witnesses must append their signatures in the presence of the testator.
4. The testator must be of a sound disposing mind.
5. The Will must adequately describe the property and the beneficiaries of the same.
6. It must name the executors of the property.
7. The testator must have testamentary capacity i.e. he must be 18 years or 21 years old above depending on the applicable law.¹²

It is advisable for a beneficiary not to be a witness as it he or she would not be entitled to the gift thereby rendering the gift void, though, there are exceptions such as when the gift is made in settlement of a debt, the existence of more than two (2) witnesses, subsequent appointment as a solicitor among few others.¹³

Restriction to Testamentary Freedom

Section 3 of the Wills Act 1837 stipulates that there is no restriction to testamentary freedom but, the Wills Laws of other states recognise that the right of a person to distribute his property is restricted to certain customary, statutory and religious provisions that apply to the testator or testatrix. These restrictions include:

1. **Customary Limitation:** Section 3 of the Wills Law of the former Western Region subjects the testamentary freedom of a person to the applicable customary law. For example, in the case of *Idehen vs. Idehen*¹⁴ where the testator bequeathed two (2) of his houses referred to as *Igiogbe* in the Bini

¹¹ Section 9 of the Wills Act 1837.

¹² Section 7 of Wills Act 1837 and Section 3 of Wills Law Lagos State

¹³ M. A. Goetting, P. Martin, (2001). Characteristics of older adults with written wills. Journal of Family and Economic Issues, 22, 243-264.

¹⁴ (1991) 6 NWLR (Pt. 198) 382

Customary Law, it was held that such devolution to a person other than the eldest surviving son was invalid.

2. **Islamic Law Limitation:** this limitation is included in the Wills Law of Kaduna State, Oyo State, Kwara State, Jigawa State and Plateau State. It stipulates that a person subject to Islamic law immediately before his death cannot dispose of more than one-third of his property by Will. In the case of *Ajibaiye vs. Ajibaiye*,¹⁵ it was held that where contrary to the wishes of the testator excluding the application of Islamic law in disposing of his property, it was still held to be applicable and thus the will invalid.
3. **Provision for Family and Dependents:** this is recognised by statutes. Notwithstanding the provisions of a testator's or testatrix's Will, the wife or husband as the case may be or the child(ren) may apply to the court on the ground that the dispositions in the Will did not make reasonable financial provisions for his dependents.¹⁶ The application should be made at the High Court of a State.

In Drafting a Will, the following Information are Necessary:

1. Full name (including former name and alias), address and occupation of the testator.
2. Full details of beneficiaries.
3. Full details of executors.
4. Details of all the testator's properties including debts.
5. Directives as to funeral preparations if any.
6. Details of Witnesses.
7. Provisions for substitute gifts.
8. Medical Certificate to prove the sound disposing mind of the testator where applicable.

Meaning of Next of Kin, Executors / Executrices and Administrators / Administratrixes

In the case of *Joseph vs. Fajemilehin & Anor*¹⁷, a next of kin is interpreted to be one's nearest blood relative. Next of kin is a person being chosen by another to provide relevant pieces of information about the appointor when the person who chooses him or her becomes unavoidably absent or not available or when the person is in a situation that deprives the person the opportunity of providing vital

¹⁵ (2007) All FWLR (Pt. 359) 1321

¹⁶ Section 2 of Wills Law of Lagos State

¹⁷ (2012) LPELR - 9849 (CA)

information for him or herself. It can also be referred to as a person who can be contacted or notified in cases of emergencies or eventualities. This include but not limited to completing of forms while boarding airoplanes, entering of schools, companies, hospitals, hotels, commuter buses and patients forms in the hospitals. It is often used in financial documents by commercial banks and other financial institutions which means next of kin is a person who can ensure that the proper steps are taken towards the recovery of the money held at the bank, if the owner dies. This does not give a right to inherit such money to the next of kin. Next of kin is not a substitute to the making of a Will. In respect of Will, next of kin is irrelevant though the person so appointed may be ignorantly happy of such appointment as a next of kin. The estate of a person who died testate is distributed in accordance to the Will but a next of kin will be entitled to his or her share of the estate if the Will says so. A Will is a legal document by which a person called testator expresses his wishes as to how his or her property is to be distributed after death. It is a testamentary document voluntarily made and executed according to law by a testator of sound mind, where he deposes his property, real or personal, to beneficiaries to take effect after his death¹⁸. A testator (male) or testatrix (female) expresses how he or she wants his or her property be shared and used after his / her death which reduces possible friction that could arise therefrom the distribution and / or sharing of the assets. The person(s) who ensure that the contents of a Will are strictly adhered to and manages the estate of the testator is called executors or executrices. However, a situation where the deceased died intestate (without making a valid Will), the distribution of his / her estate is governed by the law. The customary law / Islamic law or the Administration of Estate Law will apply depending on the kind of marriage contracted by the deceased. If the deceased contracted a statutory marriage, the distribution of his estate shall be governed by either the English Law or the Administration of Estate Law¹⁹. The Administration of Estate Law provides for the order of inheritance which must be strictly complied with and a next of kin, is not among the categories of those entitled to inheritance in this instance. The persons who are appointed by the court to manage and control the estate of a person who died without a Will are called administrators or administratrixes. Requisite things must be done at the probate registry before the administrators or administratrixes are appointed to take charge of the deceased estate.²⁰

¹⁸ Asika vs. Atuanya (2013) 14 NWLR (Pt. 1375) p. 510, SC

¹⁹ Obuzez vs. Obuzez (2007) 10 NWLR (Pt. 1043) 430.

²⁰ Sappideen, C. (2008). Families and intergenerational transfers: Changing the old order. UNSW Law Journal, 31, 738-765.

Succession is regulated by law. It is only those entitled by law to inherit a deceased person's estate that can do so. If the person so named as a next of kin is the son of the deceased, he is entitled to inherit, not as a next of kin, but because he is the legitimate son of the deceased. Also, if the person so named as a next of kin, is named in a valid Will made by the deceased, he is entitled to an inheritance not because he or she is a next of kin but, he / she is named in the WILL. Beneficiaries to a Will are those persons whose identity is clearly identified to benefit from the distribution of assets in the testator's Will²¹.

Sharing of Assets of the Deceased who Died without a Will

Under the English Law and the Administration of Estate Laws of various states in Nigeria, the surviving spouse together with the children of the deceased inherit his or her estate to the exclusion of other persons. The parents of the deceased rank next after the surviving spouse and children, followed by brothers and sisters of the full blood, brothers and sisters of half-blood, grandparents, aunts and uncles of full-blood relations to the parents of the deceased among others²².

The deceased who contracted a customary marriage, customary law will determine who will inherit his or her property. Heirs are those who are under native law and custom entitled to inherit his or her estate. Under the Nigerian law of intestate succession, one cannot choose his or her heir under the pretext of next-of-kin; the law imposes heirs on him. It is the surviving spouse and children of an estate who married under the Act that are his or her heirs. The intestate cannot therefore, by naming only one of them or any of his other blood relatives his or her next-of-kin scheme them out of inheritance as the act of naming his or her next-of-kin does not amount to testamentary disposition²³.

Administrators and executors have the right to deal, devise, dispose, lease, convey, execute documents, manage, mortgage, sell and transact in respect of the real estate of a deceased²⁴. The Administration of Estate Laws of the various states of the Federal Republic of Nigeria share similarities in terms of operation, contents and usages.

Administrators and Executors under the Administration of Estates Law, Cap. A5, Laws of Lagos State, 2015

²¹ Edem vs. Etubom (2016) LPELR - 41252 (CA)

²² Kekerogun & ors vs. Oshodi (1971) LPELR - 1686 (SC)

²³ *ibid.*

²⁴ Sections 37, 38, 40 and 57 of the Administration of Estates Law, Cap A5, Law of Lagos State of Nigeria.

In the administration of estate, the following set of persons exist to wit: when the person dies testate (dies leaving a valid Will behind) and when the person dies intestate (dies without leaving a valid Will behind). If the person who chooses someone as his or her next of kin dies testate, the question as to whether it is the named next of kin that will inherit the property or not will not be in consideration. This is because the property of the deceased person will be shared based on the contents of the Will. A Will is testamentary and ambulatory in nature, it becomes effective and operational the moment the testator goes to the life beyond. The question as to who is the beneficiary or who are the beneficiaries will not be invoked in the court of law regarding the issue of next of kin unless the named next of kin is named in the will as the beneficiary or one of the beneficiaries as the case may be. The property of the testator can only be given out in accordance with the provisions of the Will and not otherwise.

Section 57²⁵ personal representative means the executor, original or by representation, or administrator for the time being of a deceased. The law goes further to state the duties of a personal representative. **Section 37(1) Administration of Estates Law, Cap. A5, Laws of Lagos State, 2015** states thus:

“A personal representative may assent to the vesting in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled to it, either beneficially or as trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or had exercised a general power of appointment over the will, and which devolved upon personal representative.”

Furthermore, **Section 38(1)** of the stated law provides that:

“All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this law by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this law, of the probate or administration.”

The powers of the administrators and / or executors to manage the estate of the deceased is guided by the provisions Administration of Estate Law.²⁶

Consequently, when it comes to the law of succession, the term next of kin has no legal implication. It therefore does not confer the right of inheritance. It is erroneous

²⁵ Administration of Estates Law, Cap. A5, Laws of Lagos State, 2015

²⁶ Section 40(1)(a-c) (2)(3) of the Administration of Estates Law, Cap. A5, Laws of Lagos State, 2015.

and unlawful for anyone to claim any inheritance on the singularly reason that he is named as a next of kin; and such claims have no legal bases and are unfounded.

A person is said to have died intestate when the deceased person dies without a valid Will. The person named as the next of kin by the deceased person will not be conferred with ownership rights over the deceased property. What the court will carefully put into consideration is the nature of marriage contracted by the deceased person before the demise. The mode of sharing the deceased property will be determined by the incidence of marriage of the deceased. This means that if the deceased person contracted marriage under the Marriage Act, what will govern and determine how the property will be shared is the provisions of the Marriage Act. If the marriage is contracted under the customary law, the customary law of the deceased person's place will govern how the property will be shared and who is entitled or not entitled to the property. On the other hand, if the marriage is contracted under Islamic law, the Islamic practices in sharing property will be applicable.

If the marriage is done under the Marriage Act, the sharing of the property will be determined by the English law or the Administration of estate laws of various states depending on the jurisdiction²⁷.

Marriage contracted in accordance with the custom of his or her place alone, the person that will be entitled to the property will be determined by the applicable customary law of the deceased person's place and not actually the person named as the next of kin unless the named next of kin is by the custom of the place entitled to inherit such property.

However, it is important to note that the said customary law of the deceased will not have automatic admissibility in the court of law incase such customary law is challenged. The law is settled that for a customary law to be admissible in court, it has to go through the validity tests which are to wit: that the customary law must not be against public policy, that the customary law must not be repugnant to natural justice, equity and good conscience and that the customary law must not be incompatible with the relevant law for the time being.²⁸ Any customary law that does not pass the validity tests mentioned above dies a natural death will not be admitted in court of law.

If the marriage is contracted under Islamic law, those who will be entitled to the deceased property are those allowed by the Islamic law to inherit and not necessary the named next of kin.

Under English Law and the administration of estate laws of various state, the surviving spouse together with the children of the deceased stand at the apex of the

²⁷ Obuzez (supra)

²⁸ Section 18(3) of Evidence Act, 2011

hierarchy of the beneficiaries of the wealth of a person who dies intestate (without a Will). They inherit his estate to the exclusion of every other person.²⁹

It is also settled that the surviving children take in equal shares, irrespective of their sex, and that the so-called illegitimate children stand in equal pedestal with those born during the continuance of a statutory marriage, provided their paternity was acknowledged by their putative father. Section 42(2)³⁰ which prohibits discrimination based on the circumstance of one's birth. The following cases further refer:³¹

The parents of the deceased take next after the surviving spouse and children, followed by brothers and sisters of the full blood, brothers and sisters of half-blood, grandparents, aunties and uncles of full blood relation to the parents of the deceased.³²

Conclusion

There is a need for adequate knowledge, experience and precision in drafting or making a Will and its execution. Services of a legal practitioner is needed to ensure that it is drafted and structured in accordance with the law and rules to avoid the Will itself or gifts contained therein from being rendered void. A lawyer is at the best position in rendering professional advice and services on how to obtain probate or Letters of Administration, the time frame for such application and legal implications for handling an estate contrary to the law.

Administration of a deceased person's estate focuses on the need to be accountable. A personal representative standing in a fiduciary position unless expressly authorised to do so, is not allowed to make a profit by the trust either directly or indirectly.¹⁰ He is accountable for any profit made from the constituted trust.¹¹ He must not in any way make use of the estate property or of his position for his own interest or private advantage. He may not buy the estate property from himself or for himself or his co-administrator / executor. He cannot occupy the two positions of vendor and purchaser at the same time. Any such purchase is voidable at the instance of any beneficiary, however fair the transaction may be and however, full a disclosure of all material facts may have been made to the beneficiaries especially where the price is considered to be below market value.¹²

Accountability is an equitable rule, which has always been guarded and enforced and encourages all personal representatives to refrain from conduct incompatible with good faith and prevent them from purposefully occupying a position where personal interests may conflict with their duties to the estate.

²⁹ Salubi vs. Nwariaku (2003) 7 NWLR, (Pt. 819) at P. 452, Paras. D-E and Williams vs. Ogundipe (2006) 11 NWLR, (Pt. 990) 157.

³⁰ Constitution of the Federal Republic of Nigeria, 1999 (as amended)

³¹ Duru vs. Duru (2016) LPELR - 40444 (CA), Igbozuruike vs. Onuador (2015) LPELR - 25530 (CA).

³² Kekereogun & ors v. Oshodi (1971) LPELR-1686 (SC)