STATUTORY LIMITATIONS TO WILLS IN NIGERIA AND GHANA.

BY

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INTRODUCTION

In Nigeria, a person when alive often has the freedom to dispose of his property to whomever he chooses. However, when he dies, limits have been put upon that freedom by legislation in some states of the country, when he has made a will concerning the disposition of his estate. These restrictions to testamentary freedom are often justified on cultural, religious, moral and social grounds. This paper appraises these limits to testamentary freedom in Nigeria, while comparing it with the position in Ghana. The question as to whether or not the limitations to testamentary freedom are justified is also considered in the paper. The paper finds that some limitations whilst worthy ideals and thus justified, could bring about unrealistic and impracticable results while some totally take away freedom from the testator. The paper recommends that a balance between the wishes of the testator and following the strict letter of the statutes as to the limitations be found so as to as much as possible, give effect to the desires of the deceased testator as stated in his will.[1]

DEFINITION OF WILL

A will has been defined as 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 manifested in the will'.[2] Thus, a will is a document through which a person directs how his property is to be distributed when he is dead. A will takes effect only upon the death of its maker (the testator) and until then it is but a declaration of intention which can

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[2] Abayomi,k. *Wills: Law and Practice*, (Lagos; Mbeyi and Associates, 2004), p. 6.

be varied or revoked at any time.[3] It is not mandatory to make a will but persons who wish to settle their affairs before their death or with a wish to avoid family disputes after their demise choose to do so.

THE NATURE OF A WILL

1.Ambularory and Revocable two fundamental characteristics of a Will are ambulatory and revocable. The ambulatory aspect means that a Will takes effect from the death of the testator. Consequently any property dealt with within a will but disposed by the testator before his death cannot be affected by the Will. Conversely property acquired after the making of Will may be disposed under its terms.

A Will is always revocable in the sense that it may be completely revoked, altered or added to by the testator during his time so long as he complies with the appropriate formalities.

2. Animus Testandi an important requirement of the law relating to Will is that a testator must have executed his Will with the intention that it is his last Will and Testament. An exception is when the Testator is insane or is compelled to execute the Will.[4]

CAPACITY TO MAKE A WILL

Choice of law rule the capacity of a testator to make a valid Will is governed by the conflict of law rules. Under the system, capacity in respect of movables is governed by the lex domicilii of the testator at the time the Will is made while the capacity to make Wills disposing immovables is referred to the lex situs.

Persons with capacity under the Wills Act 1937 as amended and the Wills Law, 1852 every person has the capacity to make a will irrespective of whether or not such person is subject to customary law. There are however, a number of exception to this general rule.

i.Infants

ii.Persons of unsound mind

iii.Blindness or illiteracy

iv.Fraud or coercion

INFANTS

As a general rule persons under eighteen years of age may not make a valid Will.[5] An exception exists in respect of infants who are in actual military service who by law are qualified to make a privileged wills.

PERSONS OF UNSOUND MIND

A testator must of necessity possess a sound mind and memory so as to enable him to understand the nature of the act in which he is involved. If a testator is of unsound mind, that will invalidate his Will. The relevant time for determining the testator's mental capacity is the time the will is made.[6]

If for instance, the will was executed during a lucid interval it remains valid even though the testator subsequently becomes of unsound mind. There is a presumption in favour of the testator's capacity. But if evidence of his unsoundness of mind is adduced, the burden of establishing his capacity falls on the party who set up the will.

BLINDNESS OR ILLITERACY

A blind or illiterate person has the capacity to make a will. But care must be taken with regards to the execution of such will in order to avoid fraud. In the case of illiterates, the normal practice is the use of thumb prints with the testator's name written beneath the mark.

FRAUD OR COERCION

Proof of fraud or coercion in the execution of a will invalidates it. In the case of coercion, the

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[3] Egwuatu,O "Limits of aTestator onFreedom of Will p.1 Testament",<http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/LIMITS%20OF%20A%20TESTATOR%20ON%20FREEDOM%20OF%20WILL%20TESTAMENT.pdf >accessed on 7th August 2019,

[4] Cap 133, Laws of Western Nigeria, 1959

[5] Banks v Goodfellow [1870] LR. 5QB 549, 567 Sexction 69(1) of Succession Law Edict. 1987

[6] Federal Administrator General v Johnson[1960] LLR.290; Balonwu v Nezianya [1959] 3ENLR. 40. Section 69(2) of Succession Law. Edict 1987.

application of force or excessive pressure must be established.[7] It is not sufficient to prove conduct which would in equity amount to undue influence.[8]

MARRIED WOMEN

Under section 8 of the Wills Act , 1937 married lacked testamentary capacity. But this has been altered by section 1 of the Married Women Property Act, 1882 and section 3 of the Married Women Property Act, 1893. Both statutes are statutes of general application in Nigeria. The Wills Law, 1958 which applies in Lagos, Ogun, Ondo, Oyo and Bendel States and the Succession Law Edict, 1897 of Anambra State do not limit the testamentary capacity of married women.

PRIVILEDGE WILLS

(1) Persons with capacity to make privileged will

Privileged wills are those which are not required by law to comply with the requirements both as to capacity and form.

Under Section II of the Wills Act, 1837 any soldier in actual military service or any mariner or seaman being at sea may disposed of his personal estate without complying with requirements of the Act as to form. The Wills (soldiers and sailors) Act, 1918 extended the scope of the 1837 Act. It included members of the Royal Air Force within the definition of "solider" and allowed privileged testators to dispose of real property in England and Wales. The Act also authorized members of Her Majesty's naval or marine forces to make privileged wills if they were "in actual military service" irrespective of whether they were at sea or not. Lastly, the Act confirmed that privilege wills may be made by infants.

These statutes, as has been observed above, form part of the law in Lagos, Northern and Eastern States.

In Ogun, Oyo, Ondo and Bendel States, section 9 of the Wills Law consolidates the provisions of the 1837 and 1918 Acts. Two important differences exist between the Acts and the Law. The Law substitutes "any member of an air force" for members of Her Majesty's Royal Air Force. Moreover, it extends the privilege only, to "any mariner or seaman being at sea". Section 73 of the Succession Law Edict, 1987 of Anambra State, confers the privilege on members of "the armed forces on active military service or any seaman or mariner at sea."

(2) Conditions Of The Privilege

The Acts require that soldiers must be "in actual military service". This has been interpreted to mean services in connection with military operations or training for such operations which is imminent.[9] With regard to sailors, the phrase " a mariner or seaman at sea" has been construed to cover both military, navy and the merchant navy. In the case of airmen, a lot depends on the operation of section 5(2) of the Wills (Soldiers and sailors) Act, 1918, section 9 of the Wills Law and Section 73 of the Succession Law Edict, 1897. Under the 1918 Act only airmen "in actual military service" qualify but no such requirement exists under the wills Law and the Succession Law Edict.

FORMAL REQUIREMENTS OF A WIILL

With the exception of privileged wills already discussed, all wills must comply with the formalities prescribed in the Wills Act 1837 or the Wills Law in order to be valid. The following formalities are obligatory;

[7] Nelson v Oldfield (1688); 2 Wenn. 76; Hacker v Newborn (1654) Style 427.
[8] Boyse v Rossborough (1857) 6 HLC 48. 10 E.R 1192.
[9] Re Wingham (1949) p. 187

(1) The Will Must be in Writing

Although the law requires that a will must be in writing and not oral, no particular form of writing on any special substance is prescribed.[10] The established practice is to write wills on durable paper which will stand the test of time.

(2) Signature Of The Testator

It is mandatory that a will must be signed by the testator or by someone in his presence and by his direction.[11] In latter case, the person so signing, may sign his own name or that of the testator. In the case of an illiterate testator, it would be sufficient for him to make a thumb mark in place of signature.

The Wills Act, 1837 prescribed that a will must be signed "at foot or end thereof.[12] The interpretation of this phrase has been further liberalized by the Wills Act Amendment Act 1852 which enable a testator to affix his signature "at or after, or following or under, or besides or opposite to the end of the Will" or in the attestation clause or besides the signature of the witness if there is room at the bottom of the previous completed page. [13] In Lagos, Oyo, Ogun, Ondo and Bendel States, section 7 of the Wills Law provides that every will shall be valid with respect to position of the testator's signature if the signature is so placed that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. The same formulation is adopted by Section 71 (1) of the succession Law Edict, 1987.

(3) Testator's Signature or Acknowledgement in The Presence of Witness

The applicable statues require that the testator's signature "shall be made or acknowledge by the presence of two or more witness present at the same time" and who subsequently attest the will.[14] The testator may not only sign in the presence of witnesses but could acknowledge his previous signature before them. Such acknowledgement must, however, be express or implied.

(4) Attestation by the Witnesses

Both the 1837 Law and the Wills Law provide that witnesses to a will "shall attest and subscribe to the will in the presence of the testator, but no form of attestation shall be necessary". Under the provision, the witnesses must sign their signature after that of the testator. It is not permissible for them to sign before the testator and thereafter merely acknowledge their signature.[15] Moreover, the will must be attested in the testator's presence. This requirement is liberally construed to include situations where the attestation is done where the testator could have seen the witnessed sign had he looked.

While the witnessed are required to sign in the presence of the testator, they need not do so in the presence of each other.

(5) Alterations, Interlineations And Obliterations

Alterations and interlineations

[10] Section 9 Wills Act, 1837, Section 6, Wills Law, 1958: Section 67 of Succession Law Edict, 1987
[11] Ibid, Section 70 of Succession Law Edict, 1987
[12] Ibid.
[13] Section1
[14] Wills law, Section 6, Wills Act, 1837, Section 9 of Wills law, Section 70 of Succession Law Edict, 1987.
[15] In the Estate of Randle deceased (1962) 1 All NLR 130; Wyatt v Berry (1893) p:5

Section 21 of the Wills Act, 1837, section 18 of the Wills Law and Section 82 of Succession Law Edict, 1987 provide that all alterations made after the execution of a will must be executed in the same way as the will itself. Thus, the testator and his witnesses are required to sign in the margin opposite the alteration or "at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will".

1. Obliterations

The same rules apply to obliterations and interlineations.

REVOCATION AND REVIVAL OF WILLS

(1) Revocation: Express Or Implied

Under section 20 of the Wills Act, 1987, section 17 of the Wills Law and Section81 of succession Law Edict, 1987, an earlier Will may be revoked by a later one as long as the formal requirements are observed in the later cases. Such revocation may be effected by an express clause or by necessary implication from the wording of the Will. An implied revocation is said to occur where the provisions of the later Will are inconsistent with those of the earlier Will gave specific property to X and in a subsequent bequeathed the same item to Y, the later revokes the former even though to specific words to that effect were used.

(2) Revocation By Destruction

The applicable statutes also allow the revocation of a will "by the burning, tearing o otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same " [16] two important elementsof this provision are clear. First, the destruction must be effected by the testator personally or by some person" in his presence and by his direction''.

Secondly, the act of destruction must be accompanied by the intention to revoke the will . Thus if the destruction was effected when the testator is not in control of his mental faculties owing to the influence of alcohol or insanity, he cannot be said to possess the necessary intention.

(3) Revocation By Marriage

Both Section 18 of the Wills Act, 1837, section 15 of the Wills Law Section 79(1) of the succession Law Edict, 1987 provide that " every will made by a man or a woman shall be revoked by his or her marriage". However, the Wills Law except marriages celebrated in accordance in accordance with customary law from having such effect.

[16] Wills Law, Section 17: Wills Act, 1837 Section 20; Succession Law Edict,1987 Section 8(1)

> A Statutory exception exists to the revocation rule. There is no revocation of a will by a subsequent marriage of the testator where it is made in the exercise of a power of appointment and the property thereby appointed would pass in default of an appointment to the testator's heir, executor, administrator or statutory next-of-kin. Consequently, where the exercise of a power of appointment is involved, revocation by marriage is restricted only to those cases in which the instrument creating the power provides that in default of appointment the property is to devolve as on intestacy.[17]

Testamentary freedom is a principle in Wills Law whereby a person is free to dispose of his property however and to whomever he wishes in his will.[18] It is "the idea that a person has the right to choose who will succeed to things of value left behind at death."[19]As will be shown in the course of this paper, in various countries testamentary freedom is limited by statute. Such "Testamentary freedom embodies the concept of ownership of property and the right to pass on property by will even though the testator is dead. The testator's ownership survives his or her death, which can seem a bizarre notion, but is one which is crucial to dealing with property in all systems of political organization which are not is the case in some states in Nigeria, while in others, testamentary freedom remains unrestricted. Various reasons are given for this restriction of testamentary freedom which would be discussed in due course. The statutory limitations applicable in Nigeria are discussed below with comparison being made to the statutory limitations to testamentary freedom applicable in Ghana.

STATUTORY LIMITATIONS TO TESTAMENTARY FREEDOM IN NIGERIA.

The law governing Wills in Nigeria is not uniform. Different laws apply in different states. In most states created out of the Old Western Region,[20] the applicable law is the Wills Law, Cap 133, Laws of Western Region of Nigeria 1959.[21] While Oyo and Delta States have enacted their own Wills Law[22], the Wills laws in force in the other states carved out of the old Western region are basically a

[17] Re Gilligan (1950) p. 32. 37.

[18] Law-Pedia.com, 'Testamentary Freedom,' <www.law-pedia.com/testamentary-freedom.htm> accessed on 27 March 2013.

[19] L M Friedman, "The Law of Succession in Social Perspective", *in* Death, Taxes and Family Property, (E C Halbach, Jr. ed., 1977), at 9, 12, in Daniel B. Kelley, Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications, (2013). *Scholarly Works.* Paper 950, <http://scholarship.law.nd.edu/law_faculty_scholarship/950> accessed on 5 April 2013.

[20] Edo, Delta, Ekiti, Ondo, Osun, Ogun and Oyo States.

[21] The states carved out from this region have re-enacted this law although with no change in substance. I Sagay, *Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries,* (Lagos: Malthouse, 2006), p. 124.

[22] Wills Law of Oyo State 1990 and Wills Law, Cap W4, Laws of Delta State 2006.

replica of the old law with minimal alterations such as name of the state and enacting authorities, etc.[23] Lagos State adopted the law applicable to wills in the Old Western Region by the Applicable Laws Edict of 1972.[24] In some states in the former Northern and Eastern Region of Nigeria, the applicable law remains the English Wills Act of 1837.[25] Kaduna and Abia States have their own Wills Law[26]. Other States from the region that have enacted their own laws include Kwara, Bauchi, Plateau, and Jigawa.15

In the states in which the Wills Act of 1837 is still the applicable law, there is unrestricted testamentary freedom. Testators in those states are free to dispose of their properties to whomever they wish, even if they choose to disregard their family members and dependants and give all their properties to complete strangers. The applicable section is Section 3 (1) which reads as follows:

> It shall be lawful for every person to demise, bequeath or dispose of, by his Will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to either at law or in equity at the time of his death …

However, this absolute testamentary freedom as in the Wills Act of 1837 was criticized on moral, customary and religious grounds. It was argued that it could lead to testators disinheriting his dependants in favor of strangers, which would cause hardship to those

Based on community property. Testamentary freedom is really about control of property by the dead person, and can also lend itself quite readily to control of the living by the dead person. The testator can either provide for the members of his or her family, or not. He or she can attach conditions to the bequests made, provided they are not against public policy. He or she can make commentary on any relations, exact revenge, and assert his or her personality in ways which may not have been possible in life." F M Hannah, and M McGregor-Lowndes, "From Testamentary Freedom to Testamentary Duty: Finding the Balance," [27] dependants.[28] Also, according to Sagay, Muslims are particularly critical of the fact that this freedom would enable a Muslim dispose of his property by will, in a manner contrary to Islamic Law.[29] It was also argued that some properties are sacred by customary law and cannot be disposed of by the testator however he wishes. All these led to the legislative attitude as manifest in the Wills Laws enacted by some states in which laws now introduce certain limitations being placed on the testamentary freedom of testator with the states. These limitations are statutory and can be discussed under three heads:

Customary Law Limitation:

This limitation is present in the Wills Laws of Lagos, Kaduna, Oyo, Delta and the other states of the former Western Region of Nigeria. It is also present in Plateau and Kwara States.[30] This restriction serves to restrict the property that can be disposed of by will. S. 3 (1) of the Wills Law

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[23] See note 8.

[24] Now Wills Law of Lagos State Cap W2 Laws of Lagos State 2004

[25] This is a statute of general application applicable in Nigeria having being in force in England on January 1, 1900.

[26] Kaduna State Wills Law, Cap 163, Laws of Kaduna State of 1999 and Abia State Wills Law Cap 37, Laws of Abia State 1999.

[27] Kwara State Wills Law, Cap 168 Laws of Kwara State 1991; Bauchi State Wills Law, Cap 168 Laws of Bauchi State 1989; Plateau State Wills Edict, No.2 of 1988; and the Jigawa State Wills Law, Cap 155 Laws of Jigawa State 1998. See Dadem,y. *Property Law Practice in Nigeria*, (Jos: Jos University Press, 2009) p. 262 at note 833.

[28] I Sagay (n.9) p. 127.

[29] *Ibid*.

[30] Y Dadem (n.15) p. 258 at note 813. Adamawa State is also included by the author. For the limitation in Delta State, see s. 3(1) of the Delta State Wills Law, Cap 4, Laws of Delta State 2006.

of the former Western Region reads as follows:

> Subject to any Customary Law relating thereto, it shall be lawful for every person to demise, bequeath or dispose of, by his will executed in a manner hereinafter required, all real and personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so demised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator.

This statutory limitation recognized that complete testamentary freedom could upset some established rules in our Customary Laws. Belgore JSC explains this in *Lawal–Osula v. Lawal–Osula*[31] as follows:

> … Binis like some other tribes in Nigeria have got some age long traditions and norms, some peculiar to them, others in common with the other races in the other parts of the world that cannot be written off by mere legislation. To legislate to ban some of these native law and customs would lead to serious disorder that makes governance and obedience difficult. It is in light of these that instead of entirely discarding a practice that has been tried and tested over centuries, legislation are carefully drafted to accommodate the laws and customs in question and to regulate their practice.[32]

There was confusion as to the effect of S. 3 (1) of the Wills Law of Western Nigeria i.e. whether it operated to take away the testamentary capacity of all persons subject to any Customary Law or if it merely qualified the property that could be disposed of in a will[33]. This confusion has however been cleared up by the Supreme Court in *Idehen v. Idehen.*[34]This was a case involving the Bini Customary Law, the testator having died leaving behind a will wherein he devised the two houses in which he lived in his life time to his eldest son. The son however predeceased him and thus the two houses would pass to the residual estate since they were specifically willed to the son. However, these two houses wherein he lived in his lifetime constituted the *Igiogbe* or family seat[35] under the Bini Customary Law which is to pass automatically to the oldest surviving son of the deceased upon completion of the testator's second burial rites,[36] to the exclusion of all his other children. The oldest surviving son of the testator, along with some other children therefore instituted an action seeking a declaration that the will was invalid because of its conflict with the Bini Customary Law. The trial court found that indeed the plaintiff as the oldest surviving son by Bini Customary Law, was entitled to inherit the two houses constituting the *Igiogbe*. The court therefore held that the part of the will devising the houses to the deceased eldest son as invalid but upheld the remaining part of the will as valid. At the Court of Appeal, the plaintiff's right to the two houses was upheld but the entire will was declared void reason being that the dispositions under were all void. Upon further appeal, the Supreme Court however held that S. 3 (1) of the Wills Law of Old Bendel State[37] related only to the subject matter of a demise, that is, it restricted only the property that could be passed under a will, and that it was not intended to take away the testamentary capacity of a testator i.e. his ability to make a will. The judgment of the Court of Appeal was therefore reversed, and that of the trial court restored.

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[31] [1995] 32 LRCN 291.
[32] *Ibid* at 305.
[33] I Sagay (n.9) p. 141
[34] (1991) 6 NWLR (Pt. 198), 382.
[35] I Sagay (n.9), p.143.
[36] Y Dadem (n.15), p. 259 at note 820
[37] Cap 172 of 1976, applicable in Edo state.

The customary law restriction is so absolute that a testator cannot seek to exclude it. This was the position held by the Supreme Court in the *Lawal–Osula* case[38] where the testator inserted a declaration in the will as follows:

> I DECLARE that I make the above devise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this will. It is my will that the native law and custom of Benin shall not apply to alter or modify this will.[39]

Despite this declaration, a devise by the testator who was subject to the Bini Customary Law of his *Igiogbe* to persons other than his eldest son was held to be invalid. To our mind, there is need for the court to revisit its position in the above case. This is so because a testator may include such a declaration for various reasons. Most notable of which may be to completely disinherit a first son or an eldest surviving son who is wayward and wasteful and who, out of his waywardness gave the testator a whole lot of trouble during his life time. Such declaration may be the only tool the testator has to teach such child a lesson. Thus, it makes no sense that after a testator has disinherited such wayward child by not bequeathing anything to him in his (the testator's) will, such child can rely on the above section to benefit from the testator's estate under the guise of the property being *Igiogbe*. This, to our mind, amounts to an unreasonable restraint to the testamentary intention and capacity of a testator. In essence, the courts should be willing to uphold such declaration and in so doing, would be assisting the testator in preventing such child from reaping where he did not sow Lagos State limitation is a little different. It reads as follows:

> 1(1) it shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with the provision of this law, all property to which he is entitled, either in law or in equity, at the time

[38] Note 18 above.
[39] [1995] 32 LRCN 291at 318.

> of his death - Provided that the provision of this law shall not apply to any property which the testator had no power to dispose of by will or otherwise under customary law to which he was subject.[40]

According to Abayomi, this restriction is "more explicit and expansive" as it not only covers property subject to customary law, but it would seem to also cover any property which the testator has no power to dispose of such as family or community property.[41]

Islamic Law LimitationThis limitation may be seen to be a fall out of the Supreme Court decision in *Adesubokun v. Yunusa*[42]. In this case, the testator, a Muslim from Lagos State subject to the Islamic Law of the Maliki School made a will according to the Wills Act. The validity of the will was challenged on the ground that the testator did not make certain dispositions to his heirs according to Islamic Law. The trial judge held that the will was invalid as the testator did not comply with Islamic Law. However, the Supreme Court held that the testator intended to distribute his property under the Wills Act and thus Islamic Law could not be applied to him. According to Dadem, it was perhaps in response to the complete testamentary freedom approved by the Supreme Court in *Adesubokun v. Yunusa*[43] that the Islamic Law limitation in the Wills law discussed below arose[44]. By the principles of Islamic Law, a testator cannot dispose of more than one-third of his properties by a will without the consent of his legal heirs (his heirs under Islamic Law).[45] This restriction is now subsumed under the Wills Law of Kaduna State, the Wills Law of Oyo State, the Plateau State Wills Edict,[46]the Bauchi State Wills Law,[47] the Kwara State Wills Law[48] and the Jigawa State Wills Law[49]. For instance, section 2 of the Wills Law of Kaduna reads thus:

It shall be lawful for every person to bequeath or dispose of by his will executed in accordance with the provisions of this law, all property to which he is entitled, either in law or equity, at the time of his death. Provided that the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic Law.

The phrase "the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic Law" means that a will made by a person subject to Islamic law is not governed by the Wills Law. Dadem has rightly argued that the use of the expression "subject to Islamic Law" might cause problems as persons, in a bid to escape this limitation might argue that they never subjected their affairs to Islamic Law even though they are Muslims.[50] Such was the case in *Ajibaiye v. Ajibaiye*[51]where this restriction came before the Court of Appeal for the first time. In the case, the testator (deceased), a Muslim from Ilorin, made a will under the Wills Act, where he disposed of his properties in a manner not agreeable with the principles of Islamic Law. He added a statement in his will thus:
I also direct and want my estate to be shared in accordance with the English Law and as contained in

[40] Section 1(1) Wills Law of Lagos State.
[41] K Abayomi (n.2), p. 260
[42] [1971] 1 All NLR 225
[43] *Ibid*.
[44] Y Dadem (n.15) p. 262.
[45] I Sagay (n.9), p.140
[46] No. 2 of 1988.
[47] Cap 168 Laws of Bauchi State 1989.
[48] Cap 168 Laws of Kwara State 1991.
[49] Cap 155 Laws of Jigawa State 1998. See also Dadem, 262, note 833.
[50] *Ibid* at 262
[51] [2007] ALL FWLR pt 359, 1321.

this will having chosen English Law to guide my transactions and affairs in my life time notwithstanding the fact that I am a Muslim.[52]The will was challenged in court, the reason being that as a Muslim from Ilorin, Kwara State whose Wills Law contained the Islamic Law limitation, the testator could not dispose of his properties as he wished. His last wife who received the bulk of his estate under the will claimed that her husband did not live his life according to the principles of Islamic Law and so could not have been subject to it. The Court of Appeal, agreeing with the trial court, held the will to be void for being contrary to the Wills Law of Kwara State, as the testator having declared himself to be a Muslim was subject to Islamic Law notwithstanding his belief that he could choose to be governed by English Law in this regard, while being a Muslim.

Provision for Family and Dependants This is the third statutory limitation to testamentary freedom applicable in Nigeria. This limitation arose in line with developments in England, to provide for family or dependants who have been cut out of a will or to whom adequate provision was not made. This limitation is contained in the Wills Law of Lagos, Kaduna, Abia, and Oyo States.[53] For instance, Section 2(1) of the Wills Law of Lagos State provides thus: Notwithstanding the provisions of Section 1of this law, where a person dies and is survived by any of the following persons – (a) the wife or wives or husband of the deceased; and (b) a child or children of the deceased, that person or persons may apply to the court for an order on the ground that disposition of the deceased estate affected by his will is not such as to make reasonable financial provision for the applicant.

This reasonable financial provision in the case of an application by a spouse save when the marriage was subject to a decree of judicial separation, means such financial provision as would be reasonable in all the circumstances of the case for the spouse to receive, whether such is required for his or her maintenance or not. Section 2(3) goes on to stipulate that all applications must be brought within a period of six months from the grant of probate.

Differences exist in the provision for family and dependants under Lagos State and under Kaduna, Abia and Oyo States although the laws are similar. In the three latter states, the category of persons who can apply for reasonable financial provisions is extended to include the parent, brother or sister of the deceased who immediately before the death of the deceased was being maintained either wholly or partly by the deceased. In the case of that category of persons i.e. parent, brother or sister, the 'reasonable financial provisions' means such financial provision as would be reasonable in all

[52] *Ibid*.

[53] Section 2 Wills Law of Lagos State; Section 27 Kaduna State Wills Law; Section 4 Abia State Wills Law; and Section 4 Oyo State Wills Law. Dadem, 255. Section 127 of the Anambra State Administration and Succession (Estate of Deceased Persons) Law, Cap 4 Laws of Anambra State of Nigeria contains a similar provision.

circumstances of the case for the applicant to receive for his maintenance. Persons in that category in Kaduna, Abia and Oyo States will be treated as being maintained by the deceased either wholly or partly if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person.[54]

STATUTORY LIMITATION TO TESTAMENTARY FREEDOM IN SOME OTHER JURISDICTIONS.

GHANA

There was complete testamentary freedom in Ghana until Section 13 of the Wills Act, 1971 was enacted[55]. The testator was before then not bound to leave any part of his estate to his family or dependants. Section 13 came in to relieve any hardship that would be occasioned to family members as a result of the unfettered discretion given to the testator. This section allows the court to make reasonable provision for the testator's parents, spouse or children less than 18 years out of his estate, where the testator failed to make adequate provision for them[56].The court in exercising this power must be satisfied that the testator failed to make adequate provision for the applicant either during his lifetime or in his will, that the applicant is suffering or likely to suffer hardship as a result and that having regard to all the relevant circumstances of the case, the applicant is entitled to support from the testator's estate. The application also must have been brought within three years after the granting of probate of the will.Under Section 13, the court is to take into account all relevant circumstances in making a reasonable provision for the dependants. These circumstances may include the means of the applicant as well as his conduct or behaviour towards the deceased. The test whether the testator made a reasonable provision or not is also an objective one.The word 'child' in Section 13 is defined in the Interpretation Section of the Act (Section 18) to include an adopted child, any person recognized by the testator to be his child or to whom he stands in *loco parentis,* and in the case of a Ghanaian, any person recognized by Customary Law to be a child of the testator.The 1979 Constitution of the Republic of Ghana by its Article 32(2) also supported this limitation to testamentary freedom when it provided that "no spouse may be deprived of a reasonable provision out of the estate of a spouse whether the estate be testate or intestate". Article 32(3) also provides "that parliament shall enact such laws as to ensure that every child, whether or not born in wedlock shall be entitled to reasonable provision out of the estate of its parents". This mandate of the parliament may have resulted in the provisions of Section 7 of the Children's Act of 1998 (Act 560) thus: 'No person shall deprive a child of reasonable provision out of the estate of a parent whether or not born in wedlock'. This was termed the 'right to parental property". By Section 1 of this Act, a

[54] Section 2(2) of the Wills Law of Lagos State.
[55] Samuel Crabbe, *Law of Wills in Ghana,* (Ghana: Vieso Universal (Ghana) Ltd, 1998), p. 106.
[56] *Ibid.*

child is also interpreted to be a person below the age of 18 years. Comparison of the Statutory Limitations to Testamentary Freedom in Nigeria, England, Ghana and South Africa It is worthy of note that in the four countries under consideration, legislation have been made limiting testamentary freedom. This fact raises a thought in the mind that there indeed might be wisdom in limiting testamentary freedom. The statutory limitations to testamentary freedom in the above listed countries have been shown and an attempt is made here to compare and contrast them.

In Nigeria, the statutory limitations to testamentary freedom are not uniform throughout the country. There are even states where there is no such statutory limitation (the states to which the Wills Act 1837 still applies). However, in England, Ghana and South Africa, the statutory limitations to testamentary freedom relate to the entire country. In Nigeria, there is the Customary Law limitation, the Islamic Law limitation and the limitation relating to the provisions for family members and dependants. England, Ghana and South Africa share only the statutory limitation as to the provision for family members and dependants with Nigeria. In South Africa, the limitation of provisions for family members in this case comes as a charge upon the deceased's estate. Also, in South Africa, only the spouse is provided for by statute. The child is provided for under the South African common law. In all four countries, reasonable financial provision is to be made for the spouse and children of the deceased testator. In Lagos, Nigeria, the provision is only for the spouse or child. In Kaduna, Abia and Oyo States of Nigeria, the provision covers also parents and siblings of the deceased. In Ghana, this provision covers in addition to a spouse and child, parents of the testator. In South Africa, provision is to be made for a spouse and a child, although the child here is taken care of by common law. In England, this provision extends to civil partners, cohabitants, a former spouse who has not remarried[57] and any other person who was being maintained by the testator before his death. The range of dependants covered in the English law is more comprehensive. The class of applicants in Nigeria is said to be unrealistic. Abayomi put forth the question if it is "realistic to suppose that dependency in the context of an African society can be arbitrarily limited to these people"[58] By these people he meant parents and siblings, along with the spouse and children.

In Nigeria, an application under this heading must be brought within six months of the grant of probate. In England, the time limit is six months of which the court has the discretion to allow applications out of time. In Ghana, the time limit is three years. In South Africa, no time limit is stated. The provision comes in form of a charge upon the estate of the testator which though it ranks below those of creditors, it ranks above the claims of heirs and legatees. It has been suggested by Abayomi and it is agreed, that the courts in Nigeria should have the discretion to allow applications

[57] This includes a civil partner who has not formed a subsequent civil partnership.
[58] Abayomi, 268.

that are made out of time provided there are good reasons supplied to the court by the applicant.[59]

In all four countries, this financial provision only arises where the testator fails to make reasonable provisions for the applicant. The basic standard in all four is the maintenance standard, i.e. the provision should be such needed for the maintenance of the applicant. England however has a surviving spouse standard where the provision for the spouse is to be the same as if the marriage ended through divorce proceedings. In Lagos, Nigeria, the provision for the spouse is to be given whether required for her maintenance or not. Among all four countries, only Ghana has made it a constitutional provision for a spouse and a child to receive reasonable provisions from the estate of their spouse and parent respectively. The other countries including Nigeria have it just as statutory provision and in Nigeria it is only present in four states.[60]Statutory Limitations to Testamentary Freedom in Nigeria: Justified? The question that comes to mind in the face of these statutory limitations to testamentary freedom in Nigeria is whether they are justified or if it would be better for the testator to do as he deems fit with his properties. As Egwuatu puts it, "after all the property are his and he labored to acquire them"[61] Are those limitations not contrary to the "philosophy of the concept of a will"?[62] This question is valid because people often make wills to avoid customary and statutory rules of intestacy, and by the Customary Law limitation, customs still catch up with these testators.[63] First, on the Customary Law limitation, it is as noted by Belgore JSC in *Idehen v Idehen,*[64] to take into account of long established customs which have been so established over centuries. That is a worthy idea. However, subjecting the testator's testamentary freedom to customary law is 'unrealistic and impracticable in some cases."[65] This can be seen in the light of the Bini Customary law on the inheritance of the *Igiogbe* which has come often before the courts.[66] According to Abayomi, this custom "appears so stiff and appears not to admit to any exception."[67] In *Idehen v. Idehen*,[68] Karibi-Whyte JSC had this to say about the custom.

The evidence of the customary law is that the eldest son of the testator is entitled without question to the house or houses known as Igiogbe, in which his father lived and died. It has been stated emphatically that this is the normal rule, no exceptional situations, even on account of demonstrable

[59] Abayomi, 272.
[60] Lagos, Kaduna, Abia and Oyo States.
[61] Egwuatu, (n.3), p. 6.
[62] *Ibid*.
[63] K Abayomi (n.2), p. *279.*
[64] [1991] 6 NWLR (Pt. 198), 382.
[65] K Abayomi (n.2) p. 280.
[66] See *Idehen v. Idehen* (1991) 6 NWLR (Pt. 198), 382, *Lawal-Osula v. Lawal-Osula* (1995) 32 LCRN 291, *Agidigbi v. Agidigbi,* 1992) 2 NWLR (pt 221), 98, etc.
[67] K Abayomi (n.2), p. 280.
[68] **[**1991] 6 NWLR (Pt. 198) 382.

unsuitability to understand and discharge the responsibilities of the status of the head of the family.[69] According to Sagay,[70] Kolawole JCA made an "unassailable case" for the review of the Supreme Court's decisions which have upheld the automatic devolution of the *Igiogbe* to the eldest son without qualifications in Agidigbi v Agidigbi[71] In that case, the learned Justice provided circumstances in which such automatic devolution should be disregarded thus:

If the eldest son attempted to exterminate his father in order to succeed to the Igiogbe and the testator decided to disinherit the eldest surviving son for that purpose, would Section 3 (1) of the Wills Law ensure for the benefit of the eldest son in the face of such criminal act? If the eldest surviving son is an imbecile, an idiot, a mentally incompetent son who was to be looked after, what does the court do? What is the position when the eldest surviving son has been imprisoned to a long term of imprisonment for crime against his father? *Would such eldest son be able to undertake and discharge the responsibilities of the status of the head of the family?* Is the testator not entitled to disinherit such a son? Is the testator not entitled to disinherit such a man? I am of the view that it is contrary to public policy that a man should be allowed to claim a benefit resulting from his own crime … it seems clear to me therefore that a donee who is proved to be guilty of the murder or manslaughter of the testator ought not to take any benefit under this will notwithstanding the provisions of Section 3 (1) of the Wills Law.[72]

Abayomi's question is valid in light of this. He asks, "What then happens to a lunatic first son or one who is a recidivist who hops in and out of prison or one who is a vagabond?" K Abayomi (n.2), p. 258. Even the most incompetent of sons is automatically entitled to the *Igiogbe* if the custom is to be followed to the letter. In cases such as this, should not the testator be able to appoint another child or person to inherit the property by his will? There should at least be some circumstances where the rule should be disregarded. The courts should have the opportunity to find out why such son was disinherited and to decide if the custom should be disregarded because of the reason. It has been rightly said by Abayomi that the Supreme Court will have to find an acceptable balance between the testator's freedom to dispose his properties and the preservation of customs as contemplated by Section 3 of the Wills Law. Customs will need to be brought in harmony with realities on ground. There is a worthy idea behind Section 3(1) but there are some circumstances where it should not be

[69] *Ibid* at 421.
[58] I Sagay (n.9), p.151.
[71] Agidigbi v. Agidigbi, 1992) 2 NWLR (pt 221), 98, etc.

[72] Section 3 (1) of the Wills Law.

strictly followed as above. Also, it has been asked that if custom is so sacrosanct, why is the customary law restriction limited to Wills and not extended to other forms of transfer documents.[103] If a man can sell or give out his property as he pleases when he is alive, what changes when he is dead so that he should not have that same privilege? Custom should not be held on to so fastidiously as to defeat the express wishes of a man.

The Islamic law limitation also raises its own issues. By this limitation (in states where it is present), a will by a Muslim as held in Ajibaiye v Ajibaiye[73] must be in accordance with Islamic law to be valid. The testator cannot elect to be governed by English law. According to Sagay, there is almost no purpose for such person to make a will as Islamic law has detailed and fixed rules for the division of a deceased's person's estate. A testator here thus has very little or no testamentary freedom, or even capacity. In the cases where a Muslim might not want his estate to be distributed by Islamic law as in *Ajibaiye v Ajibaiye*, he is in a fix as statute has clearly taken that choice away from him.[74]

Putting the third limitation into the mix i.e. the provisions for family and dependants, Abayomi does not really see this as a restriction but as a "piece of social engineering which seeks to ensure justice is done."[75] It is agreed that this limitation could serve to ensure justice is done in some situations but again giving or withholding property from a family member or dependant might be a tool in the hands of a testator to show his displeasure or approval[76] to his family members or dependants for example, disinheriting a child for being wayward. It is the view of Egwuatu that a spouse or child who was

[73] [2007] ALL FWLR pt 359, 1321.

[74] The view of Abdulmumuni Oba in this regard is here noted. In his article "Can a Person Subject to Islamic Law Make a Will in Nigeria?: *Ajibaiye v Ajibaiye* and Mr. Dadem's Wild Goose Chase," 2008 *CALS Review of Nigerian Law and Practice* Vol. 2(2), 131 – 145, argues that there is nothing wrong with the Wills Law precluding Muslims from making wills underneath it. He states that it is always open to a Muslim to make a will under Islamic law (*wassiyah)*, consistent with the dictates of Islam and thus such person is not without respite. Oba argues that a Muslim cannot elect to dispose of his estate outside Islamic law as long as he professes Islam, agreeing with *Ajibaiye v. Ajibaiye.* He states that this position of the law is satisfactory to Muslims and thus needs no amendment. However, the current writers note that the *Ajibaiye* case shows that such position is not indeed satisfactory to all Muslims. The deceased testator clearly wished otherwise, thus his declaration in his will to that effect. Per Oba's view, it would seem the only respite to such person would be to give up Islam.

[75] Abayomi (n.2), p. 285.

[76] See J C Tate, "Caregiving and the Case for Testamentary Freedom," (2008) *University of California, Davis,* Vol. 42, 129, where the author makes a case for testamentary freedom using eldercare as a basis, stating that a bequest in a will to the exclusion or major disadvantage of others, may be a reward for family members who cared for such testator in their old age.

responsible, respectful and who loved the testator would not be disinherited by the testator,[77] and that even in cases where he does, if there is no ground to declare the will void such as that of undue influence, the court should hold the will as valid.

We believe that in this case of provisions for family members, there should be a middle ground. It is not believed that the testator should be left with an unfettered discretion in this regard. If there is no history of bad conduct by the family member or dependant (which would give a clue to the court why the testator would have wish to disinherit such person) and the person was being maintained by the testator before his death of which such seizure of maintenance would work hardship on such family member or dependant, such person should be reasonably provided for by the court, out of the testator's estate. Here, conduct and need for such maintenance should be the decisive factors. It seems to take away the freedom of choice from the testator but it is submitted that it is the practical thing to do, to relieve the hardship of such persons. The acceptance of this limitation in all four countries considered goes to show that there is some reasonableness in it.

RECOMMENDATIONS

It is recommended that the Customary Law limitation be reviewed. Even if it would not be completely taken away as to allow a testator complete testamentary freedom to match the freedom he had when alive, there should be circumstances where the court should be free to hold that the customs would not apply and that the provisions of the will should stand. These circumstances should be in line with those outlined by Kolawole JCA in Agidigbi v Agidigb.[78] This would bring the customs in line with the realities on ground. Even though this is not the same as granting the testator his freedom, it would prevent really absurd situations from coming into being (such as a lunatic son under the Bini Customary Law inheriting his father's *Igiogbe* despite the father in his will giving the reason for disinheriting him to be his mental incompetence.)

For the Islamic Law limitation, it is recommended that Muslims who do not want their estate to be distributed according to Islamic Law be given the opportunity to do so. The few who do not want to go down that route should have the opportunity to choose. For the limitation dealing with provisions for family members and dependants, it is recommended that this be allowed to stand. However, conduct of an applicant under this provision and the need for maintenance should be decisive factors in derogating from the testator's freedom to dispose of his properties as he pleases. This would be a middle ground where respect for the wishes of the testator and reasonable provisions for his

[77] It is submitted that the testator might in some cases be the wayward one and deprive his spouse and children from necessary maintenance out of his estate.
[78] ibid

dependants meet. It is also recommended that the class of applicants under the provisions for family members and dependants in Nigeria be expanded to include any person being maintained by the testator before his death. This takes into account the African society where a person could be supporting uncles, aunts, grandparents, cousins, etc. This is often the case. It is yet recommended that the courts should be given the discretion to extend the time for bringing applications under the limitation as to provision for family members and dependants in Nigeria, as this would allow applicant with good reasons for applying out of time, the opportunity to present their application.

CONCLUSION

The statutory limitations to testamentary freedom in Nigeria has been discussed above and compared with those applicable in Ghana. Parliament has found cause to limit the testator's freedom to dispose of his property as he wishes. The rationale behind the limitations present in Nigeria has been discussed and it has. been found that while these limitations are not totally justified, yet they have their merits. A review of the Customary Law and the Islamic Law limitations has been advocated for and a middle ground approach in the limitation relating to provision for dependants has been recommended. It is hoped that these suggestions be taken so as to respect as fully as practicable the wishes of a testator after death.[79]

[79] This would accord with the words of the Court of Appeal in *Asika v. Atuanya* [2008] 17 N.W.L.R 1117 at 516 (Denton-West J.C.A,) thus: "A will is a sacrosanct document and the testator's will is his last wishes and his testament must be applicable to declared estate of the testator."