

STATUTORY LIMITATIONS TO TESTAMENTARY FREEDOM IN NIGERIA: A COMPARATIVE APPRAISAL¹

Abstract

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 positions in England, Ghana and South Africa. 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.

Key word: *Testamentary freedom, Testator, Will; Igiogbe, Succession.*

1. Introduction

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 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.⁴

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.⁵ It is "the idea that a person has the right to choose who will succeed to things of value left behind at death."⁶As will be shown in the course of this paper, in various countries testamentary freedom⁷ is limited by statute. Such

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

³ O Egwuatu, “Limits of a Testator on Freedom of Will Testament”, p. 1, <<http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/LIMITS%20OF%20A%20TESTATOR%20ON%20FREEDOM%20OF%20WILL%20TESTAMENT.pdf>> accessed on 27 March 2013,

⁴ The type of will used in this context is the statutory will.

⁵ Law-Pedia.com, ‘Testamentary Freedom,’ <www.law-pedia.com/testamentary-freedom.htm> accessed on 27 March 2013.

⁶ 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.

⁷ “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 organisation 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 England, Ghana and South Africa.

2. 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,⁸ the applicable law is the Wills Law, Cap 133, Laws of Western Region of Nigeria 1959.⁹ While Oyo and Delta States have enacted their own Wills Law¹⁰, the Wills laws in force in the other states carved out of the old Western region are basically a replica of the old law with minimal alterations such as name of the state and enacting authorities, etc.¹¹ Lagos State adopted the law applicable to wills in the Old Western Region by the Applicable Laws Edict of 1972.¹² In some states in the former Northern and Eastern Region of Nigeria, the applicable law remains the English Wills Act of 1837.¹³ Kaduna and Abia States have their own Wills Law¹⁴. 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 favour 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,” The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, Working Paper No. CPNS 42, 17. <<http://eprints.qut.edu.au/>> accessed on 5 April 2013.

⁸ Edo, Delta, Ekiti, Ondo, Osun, Ogun and Oyo States.

⁹ 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.

¹⁰ Wills Law of Oyo State 1990 and Wills Law, Cap W4, Laws of Delta State 2006.

¹¹ See note 8.

¹² Now Wills Law of Lagos State Cap W2 Laws of Lagos State 2004

¹³ This is a statute of general application applicable in Nigeria having being in force in England on January 1, 1900.

¹⁴ Kaduna State Wills Law, Cap 163, Laws of Kaduna State of 1999 and Abia State Wills Law Cap 37, Laws of Abia State 1999

¹⁵ 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 Y Dadem, *Property Law Practice in Nigeria*, (Jos: Jos University Press, 2009) p. 262 at note 833.

dependants.¹⁶ 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.¹⁷ 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:

2.1. 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.¹⁸ This restriction serves to restrict the property that can be disposed of by will. S. 3 (1) of the Wills Law 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*¹⁹ 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.²⁰

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 will²¹. This confusion has however been cleared up by the Supreme Court in *Idehen v. Idehen*.²² 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

¹⁶ I Sagay (n.9) p. 127.

¹⁷ *Ibid*.

¹⁸ 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.

¹⁹ [1995] 32 LRCN 291.

²⁰ *Ibid* at 305.

²¹ I Sagay (n.9) p. 141

²² (1991) 6 NWLR (Pt. 198), 382.

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 seat²³ 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,²⁴ 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 State²⁵ 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.

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* case²⁶ 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.²⁷

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. We shall revisit this issue later in the course of this paper. The 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

²³ I Sagay (n.9), p.143.

²⁴ Y Dadem (n.15), p. 259 at note 820

²⁵ Cap 172 of 1976, applicable in Edo state.

²⁶ Note 18 above.

²⁷ [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.²⁸

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.²⁹

2.2. Islamic Law Limitation

This limitation may be seen to be a fall out of the Supreme Court decision in *Adesubokun v. Yunusa*³⁰. 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*³¹ that the Islamic Law limitation in the Wills law discussed below arose³². 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).³³ This restriction is now subsumed under the Wills Law of Kaduna State, the Wills Law of Oyo State, the Plateau State Wills Edict,³⁴ the Bauchi State Wills Law,³⁵ the Kwara State Wills Law³⁶ and the Jigawa State Wills Law³⁷. 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.³⁸ Such was the case in *Ajibaiye v. Ajibaiye*³⁹ where this restriction came before the Court of Appeal for the first time. In the case, the testator (deceased), a Muslim from Ilorin,

²⁸ Section 1(1) Wills Law of Lagos State.

²⁹ K Abayomi (n.2), p. 260

³⁰ [1971] 1 All NLR 225

³¹ *Ibid.*

³² Y Dadem (n.15) p. 262.

³³ I Sagay (n.9), p.140.

³⁴ No. 2 of 1988.

³⁵ Cap 168 Laws of Bauchi State 1989.

³⁶ Cap 168 Laws of Kwara State 1991.

³⁷ Cap 155 Laws of Jigawa State 1998. See also Dadem, 262, note 833.

³⁸ *Ibid* at 262

³⁹ [2007] ALL FWLR pt 359, 1321.

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 this will having chosen English Law to guide my transactions and affairs in my life time notwithstanding the fact that I am a Muslim.⁴⁰

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.

2.3. 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.⁴¹ For instance, Section 2(1) of the Wills Law of Lagos State provides thus:

Notwithstanding the provisions of Section 1 of this law, where a person dies and is survived by any of the following persons – (a) the wife or wives or husband of the deceased; and (b) a child or children of the deceased, that person or 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.⁴² 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 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

⁴⁰ *Ibid.*

⁴¹ 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.

⁴² Section 2(2) of the Wills Law of Lagos State.

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.⁴³

3. Statutory Limitation to Testamentary Freedom in some other Jurisdictions

3.1. England

Testamentary freedom became complete in England and Wales in 1891 with the enactment of the Mortman and Charitable Uses Act.⁴⁴ Before then, however, under the Wills Act 1837, a testator was free to do whatever he wished with his property and could will them to complete strangers or favour some of his children and cut out others from his will. In *Banks v Goodfellow*,⁴⁵ the complete testamentary freedom was affirmed by the court where it held thus:

The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law...⁴⁶

This testamentary freedom however came to an end with the enactment of the Inheritance (Family Provision) Act 1938. By this Act, four categories of dependants of a deceased testator were allowed to bring an application before the court for an order for maintenance out of his estate. The four categories were the deceased's spouse, unmarried or incapacitated daughter, infant son and adult but incapacitated son.⁴⁷ In 1975, the Inheritance (Provision for Family and Dependants) Act repealed and replaced the 1938 Act.⁴⁸ This 1975 Act has been amended by the Law Reform (Succession) Act 1995 and the Civil Partnership Act 2004.⁴⁹

The 1975 Act as amended, applies only if the deceased is domiciled in England or Wales. A deceased testator's spouse or civil partner, former spouse who has not remarried or civil partner who has not formed another civil partnership, child⁵⁰ and cohabitant (under specified circumstances) may apply for financial provisions under the Act. Also eligible are persons who were treated by the deceased as a child of the family in relation to any marriage or civil partnership to which he was a party and any person who was being maintained by the deceased (either wholly or partly) immediately before his death⁵¹.

⁴³ Y Dadem (n.15), p. 255.

⁴⁴ R Kerridge and A Brierley, *Perry and Kerridge, The Law of Succession*, (London, Sweet and Maxwell, 2009, 12th edition)163.

⁴⁵ [1870] LRQB 549 at 564 -565 (Cockburn C.J.)

⁴⁶*Ibid.*

⁴⁷ Kerridge and Brierley (n.44), p. 164

⁴⁸ I Sagay (n.9), p. 128

⁴⁹ Kerridge and Brierley (n.44), p. 164

⁵⁰ Here there is neither an age limitation nor a requirement that the applicant be unmarried.

⁵¹Kerridge and Brierley (n.44), p. 165.

The time limit for an application under the Act is no later than six months after the grant of probate or taking out of letters of administration⁵². However, the court has the discretion to extend this time limit. In *Re Salmon*⁵³, Megary V. C. laid down guidelines to assist the court in exercising this discretion which include that the discretion must be exercised judicially and that the onus lay on the applicant to make a substantial case as to the justice and propriety of the court exercising the discretion. He thought the court should also consider the circumstances by which the applicant applied and whether the estate had been distributed or not, among other things.

Under Section 1(2) of the 1975 Act, there are two standards of reasonable financial provision. The first is the 'surviving spouse standard' and the other, 'the maintenance standard'⁵⁴. The 'surviving spouse standard' applies to an application by the deceased's spouse or civil partner⁵⁵. This is a higher standard which puts the applicant in the same position as a spouse applying for financial provision in divorce proceedings⁵⁶. The court has the discretion to apply this standard to a judicially separated spouse or a former spouse who has not remarried in certain circumstances else the maintenance standard applies to such applicant⁵⁷. The 'maintenance standard' is applicable in all other cases. In *Re Coventry*,⁵⁸ it was suggested that it meant "such financial provision as would be reasonable in all the circumstances of the case to enable the applicant to maintain himself in a manner suitable to those circumstances"⁵⁹. The test whether a reasonable financial provision was made or not is to be objective. As put in *Re Coventry*,⁶⁰ "any view expressed by a deceased person that he wishes a particular person to benefit will generally be of little significance, because the question is not subjective but objective".⁶¹ Under this Act,⁶² the court is required to take into account the conduct of the applicant or any other person which in the circumstances, the court may consider relevant⁶³. For example, in *Re Snoek*,⁶⁴ the 'atrocious and vicious conduct' of the wife towards her husband during the latter part of their marriage led to the court awarding her only a 'modest' sum of money out of her husband's estate.

3.2. Ghana

There was complete testamentary freedom in Ghana until Section 13 of the Wills Act, 1971 was enacted⁶⁵. 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 them⁶⁶. 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

⁵² *Ibid* at 167.

⁵³ [1981] Ch. 167.

⁵⁴ Kerridge and Brierley (n.44), p.169

⁵⁵ *Ibid* at 170

⁵⁶ I Sagay (n.9), p.128

⁵⁷ Kerridge and Brierley (n.44), p.170

⁵⁸ [1980] Ch. p. 461

⁵⁹ *Ibid* at 494

⁶⁰ *Ibid* at 474 to 475, 488 to 489

⁶¹ *Ibid*.

⁶² The 1975 Act.

⁶³ Kerridge and Brierley (n.44), p.179

⁶⁴ [1983] 13 Fam. Law 18 in Kerridge and Brierley (n.43), p.185.

⁶⁵ Samuel Crabbe, *Law of Wills in Ghana*, (Ghana: Vieso Universal (Ghana) Ltd, 1998), p. 106.

⁶⁶ *Ibid*.

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 estate⁶⁷. The application also must have been brought within three years after the granting of probate of the will⁶⁸. 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 deceased⁶⁹. The test whether the testator made a reasonable provision or not is also an objective one⁷⁰. 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 testator⁷¹.

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".⁷² 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".⁷³ This mandate of the parliament may have resulted in the provisions of Section 7 of the Children's Act of 1998 (Act 560)⁷⁴ 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 child is also interpreted to be a person below the age of 18 years.⁷⁵

3.3. South Africa

Under South African Law, there is testamentary freedom but it is not absolute. This freedom has been limited by several statutes.⁷⁶ For example, under Section 3 of the Immovable Property (Removal or Modification of Restrictions) Act 1965, the courts can modify a testator's directions as to the disposal of immovable property. The testator's power to subdivide agricultural land is also restricted. This is done by the Agricultural Holdings (Transvaal) Registration Act 1919 (Section 5) and the Subdivision of Agricultural Land Act 1970 (Sections 3, 4 and 5). The Mineral Act of 1991 also limits the division of any mineral right among two or more persons into undivided shares or increasing the number of holders of undivided shares in a mineral right whether by will or intestacy. Another limitation can be found in Section 13 of the Trust Property Control Act which gives the High Court the power to vary provisions of trust instruments including testamentary trusts that have conditions containing elements of racial discrimination⁷⁷.

⁶⁷ *Ibid* at p. 107.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* at 108.

⁷⁰ *Ibid*.

⁷¹ *Ibid* at 110

⁷² *Ibid*.

⁷³ *Ibid*. Those provisions were retained in the extant 1992 Constitution. Article 22 is identical with Article 32(2) of the 1979 Constitution. Article 28 (1) (b) of the 1992 Constitution also provides same as in Article 32(3). Article 28 of the 1992 Constitution interprets a child to mean a person below the age of eighteen years of age. *Ibid*.

⁷⁴ Available at < <http://www.unhcr.org/refworld/docid/44bf86454.html>> accessed on 7 April 2013.

⁷⁵ *Ibid*.

⁷⁶ H Corbett, G Hofmeyr and E Kahn, *Law of Succession in South Africa*, (South Africa: Juta Law, 1980), p. 40.

⁷⁷ Go Legal, "Freedom of Testation has Limits", <www.golegal.co.za/citizen-rights/freedom-testation-has-limitations> accessed on 28 March 2013.

Yet another limitation is that created under the Maintenance of Surviving Spouses Act 1990 which deals with the provision of reasonable maintenance for the needs of a surviving spouse⁷⁸. This creates a potential charge on the deceased's estate. The Act in Section 2 provides that the surviving spouse of a marriage which was dissolved by death has a claim against the estate of the deceased spouse for his/her reasonable maintenance needs until he/she remarries. The condition is that such spouse should be unable to meet such needs from his/her own earnings. The marriage in this situation must be a monogamous one.⁷⁹ Factors to be taken into account when determining maintenance needs by the court include the amount in the deceased estate available for distribution to heirs and legatees, the standard of living of the survivor during the marriage, the survivor's age, etc. One factor that has been listed that should not be taken into account is the conduct of the surviving spouse.⁸⁰

Another potential charge on a deceased's estate though not as a result of a statute is the provision of maintenance for a child in need. Minor children, legitimate or not, are said to have a claim of maintenance against the estate of a parent⁸¹. This claim and that of a surviving spouse is said to rank equally after the claims of creditors but before the claims of heirs and legatees⁸². Under appropriate circumstances, a child of majority age may have a claim of maintenance. The claim is based on need and whether or not there is need for support would depend on many factors.⁸³ In *Ex Parte Jacobs*,⁸⁴ an adult daughter claimed maintenance from her deceased father's estate. The right of a child in need was affirmed but it was decided that the need for support had not been proven as the duty to support her lay first on her husband and would only arise against her father if it was proven that her husband was incapable of fulfilling the obligation.

4. 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.

⁷⁸ *Ibid* at 44.

⁷⁹ *Ibid* at 45.

⁸⁰ *Ibid*.

⁸¹ *Ibid* at 41.

⁸² *Ibid* at 46.

⁸³ *Ibid* at 42.

⁸⁴ 1982 (2) SA 276 (O), *Ibid* at note 80.

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 remarried⁸⁵ 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”⁸⁶ 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 that are made out of time provided there are good reasons supplied to the court by the applicant.⁸⁷

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.⁸⁸

5. 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 laboured to acquire them”⁸⁹ Are those limitations not contrary to the “philosophy of the concept of a will”⁹⁰ 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.⁹¹ First, on the Customary Law limitation, it is as noted by Belgore JSC in *Idehen v Idehen*,⁹² 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

⁸⁵ This includes a civil partner who has not formed a subsequent civil partnership.

⁸⁶ Abayomi, 268.

⁸⁷ Abayomi, 272.

⁸⁸ Lagos, Kaduna, Abia and Oyo States.

⁸⁹ Egwuatu, (n.3), p. 6.

⁹⁰ *Ibid.*

⁹¹ K Abayomi (n.2), p. 279.

⁹² [1991] 6 NWLR (Pt. 198), 382.

to customary law is ‘unrealistic and impracticable in some cases.’⁹³ 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.⁹⁴ According to Abayomi, this custom “appears so stiff and appears not to admit to any exception.”⁹⁵ In *Idehen v. Idehen*,⁹⁶ 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 unsuitability to understand and discharge the responsibilities of the status of the head of the family.⁹⁷

According to Sagay,⁹⁸ 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*.⁹⁹ 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?*¹⁰⁰ 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.¹⁰¹

⁹³ K Abayomi (n.2) p. 280.

⁹⁴ 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.

⁹⁵ K Abayomi (n.2), p. 280.

⁹⁶ [1991] 6 NWLR (Pt. 198) 382.

⁹⁷ *Ibid* at 421.

⁹⁸ I Sagay (n.9), p.151.

⁹⁹ [1992] 2 NWLR (pt 221), 98.

¹⁰⁰ Italics ours.

¹⁰¹ *Ibid* at 122. 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.¹⁰² There is a worthy idea behind Section 3(1) but there are some circumstances where it should not be 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*¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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."¹⁰⁷ 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 approval¹⁰⁸ 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 responsible, respectful and who loved the testator would not be disinherited by the testator,¹⁰⁹ 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.¹¹⁰

¹⁰² *Ibid* at 281.

¹⁰³ *Ibid* at 283.

¹⁰⁴ [2007] ALL FWLR pt 359, 1321.

¹⁰⁵ I Sagay (n.9), p.130.

¹⁰⁶ 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.

¹⁰⁷ Abayomi (n.2), p. 285.

¹⁰⁸ 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.

¹⁰⁹ 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.

¹¹⁰ Egwuatu (n.3), p. 8.

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.

6. 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 Agidigbi*.¹¹¹ 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 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.

7. Conclusion

The statutory limitations to testamentary freedom in Nigeria has been discussed above and compared with those applicable in England, Ghana and South Africa. In all four countries, 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

¹¹¹ [1992] 2 NWLR (pt 221) at 98.

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.¹¹²

¹¹²This 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.”