

INHERITANCE RIGHTS OF AN ADOPTED CHILD IN NIGERIA

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Abstract

What is an adopted child's legal standing? What legal justification does he or she have for inheriting in the adoptive parents' estate? Can the circumstance of his adoption extinguish his/her inheritance right from the estate of his/her family of origin? Can the inheritance right of an adopted child be sustained if bequeathed property in a Will? This paper aims to respond to the questions raised above. These policies and frameworks are analysed in this paper which adopts doctrinal methodology. The paper examined Nigeria's present legal system concerning an adopted child's right to inherit and painstakingly x-ray the normative standards on the inheritance right of adopted children in selected jurisdictions. This paper finds that in the Nigerian context, there still exists discrimination and conflicting provisions as it relates to the inheritance rights of an adopted child, particularly under the Nigerian customary law system. Also, the legal justification for an adopted child inheriting from the estate of his natural parent is unclear and calls for enlightenment on the options for wills in making provisions for adopted children in order to address the discrimination, conflicting provisions and limitations of customary law as well as the need for further research on this subject.

Keywords: Adoption rights, Adoptive parents, Child adoption, Family court, Family of origin, Inheritance rights, customary law of adoption

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1.0 INTRODUCTION

The general rule is that adoption creates a parent-child relationship between the adopted child and the adoptive parents with all the rights, privileges, and responsibilities that attach to that relationship¹. Consequently, a decree of adoption grants the adopted child a legal standing with the biological children of the adoptive parents with all the rights, privileges, and obligations in the estate of the adoptive parents, including the right to inherit or share in their inheritance.²

While the right of an adopted child to inherit or share in the estate of his adoptive parents is clear and has been reaffirmed by the adjudicatory system in Nigeria, the inheritance right of an adopted child to the estate of his biological parent is rather unclear. Also, there still exists limitations relating to the inheritance rights of adopted children under customary law as a result of discriminatory and conflicting practices. This paper will attempt to define the various terms used, and examine the scope of the rights of an adopted child under specified African customary laws as well as other selected jurisdictions. The paper makes a further attempt to recommend measures to protect the inheritance rights of an adopted child in Nigeria drawing lessons from what is practicable in other jurisdictions.

2.0 DEFINITION OF TERMS

Adoption is defined as the action or fact of legally taking another's child and bringing it up as one's own, or the fact of being adopted or the act of legally taking a child to be taken care of as your own.³

Adoption is defined by the Blacks' Law Dictionary⁴ as the statutory process of terminating a child's legal rights and duties toward the natural parents and substituting similar rights and duties toward adoptive parents. It is the process whereby a court extinguishes the

¹*Ibiam v Ibiam & Anor* (2017) LPELR-42028(CA)

²*Duru v Duru*(2016) LPELR-40444(CA)

³Weiner, *The Oxford English Dictionary*. Oxford: Clarendon Press, 1989. MLA (7th ed.) Cambridge International Dictionary of English. Cambridge: Cambridge University Press, 1995.

⁴Black's Law Dictionary, 9th Edition, pp 55 - 56

parental link between a child and his natural parents and creates analogous links between him and the adopter.⁵

The adoption of a child is sanctioned by a Court order that vests parental responsibility for a child in the adopter(s) and extinguishes the parental responsibility of the birth parents.⁶ The effect of an adoption order is that the child is treated as if born as a child of the marriage of the adopter(s) and not as the child of anyone else and is prevented from being illegitimate.⁷

The United Nation Convention on the Right of a Child and the Childs Rights Act 2003 defined a Child as any person below the age of 18 years.⁸ However, in Nigeria, only children below the age of 16 and 17 in certain cases can qualify for adoption.⁹ An adopted child is therefore one who has become the son or daughter of a parent or parents by virtue of legal or equitable adoption.¹⁰

3.0 THE CONCEPT OF CHILD ADOPTION

The need for adoption stems from the simple fact that a person is childless to the desire to replace a deceased child; acquire a companion for an only child; stabilize a marriage; legalize an illegitimate child; maintain a specific line of descent; rescue a child who is in an irreversible situation of abandonment or relieve parents who are unable to care for their child.¹¹ Adoption is significant in society

⁵Creteny, Principles of family law, 4th Edition, 1984, p.417.

⁶ Sheila Bone, Osborn's Concise Law Dictionary, 9th Edition, p. 19.

⁷ Section 12(1) of the Adoption Act 1976. See also the comment of Joseph Tine Tur JCA in the case of *Ibiam v Ibiam & Anor* (2017) LPELR-42028(CA).

⁸ Article 1 of the Convention, <https://www.unicef.org/what-we-do/un-convention-child-rights/> accessed on 20 August, 2022.

⁹ For instance, Certain minors under the age of 17 who are abandoned, whose parents and other relatives are unknown or cannot be located after reasonable inquiry, and who have been certified by a juvenile court may be adopted under Section 1 of the Lagos State Adoption Law (ALLS).

¹⁰ OhnAlewo Musa Agbonika And Josephine A.A. Agbonika, *Adoption Without Tears: Appraisal Of The Legal Requirements In Nigeria And Other Jurisdictions*, American Journal of Law, Vol. 3, pp 38 – 60, 2021

¹¹ Eke CB, Obu HA, Chinawa JM, Adimora GN, Obi IE, *Perception of child adoption among parents/care-givers of children attending pediatric outpatients'*

because it affects the status and thus the rights and obligations of an adopted person.¹² In Nigeria, adoption is created either statutorily or customarily.

Adoption under the Nigerian customary law system can be likened to the English notion of foster parentage. It lacks the effect of permanently extinguishing the biological parent's rights. Adoption as a statutory creation in Nigeria is governed by the Child Rights Act 2003¹³. The Act mandates every state to enact its adoption law. Owing to this provision, states have gone ahead to enact laws on the adoption of a child.

It is instructive to note that the first adoption of legislation in Nigeria was enacted in the then Eastern Region of Nigeria in 1965. This law was known as the Eastern Nigeria Adoption Law 1965, and it went into effect on May 20, 1965. Till date, the Eastern Nigeria Adoption Law 1965 continues to be the applicable legal framework for child adoption in the Eastern states. In 1968, Lagos State passed an adoption law, and other South Western states quickly followed suit with laws that shared many similarities.¹⁴

In Nigeria, different States of the Federation have a variety of approaches to child adoption for example, in Lagos, Edo, and Delta states, only juveniles, that is, persons under the age of seventeen and who are abandoned, or whose parents are not known or cannot be traced after due inquiry by a juvenile court may be adopted.¹⁵

In the Nigerian context, an adoption order has the effect of transferring all legal rights from the birth family to the new adoptive family, severing all ties with them. The child becomes a full member of the adoptive family, takes their surname, and has the same rights and

clinics in Enugu, South East, Nigeria, Nigerian Journal of Clinical Practice 2014;17:188-95.

¹²Tajudeen, OjoIbraheem, 'Adoption Practice in Nigeria- an Overview, Journal of Law, Policy and Globalization', ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.19, 2013, www.iiste.org<last assessed 26July, 2022>

¹³ Section 125 of the Child Rights Act.

¹⁴Olanike A. Ojelabi, Pauline E. Osamor, Bernard E. Owumi, *Policies and Practices of Child Adoption in Nigeria: A Review Paper*, Mediterranean Journal of Social Sciences, MCSER Publishing, Rome-Italy, Vol 6 No 1 S1, January 2015

¹⁵ItseSagay, *Nigerian Family Law, Principles, Cases, Statutes and Commentary*, 1999, p.557

privileges as if he were born into that family, including the right to inherit from the adopter's intestacy.¹⁶ Under this system, the general rule is that adoption severs the parent-child relationship between the adopted child and his or her parents (including severance of all inheritance rights) and creates a parent-child relationship between the adopted child and his or her adoptive parent(s) (including full inheritance rights).¹⁷

This rule is based on several public policy considerations. First and foremost, consider the "best interests of the child". This is a well-known and common public policy consideration in family law matters. The prevailing belief is that it is in the child's best interest to be a child of only one family and that completely severing the child's ties to the old family facilitates the child's assimilation into the new family. Thus, ensuring that the child has a "fresh start" in the new family. A separation of parentage between a child and a biological parent basically involves a complete separation of inheritance rights between the child and the biological parent¹⁸.

4.0 THE CONCEPT OF INHERITANCE RIGHTS

Inheritance rights define who is eligible to receive the properties of a person after the demise of that person. The concept of inheritance has been existing from time immemorial amidst diverse communities and people. In our view, by conservative estimates, Nigeria is home to more than 300 different nationalities, each with its own laws, and customary or personal laws governing inheritance and inheritance of property. Some of these laws are still inconsistent with the fundamental principles of natural justice, equity and morality in the 21st century. The majority of Nigerians live in rural areas with high

¹⁶ *Supra* 7.

¹⁷ Peter Wendel, *Inheritance Rights and The Step-Partner Adoption Paradigm: Shades of The Discrimination Against Illegitimate Children*, Hofstra Law Review, [Vol. 34:351, p. 362 – 363.

¹⁸ Timothy Hughes, *Comment, Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child Be Determined by Blood or by Law?* 1988 WIS. L. REV. 321, 327-28, Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 145 (2005)

levels of poverty, high literacy rates, and high poverty levels. low literacy, lack of language, limited reading and comprehension skills, and many socio-economic inequalities have hindered prosecution of acts of unfair distribution of property against their deceased ancestors. Only a few rich and intelligent people who had an incentive to protect their heirs and benefactors after death were executed.¹⁹

In the Nigerian customary law system, it is not entirely obvious where adopted children stand in terms of succession. However, it has been established that an adopted child's rights are less significant than those of a natural child.²⁰ Nwogugu²¹ on the other hand, however, does not share this opinion. Nwogugu opined that, under customary law, an adopted child assumes the name of his adopter and is considered his legal child. He will reportedly succeed alongside the other legal adaptor offspring.

Under the Yoruba customary law practice, legitimate male and female children of a deceased person can inherit and equally share in the estate of their deceased parent. In the case of *Yusuff v Dada & Ors*²² the court restated the principle that under Yoruba customary law the properties of a Yoruba person who dies intestate devolve on all his surviving children in equal shares.²³

Although it is not quite clear to the Yoruba what an adopted child's inheritance rights are. An adopted child cannot inherit from his or her adoptive parents, according to popular belief. But in the case of *Administrator General v Tuwase*²⁴, the estate of a Yoruba woman from

¹⁹ Michael Takim Otu, Miebaka Nabiebu, 'Succession to, and Inheritance of Property under Nigerian Laws: A Comparative Analysis', *European Journal of Social Sciences* ISSN 1450-2267 Vol. 62 No 2 June, 2021, pp. 50-63 <http://www.europeanjournalofsocialsciences.com> last accessed 1 August, 2022.

²⁰ Dr Babatunde Adetunji Oni, Discriminatory Property Inheritance Rights Under The Yoruba And Igbo Customary Law In Nigeria: The Need For Reforms, *OSR Journal Of Humanities And Social Science (IOSR-JHSS)* Volume 19, Issue 2, Ver. IV (Feb. 2014), pp 30-43.

²¹ Nwogugu, E.I. *Family Law in Nigeria*, 2002, p. 145.

²² (1990) LPELR – 3538 (SC)

²³ *Amodu v Abayom* (1992) 5 NWLR (Part 242) 503; *Ologunleko v Ikuemelu* (1993) 2 NWLR (Part 278) 10; *Rabiu v Abasi* (1996) 7 NWLR (Part 462) 505; *Akinnubi v Akinnubi* (1997) 2 NWLR (Part 486) 147

²⁴ (1946) 18 NLR 83.

Ijebu who had passed away childless was being divided between her husband, from whom she had been estranged for 44 years prior to her death, and her adopted kid, who had passed away before her. The husband's claim was denied, and it was decided that the deceased natural grandfather's adopted children should receive one share each, along with her direct descendants, which includes the surviving adopted kid, who should receive one share per stripe. This implies that an adopted child's rights are less significant than those of a natural or legitimated child.

Also, under the Yoruba native law and custom, it is unclear if an adopted children can inherit from his biological parents even where he is aware of them. However, since inheritance follows the line of blood and since he never clearly has an inheritance right from his adoptive parents, it follows logically that he should be entitled to inherit from his original parents.²⁵

Under the Igbo customary law practice on inheritance and succession, the first male child takes over as family head following the death of the head or founder of the family. The first male child receives his late father's "obi" (home) and the surrounding compound as his inheritance.²⁶ Other sons, however, inherit other lands and houses as a family unit. Females whether daughters or widows have no right of inheritance or succession under the Ibo Customary Law. Hence, it is clear that women, illegitimate and adopted children, strangers, and former slaves have no right of inheritance under Igbo Customary Law.²⁷

5.0 LEGAL FRAMEWORK FOR THE PROTECTION OF INHERITANCE RIGHTS IN NIGERIA

In Nigeria, the Wills Act and the various Wills laws of the states govern testate inheritance rights. While intestate inheritance rights, on the other hand, are governed by three basic systems of legislation. That

²⁵*Ibid.*

²⁶*Ibid.*

²⁷*Ukeje v Ukeje* (2014) 11 NWLR (PT. 1418) 384.

is common law, the Administration of Estate Laws of the various States, and customary law.²⁸ Islamic law only regulates inheritance among Muslims in the country.²⁹

A cursory examination of the Wills Law's provisions reveals that they essentially re-enacted the provisions of the Wills Act 1837, the Wills Amendment Act 1852, and the Wills (Soldiers and Sailors) Act 1918, with the addition of a few clauses that took into account the principles of prevailing customary law that govern succession under customary law in the affected states.³⁰ States such as Ogun, Oyo, Edo, Ondo and Delta have enacted their own Wills Laws with similar provisions.

Section 2(1) of the Wills law of Lagos State provides as follows:

"2(1) Notwithstanding the provisions of Section 6 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) the child or children of the deceased –

that person or those persons may apply to the court for an order on the ground that disposition of the deceased estate effected by will is not such as to make reasonable provision for the applicant".

This provision seeks to achieve, as in England is to protect the interests of the family against unjust dispositions by Will. The Administration of Estate Law governs the administration of the estate of a resident of Nigeria who was married under the Nigerian Marriage Act but passes away intestate. It is essential to clarify that regardless of

²⁸ Paul Itua, *Legitimacy, legitimation and succession in Nigeria: An appraisal of Section 42(2) of the constitution of the Federal Republic of Nigeria 1999 as amended on the rights of inheritance*, Journal of Law and Conflict Resolution Vol. 4(3), pp. 31-44, March 2012 <<http://www.academicjournals.org/JLC>> last assessed 20 August, 2022.

²⁹ Michael TakimOtu, MiebakaNabiebu, *Succession to, and Inheritance of Property under Nigerian Laws: A Comparative Analysis*, European Journal of Social Sciences ISSN 1450-2267 Vol. 62 No 2 June, 2021, pp. 50-63 <http://www.europeanjournalofsocialsciences.com>> last accessed 1 August, 2022.

³⁰n31

the type of marriage they entered into, everyone who is not covered by customary law is subject to the Administration of Estate Law.³¹

Section 49 (5) of the Administration of Estate Law of Lagos State provides the priority order for those who could receive letters of administration in cases of intestate inheritance. It prioritizes these individuals as follows:

1. Husband and wife of the deceased.
2. Children of the deceased or the surviving issue of a child who died in the lifetime of the deceased.
3. Father or mother of the deceased.
4. Brothers and sisters of the deceased of full blood and the children of such brothers or sisters who died in the lifetime of the deceased.
5. Brothers and sisters of half-blood of the deceased or the children of any such half-brother or sister who died in the lifetime of the deceased.
6. Grandfather or grandmother of the deceased.
7. Uncles and aunts of full blood or their children.
8. Creditors of the deceased.
9. Administrator General, in a situation where all the preceding fail.

The purport of this provision is essential to protect the interest of the family members of a deceased and shield them against indiscriminate maltreatment and considers the same as foremost.

6.0 INHERITANCE RIGHTS AS A COMPONENT OF FUNDAMENTAL HUMAN RIGHTS

There is a plethora of legislation that takes cognizance of the right of inheritance. These legislations recognize discriminating practices that violate these human rights and prohibit them. A good example is section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 which provides as follows:

- (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.³²

³¹ Ibid

³² See also the cases of *Dr. T.E.A. Salubi v Mrs. Benedicta Nwariakwu (supra)*

In the same vein, Article 2 of the African Charter on Human and Peoples Rights provides as follows:

Every individual shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion of national or social origin, fortune, birth or another status.

According to Article 26 of the International Covenant on Civil and Political Rights, everyone has a right to equal protection under the law and is treated equally in front of the law. In this regard, the law forbids all forms of discrimination and guarantees that everyone will receive equal and effective protection from discrimination based on their sexual orientation, place of birth, or any other status.

However, as with every other human right enshrined in the Nigerian Constitution, the right to property and inheritance is not an absolute one and as such as its limitations. These limitations are evident from a cursory examination of the Wills Laws of the various states. Also, there are still evidences of discrimination in Nigeria's succession system, despite the clear provisions of Section 42(2) of the 1999 Constitution.

7.0 RIGHT TO PROPERTY AND PROTECTION OF TESTAMENTARY WISHES IN NIGERIA

It is the lifelong dream of every individual who passes through earth to strive to acquire properties, own chattels and also ensure that these rights are well protected and the properties are well preserved. The property right is the social-political principle that human beings may not be prohibited or prevented by anyone from acquiring, holding, and trading (with willing parties) valued items not already owned by others. Such a right is, thus, inalienable and, if in fact justified, is supposed to enjoy respect and legal protection in a just human community.³³

³³ Akintunde Otubu, 'Fundamental Right to Property and Right To Housing in Nigeria: A Discourse'

To have the right to property simply means a right of ownership³⁴ and ownership comprises a bundle of rights – the right to use, sell, pledge, bequeath, and subject to some limitation, the right to destroy.³⁵ The concept of ownership could be likened to the Roman doctrine of dominion under which the *dominus* was entitled to the absolute and exclusive right of property in the land.³⁶

The right to property also extends to private ownership of property which well recognized all over the world. International laws, regional laws and laws of various countries acknowledge the right to private ownership of property. The Universal Declaration of Human Rights Instrument³⁷ provides that “everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.³⁸In addition, the African Charter on Human and People’s Rights lend credence to the existence and preservation of private rights to property. In Article 14, it is provided that the right of individuals to property shall be guaranteed and it may not be encroached upon except in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.³⁹

<https://www.researchgate.net/publication/269874662_Fundamental_Right_To_Property_And_Right_To_Housing_In_Nigeria-A_Discourse/link/54988ffa0cf2c5a7e342c335/download> last assessed 10 August, 2022

³⁴Roger Bird, Osborn, Concise Law Dictionary, 8th ed, Sweet & Maxwell, London, 1993

³⁵Udombana, *Weighted in the Balances and Found wanting. “Nigeria’s Land Use Act and Human Rights” in Akintunde Otubu, Fundamental Right to Property and Right To Housing In Nigeria: A Discourse.*

³⁶E.H. Burns, Cheshire & Burns, Modern Law of Real Property (1982) p.26

³⁷See Universal Declaration of Human Rights adopted Dec 10 1948, G.A. Res. 217 A (III) GAOR 3rd session (Resolutions, Part 1) of 71, UN Doc. A/810 (1948) Reprinted in 43 A.J. I.L. 127 (Supp. 1949)

³⁸*Ibid.* Art.17 of The American Declaration of the Rights and Duties of man 1948. Art 23 providing that every person has a right to own such private property as meets the essentials needs of decent living and helps to maintain the dignity of the individual and his home.

³⁹Adopted June 27 1981 and came into force on October 21 1986 OAU Doc. OAU/CAB/LEG/67/3/Rev 5 reprinted in 21 I.L.M 58 (1982)

At the National level, Section 43 of the constitution provides that “subject to the provision of this constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria. Section 44 of the constitution provides further that no such private property shall be compulsorily acquired by the state except on payment of prompt compensation and a right of access to court or tribunal for the determination of his interest in the property and the adequacy of compensation paid. From the foregoing, it is crystal clear that the right to property is an inalienable right one that is exercisable by all and should be preserved and respected.

An individual who toils hard to amass wealth and acquire properties should also have the corresponding right and freedom to bequeath his properties to whomever he wishes so long he is of full age and has the capacity to do so. The general rule is that any property vested in the testator at his death may be disposed of by his Will. When a person expresses his will as to how his property would devolve, his words are words of command and the word “Will” as so used is mandatory, comprehensive and dispositive in nature.⁴⁰ The question that needs to be answered is whether the wishes of a person who makes Will, will be protected and strictly adhered to? This question is addressed in the next segment of this paper.

7.1 PROTECTION OF TESTAMENTARY WISHES FOR AN ADOPTED CHILD IN NIGERIA

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.⁴¹

⁴⁰Eseyin M, Ugbe V, *Incurring the Ghost of a Dissatisfied Testator Expostulation on the Derogation of Testamentary Capacity in Nigerian Law of Succession*, Beijing Law Review, Vol. 9, 308-321.

⁴¹Kole Abayomi, *Wills: Law and Practice*, (Lagos: Mbeyi and Associates (Nig.) Ltd., 2004) p. 6

It is beyond doubt that a person has the unlimited power to dispose of his legal property *inter vivos* in any way or manner he chooses. A testator may decide to give out his estate to total strangers or friends at the expense of his immediate family members.⁴² The roots of the duty to protect the dignity of the deceased stems from his death, the law tends to limit this freedom. There are various reasons that have been put forward which include but not limited to social responsibility, legal, tradition or custom religion in justifying this restriction.⁴³ A cursory look at the various Wills Act and Laws will provide an insight as to how the wishes of a testator have been protected as well as how it has been limited.

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 dependents and give all their properties to complete strangers.⁴⁴ 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 the 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, the absolute testamentary freedom granted by the Wills Act of 1837 has been criticized on moral, customary and religious grounds. Sagay argued that this could lead to testators disinheriting his dependants in favor of strangers, which would cause hardship to those dependants.⁴⁵ Sagay further stated that the Muslims are critical of the fact that unfettered freedom would enable a Muslim dispose of his

⁴² n 44.

⁴³ Obiora Atuegwu Egwuatu, Limits of a Testator on Freedom of Will Testament, <<http://www.nigerianlawguru.com/articles/family%20law/LIMITS%20OF%20A%20TESTATOR%20ON%20FREEDOM%20OF%20WILL%20TESTAMENT>> last assessed 10 August, 2022

⁴⁴ Alero I. Fenemigho and Desmond O. Oriakhogba, 'Statutory Limitations to Testamentary Freedom In Nigeria: A Comparative Appraisal', <<https://www.ajol.info/index.php/naujilj/article/view/136294>> last assessed 19 August, 2022

⁴⁵ I Sagay, Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries, (Lagos: Malthouse, 2006) p. 127.

property by Will, in a manner contrary to Islamic Law.⁴⁶ It has also been argued that some properties are sacred by customary law and cannot be disposed of by the testator however he wishes.⁴⁷ These and other reasons led to the various limitations placed on the testamentary freedom of the testator which is manifest in the Wills Law enacted by some states. The limitation placed on the testamentary wishes can be classified as the Customary Law Limitation and Islamic Law limitation.

7.1.1 Customary Law Limitation

The Statutes conferring restriction or limitation on testamentary freedom can be seen in our jurisdiction under two different regimes namely the Western Region Models of Wills Law of 1959 and the Wills Law of Lagos State 2004.⁴⁸

Section 3 (1) of the Wills Law 1959⁴⁹ which is the same as the various Wills Law of the states comprising the former Western Region except Oyo and Lagos states provides thus:

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

Section 1(1) of the Wills Law of Lagos State also provides as follow:

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, of at the time of his death - provided that the provision of this law shall not

⁴⁶ *Ibid.*

⁴⁷ n 48.

⁴⁸ n 47.

⁴⁹ Cap 113 Laws of the Western Region of Nigeria Vol. VI 1959.

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.

In *Oke v Oke*⁵⁰, the Supreme Court held that the devise of a house subject to customary law by a testator to a person not entitled to it under customary law was ineffective.

The above provision covers property subject to customary law and any property which the testator has no power to dispose of, that is family or community property. The main restriction to testamentary freedom is contained in Section 2 of the Wills Law of Lagos State which allows the wife or wives or husband, child or children of the deceased testator to apply to the court for an order on the ground that disposition of the deceased estate effected by will is not such as to make reasonable provision for the applicant and upon successful application to the court by such categories of person, the testator's will be altered so as to make provisions for such applicant.

In the case of *Idehen v Idehen*,⁵¹ in interpreting the phrase "subject to any customary law relating thereto" contained in Section 3 (1) of the Wills Law of Bendel State 1976, the Supreme Court held among others, that the opening words of Section 3 (1) Wills Law to wit "subject to any customary law relating thereto" clearly render the capacity to make, devise, bequeath or disposition by will, subject to customary law relating thereto. That the expression controls and governs the whole provisions of Section 3 (1), which includes testamentary capacity (freedom).

7.1.2 Islamic Law Limitation

The principles of Islamic Law state that 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).⁵² This restriction is now subsumed under the Wills Law of Kaduna State, the Wills Law of Oyo State, the Plateau State Wills Edict,⁵³ the Bauchi State Wills Law,⁵⁴

⁵⁰ (1974) 3 SC 1.

⁵¹ (1991) 6 NWLR (Pt. 98) 382.

⁵² n.49, p.140.

⁵³ No. 2 of 1988.

⁵⁴ Cap 168 Laws of Bauchi State 1989.

the Kwara State Wills Law⁵⁵ and the Jigawa State Wills Law⁵⁶. 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 underlined provision simply means that a will made by a person subject to Islamic law is not governed by the Wills Law. Thus, in the case of *Ajibaiye v Ajibaiye*⁵⁷ 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 went on to make a statement in his will, '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'⁵⁸

The will was challenged in court, on the ground 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.

⁵⁵ Cap 168 Laws of Kwara State 1991.

⁵⁶ Cap 155 Laws of Jigawa State 1998

⁵⁷ [2007] ALL FWLR (Pt 359) 1321

⁵⁸ Ibid.

8.0 PROTECTION OF INHERITANCE RIGHTS OF AN ADOPTED CHILD IN SELECTED JURISDICTIONS

8.1 CANADA

As with Nigeria, the legal frameworks governing the practice and procedures for adoption varies by province or territory. The National Adoption Deck coordinates intercountry adoptions for all provinces with the exception of Quebec.⁵⁹

In this jurisdiction, Subsections 37(1) of the Adoption Act provides as follows:

- (1) When an adoption order is made,
 - (a) the child becomes the child of the adoptive parent,
 - (b) the adoptive parent becomes the parent of the child, and
 - (c) the parents cease to have any parental rights or obligations with respect to the child, except a parent who remains under subsection (2) a parent jointly with the adoptive parent.

In the provinces such a British Columbia and Ontario, Adoption completely severs a blood relationship for succession purposes.⁶⁰ Hence, a child who has been adopted out to another family has no claim on his or her birth parents in the event of an intestacy, partial intestacy or under the wills variation provisions of Section 60 Wills Estate and Succession Act (WESA) and as such cannot has no right to inherit from the estate of his or her birth parents⁶¹

⁵⁹ United Nations Department of Economic and Social Affairs/Population Division, Child adoption: Trends and Policies, p. 199.

⁶⁰ Information about British Columbia's new Wills, Estate and Succession, <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/wesa/part2.pdf>> last assessed 20 August, 2022. See also S. 158(2) of the Childs and Family Services Act (pursuant to Part II of the Succession Law Reform Act).

⁶¹ Trevor Todd, 'Will Variation: Adopted Children have no Claims', <https://disinherited.com/wills-variation/adopted-out-children/> last assessed 20 August, 2022. See also the cases of *Atrill Estate* 2018 BCSC 350, *Boer v Mikaloff* 2017 BCSC 21.

On the effect of an adoption, Section 3(2) (A) of WESA serves to confirm that an adopted child is not entitled to the estate of his or her own pre-adoption parent except through the will of the pre-adoption parent. It provides as follows:

- (2) Subject to subsection (3), if a child is adopted,
 - (a) the child is not entitled to the estate of his or her pre-adoption parent except through the will of the pre-adoption parent...

However, the birth parent of an adopted child may devise properties to an adopted child in a will and the child shall be entitled to inherit such properties.

8.2 SOUTH AFRICA

The national legislation governing adoption in this jurisdiction is the Child Care Amendment Act of 1996.⁶² In this jurisdiction, an adopted child is for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child, and as such an adopted child cannot inherit from both the adoptive and natural parents but rather can only be considered a child of one of them.⁶³

The Intestate Succession Act 81 of 1987 which governs intestate succession in the jurisdiction provides that:

An adopted child shall be deemed

- a. to be a descendant of his adoptive parent or parents.
- b. not to be a descendant of his natural parents or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child.

It is therefore apparent that an adopted child thus has the right to inherit as any biological child would from their adoptive parents. They do not have the same right to inherit from their biological parents as they are legally no longer seen as their biological parents' descendants.

⁶² n 15 .

⁶³ Section 1(4) of the Intestate Succession Act No. 81 of 1987. See also 242(3) of the South African Children's Act.

This, however, does not preclude an adopted child from inheriting from the estate of his biological parents where gifts are given to him in their will.⁶⁴

8.3 THE UNITED KINGDOM

In the United Kingdom, there are numerous legal structures in place to preserve and maintain the status of adopted children's inheritance rights. The Inheritance (Provision for Family & Dependents) Act of 1975 serves as a fundamental framework. Adopted children have the same legal standing as their adoptive parents' biological children in this jurisdiction⁶⁵. This indicates that adopted children have the same legal rights to their adoptive parent's estate as their biological offspring, whether there is an intestacy or not.

Adopted children have the right to file an inheritance claim against their adoptive parents' estate or contest the legality of their adoptive parents' wills under the provisions of Section 1 of the Inheritance (Provision for Family & Dependents) Act 1975.

It is vital to remember that adopted children might inherit from their birth parents' estates as well. If they can demonstrate that they had a relationship with their biological parent and are so classified as a child of the family, they may pursue a claim under the Inheritance Act against the estate of their biological parent. However, even if they are not considered as a child of the family, they can still contest the legality of their biological parents will.⁶⁶

9.0 LEGAL FRAMEWORK FOR THE PROTECTION OF AN ADOPTED CHILD IN NIGERIA

⁶⁴AED Attorneys, Adoption and Inheritance in terms of Intestate Succession Act <https://adattorneys.co.za/adoption-and-inheritance-in-terms-of-the-intestate-succession-act/>> last assessed 20August, 2022

⁶⁵ Section 67 (1) of the Adoption and Child's Act 2022 provides that the child is to be treated as if born as the child of the adopter or adopters. Subsection 2 provides that an adopted child is the legitimate child of the adopters or adopter and where a person is adopted by a couple or a partner of his parent, he is to be treated as if he had been born as the child of the relationship of that couple.

⁶⁶ The Inheritance rights of adopted children, <https://www.inheritancedisputes.co.uk/news-articles/inheritance-rights-adopted-children.html>> last assessed 20August, 2022.

Nigeria's legal framework regime on the adoption of a child is largely fragmented as the rules governing the same vary from state to state. This is because, prior to the enactment of the Eastern Adoption Law of 1965 and the Childs Rights Act of 2003 (CRA), adoption was created customarily and lacked legal backing. However, with the passage of the CRA, legal provisions regarding the status, implications, and rights of an adopted child have become more explicit.

Section 141 (3) of the Childs Right Act 2003 provides as follows, '...for the purpose of the devolution of the property on the intestacy of the adopter, an adopted child shall be treated as a child born to the adopter'. This section grants the adopted child the right to inherit the adopter's property in the event of his/her intestacy. The Courts of law and equity are indeed the keepers of the conscience of the society and will prevent any person or authority from acting against the dictates of conscience. The Courts of law have over the years, reinstated the rights of an adopted child to inherit the estates of his/her adoptive parents. A good example is the case of *Anthony Aduba &Ors v Titus Aduba*⁶⁷ which is instructive on this point.

In this case, while upholding the trial court's decision, the Court of Appeal agreed that the biological children's claim that the Respondent has no right to inherit his adoptive parents' estate violates Section 42 of the Constitution (as amended). The court also ruled that their actions were inequitable, violating natural justice, equity, and good conscience. The court reasoned that their argument and actions were so heinous that no court of law would give in to their whims and caprices. As a result, their appeal was dismissed with substantial costs levied against them.

10.0 SUMMARY OF FINDINGS

A cursory examination of the governing legal frameworks on the adoption of children and their inheritance rights also reveals that there still exists discriminations as it relates to the inheritance rights of an adopted child particularly under the Nigerian customary law system. More so, the legal status of an adopted child as it relates to his/her inheritance right viz-a-viz a biological child as well as his/her right to

⁶⁷(2018) LPELR-45756(CA)

inherit from the estate of his biological parents under customary law in rather unclear.

A comparative analysis of the normative standards for the inheritance rights of adopted children in Nigeria, Canada, the United Kingdom and South Africa reveals that a common feature is the legal status of an adopted child. In these jurisdictions, adopted children have the same legal standing as their adoptive parents' biological children with equal rights and privileges including the right to inherit and share in the estate of their adoptive parents. However, save for the United Kingdom, an adopted child in any of these jurisdictions, cannot inherit from the estates of his biological parents.

While, it is also the general rule that an individual to devise or dispose of his properties to whomsoever he deems fit, this right is not without its limitations. The questions that therefore begs for answer are- Can the inheritance right of an adopted child be sustained if bequeathed property in a Will made by his biological parents bearing in mind the Child Rights Act which sever the legal relationship existing between a biological parent and an adopted child upon adoption by the adoptive parent?

The Nigerian law is silent in this regard, however, it will be safe to say that since a person can freely give property *inter vivos* to anybody, the birth parents can choose to include any biological child or any person as a beneficiary in their will. This is as long as none of the family members or relatives of the birth parents contests the will and well as the inclusion of the adopted child.

This paper also finds that although biological parents may devise properties to an adopted child or any person as they wish based on their right to property and right to testamentary wishes, this right is not absolute and is subject to customary and Islamic limitations.

11.0 RECOMMENDATIONS

Owing to the limitations in the right to devise properties and testamentary wishes as well as the conflicting and discriminatory practice of customary law where an individual dies intestate, it is recommended that the adoptive parents and biological parents of adopted child where they desire to devise properties to an adopted child to make a will in order to guarantee and assure that an adopted

child (or children) inherits from their estate, make the adopted child or children the will's beneficiary, continually update the will and making required changes as needed, and specifically designate that child to a specific asset. Also, despite the alleged advantages associated with customary laws' unwritten form, it is recommended that all customary laws should be codified in order to guarantee consistency in how they are applied in Nigeria.

Section 42 (2) of the constitution is emphatic on the prohibition of discriminatory practice against any person as a result of any circumstance of his birth. This section of the hence, confirms a legal status of an adopted child. It for all intent and purpose, eliminated the status of illegitimacy once a child has been adopted. This paper has found that notwithstanding this provision, there are still discriminatory practices in Nigeria as it relates to the inheritance rights of adopted children.

Consequently, in resolving the discriminatory and conflicting practice, it is hereby recommended that the government should formulate implementation measures to give full effect to the provisions of this section of the constitution. Here, beyond the Court's declaring discriminatory customary practices as prohibited, it is imperative for governments at the federal and state levels to enact laws prohibiting harsh and discriminatory customary law norms that affect adopted children's inheritance rights.

12.0 CONCLUSION

This paper has carried out a painstaking understudy of the concept of child adoption, the legal status of an adopted child viz-a-viz the inheritance rights of adopted children. This paper finds that there is evidence of discrimination in Nigeria based on a child's adoption status in the area of succession despite the provisions of Section 42(2) of the 1999 Constitution and international legal frameworks prohibiting discriminatory practices and made recommended reforms in preserving the inheritance right of adopted children. The paper has exposed the lacuna to be filled by future legal reforms in order for an adopted child to enjoy the rights vested upon him by the constitution and our various laws.