EXECUTORSHIP

On the death of a man/woman, his/her property will pass on to someone else. The right to own the property left behind by the deceased and exercise control over it will need to be determined. The way and manner the property will be distributed will depend on whether or not the deceased left a valid will or not. The property of the deceased are generally classified into two, namely: real property and personal property. Where a valid will is in place, the rules governing testate succession will apply, otherwise, the rules governing intestate succession will come to play.

Definition of Key Terms

i. **Will**: A will is a legal declaration, usually in writing, by which a person names one or more persons to manage his or her estate and provides for the distribution of his or her property at death. It is also called a testament.
ii. **Testator**: the person who executes or signs a will; that is, the person whose will it is. A female testator can also be referred to as a testatrix.
iii. **Executor**: a person named to administer the estate, generally subject to the supervision of the probate court, in accordance with the testator's wishes in the will. In most cases, the testator will nominate an executor in the will unless that person is unable or unwilling to serve. He is also known as the Personal Representative. A female executor can be called an Executrix.
iv. **Administrator:** person appointed or who petitions to administer an estate in an intestate succession.
v. **Probate:** legal process of determining the validity of a will to settle the estate of a deceased person.
vi. **Testate:** person who dies having created a will before death.
vii. **Intestate:** person who has not created a will, or who does not have a valid will at the time of death.
viii. **Codicil:** an amendment to a will; or a will that modifies or partially revokes an existing or earlier will.
ix. **Beneficiary:** anyone receiving a gift or benefitting from a trust as stated in a will.
x. **Inheritor:** a beneficiary in a succession, whether testate or intestate.
xi. **Devise:** testamentary gift of real property.
xii. **Devisee:** beneficiary of real property under a will.
xiii. **Legacy:** testamentary gift of personal property, traditionally of money.
xiv. **Legatee:** beneficiary of personal property under a will, i.e., a person receiving a legacy.

Creation of a Valid Will

Any person who is 18 years and above and of a sound mind (having appropriate mental capacity) can draft his or her own will with or without the aid of a lawyer. A person under the age of 18 years can only make a valid will if he is a soldier or airman under active military service, or a sailor.

The following are requirements to create a valid will:

1. The testator must clearly identify himself as the maker of the will, and that a will is being made; this is commonly called "publication" of the will, and is typically satisfied by the words "last will and testament" on the face of the document.
2. The testator should declare that he revokes all previous wills and codicils. Otherwise, a subsequent will revokes earlier wills and codicils only to the extent to which they are inconsistent. However, if a

subsequent will is completely inconsistent with an earlier one, the earlier will is considered completely revoked by implication.

3. The testator may demonstrate that he has the capacity to dispose of his or her property ("sound mind"), and does so freely and willingly.
4. The testator must sign and date the will, usually in the presence of at least two disinterested witnesses (persons who are not beneficiaries). There may be extra witnesses, these are called "supernumerary" witnesses, if there is a question as to an interested-party conflict.
5. If witnesses are designated to receive property under the will they are witnesses to, this has the effect, in many jurisdictions, of either
    (i) disallowing them to receive under the will, or
    (ii) Invalidating their status as a witness.
6. The testator's signature must be placed at the end of the will. If this is not observed, any text following the signature will be ignored, or the entire will may be invalidated if what comes after the signature is so material that ignoring it would defeat the testator's intentions.
7. One or more beneficiaries (devisees, legatees) must generally be clearly stated in the will.

Types of Will

Generally, a will can either be formal or informal.

A **formal will** is a will that is done in writing (handwritten or typewritten); and is properly executed (signed by the testator or by his direction in the presence of two or more witnesses present at the same time. The witnesses attesting to the will in the presence of the testator).

An **Informal Will** is a will that does not conform to the requirements of a formal will. The Wills Act permits military personnel, and sailors to make informal will.

Wills, depending on whether they are formal or informal, can also include the following:

a. **Nuncupative:** this is an oral or dictated will. They are often limited to sailors or military personnel.
b. **Holographic:** this is a will written in the handwriting of the testator.
c. **Unsolemn will:** this is a will in which the executor is unnamed.
d. **Will in solemn form:** signed by testator and witnesses.
e. **Self-proved:** this is a will written 'in solemn form' with affidavits of subscribing witnesses to avoid probate.
f. **Mystic:** this is a will that is sealed until the death of the testator.
g. **Reciprocal/Mutual wills:** wills made by two or more parties (typically spouses) that make similar or identical provisions in favour of each other.

Reasons for making a Will

It is desirable to make a will for some of the reasons highlighted below:

a. To make specific provisions for the Testator's loved ones after demise;
b. To avoid cases of intestacy—a condition wherein a person dies without a valid Will. Which leaves the estate to be governed by the rules of intestacy or customary law;

c. To prevent long years of family feud, disagreement and litigation over the deceased person's estate;
d. To enable the Testator appoint the persons he desires to be the Executors of his estate after his demise; and
e. To prevent the Testator's estate from perishing. This may occur when the Testator has no relatives or when none of his relatives are aware of the existence of a particular property.

Revocation of a Will

A will may be revoked in any of the following ways:

i. **By a Subsequent Will or Codicil**: a codicil is an instrument (document) executed by the testator for the purpose of adding to or altering a will previously made by him. Where a new will is made deliberately to set the previous will aside, it is necessary that it is stated specifically in the new will that the earlier will is being revoked. If this is not done, the court will consider the two wills valid and any inconsistencies between them will be resolved in favour of the most recent will.
ii. **By Physical Destruction:** revocation can be done by the physical destruction (tearing or burning) of a will by the testator, or by some other person in the presence of the testator (and witnesses) and by his direction. The destruction must be intentional and not accidental for the revocation to be valid. If a will is destroyed accidentally or without the testator's authority, there is no revocation and another copy of the will can be admitted for the purpose of grant of probate. But the onus of proof that the original will was accidentally destroyed rests on the person seeking to tender a copy.
iii. **By a Subsequent Marriage:** a subsequent marriage effectively revokes an existing will as it is assumed that upon marriage a testator will want to review his/her will. There is an exception however, if the will contains a statement that it has been made in contemplation of a forthcoming marriage and the marriage actually takes place. A marriage under customary law, however, does not revoke a will.

Family Provision

By 1975, the Inheritance (Provision for Family and Dependants) Act was passed. This Act gave extensive powers to the courts to award reasonable provision out of a deceased's estate for the maintenance of certain dependants if the will or intestacy failed to make such provisions for them. The Act allows claims by close family members and also by persons who were financially dependent on the deceased when he died.

The dependants who may apply to the court for financial provision out of the deceased estate include:

a. The wife or husband of the deceased;
b. A former wife or husband of the deceased who has not remarried;
c. A child of the deceased;
d. Any adopted child;
e. Any other person who at the time of the death of the deceased was wholly, or partly being maintained by him.

For an application to be effective in this situation, it must be made within 6 months immediately following the grant of probate or letter of administration; unless the court at its discretion agrees to an extended period.

Probate and Administration

Personal representatives cannot act in respect of a deceased's estate until they obtain a grant of probate for executors; or a letter of administration for administrators (intestate succession/where there

is no will). After the testator has died, a probate proceeding may be initiated in court to determine the validity of the will or wills that the testator may have created, i.e., which will satisfy the legal requirements, and to appoint an executor. In most cases, during probate, at least one witness is called upon to testify or sign a "proof of witness" affidavit. In some jurisdictions, however, statutes may provide requirements for a "self-proving" will (must be met during the execution of the will), in which case witness testimony may be forgone during probate.

If the will is ruled invalid in probate, then inheritance will occur under the laws of intestacy as if a will were never drafted. Often there is a time limit, usually 30 days, within which a will must be admitted to probate. Usually only an original will can be admitted to probate – even the most accurate photocopy will not suffice. However a copy of a will can be admitted if the original was lost or accidentally destroyed and the validity of the will can be shown to the court.

Where the application for grant of probate is not opposed, the probate is said to be **"in common form."** However, where there is an objection as to the validity or authenticity of a will, witnesses will be called and a probate granted after such proceeding is said to be **"in solemn form."**

Trust Corporations

Rather than name in individuals as executors, a testator may appoint a trust corporation as the executor of a will. A trust corporation is a company registered under CAMA 2004 to carry on the business of trusteeship. If a trust corporation is granted probate, it will normally appoint an officer to carry out the work.

Advantages of a Trust Corporation

Some of the advantages of appointing a trust corporation as executor include:

i. wide experience of legal, tax and accountancy requirements;
ii. a corporation cannot die unlike a private/individual executor;
iii. assurance of impartiality: there's reduced chances of the corporate executor taking sides in family feuds; and
iv. the cost of administration is likely to be lower

Revocation of Probate

A grant of probate will be revoked in any of the following circumstances:

a. Where it was obtained 'in common form' and the executor is called upon to prove the will in solemn form and fails to do so.
b. Where a later will is discovered.
c. When the probate is obtained by fraud.
d. Where the probate is granted to a wrong person.
e. If the executor becomes incapable of acting by reason of insanity or infirmity.
f. If the testator is found to be alive.

Revocation of Administration

A grant of letter of administration will be revoked under the following situations:

a. Where a will is discovered.
b. When the grant is obtained by fraud.

c. Where the grant is made to a wrong person.
d. If the administrator becomes incapable of acting by reason of insanity or infirmity.
e. If the intestate is found to be alive.

INTESTATE SUCCESSION

Intestacy is the situation where an individual dies without leaving a valid will. Partial intestacy however occurs where there is a valid will, but the will does not dispose all of the testator's property. In cases of intestacy and partial intestacy, the rules governing intestate succession will apply.

Intestate Succession under Statute

According to the provisions of the Administration of Estates Law of 1959, the following will play out in case of intestacy, where the intestate had married under the Marriage Act:

1. Where the intestate leaves no issues, no parent, and no whole brother or sister; the residuary estate will be held for the surviving husband or wife absolutely.
2. Where the intestate leaves issues, the surviving husband or wife shall take the personal chattels absolutely and in addition the surviving spouse will receive lump sum of money equivalent to one-third of the residuary estate. One-third of the residuary estate after deducting the lump sum due to the surviving spouse shall also be held in trust for the surviving spouse during his or her life time. The balance will then be distributed equally among the children or held on statutory trusts for them where they are not yet entitled to it.
3. Where the intestate leaves no issues, but is survived by parents and whole blood brothers and sisters; the surviving spouse shall take in addition to the personal chattels, a lump sum of money equivalent to two-thirds of the residuary estate. One-half of the residuary estate above after deducting the lump sum above shall be held in trust for the surviving spouse absolutely. The other half shall be held in trust for the parent(s) in equal share absolutely. Where the intestate leaves no parents, the other half shall be held in trust for the whole blood brothers and sisters of the intestate.
4. Where the intestate leaves no surviving spouse, no issue, no parent, and no whole blood or sister; the residuary estate shall be held in trust for the half brothers or sisters of the intestate.
5. Where the intestate leaves no surviving spouse, no issue, no parent, no whole blood or sister, and no half brother or sister; the residuary estate shall be held in trust for the grandparents.
6. Where the intestate leaves no surviving spouse, no issue, no parent, and no whole blood or sister, no half brother or sister and no grandparent, the residuary estate shall be held in trust for the uncles and aunts of the intestate being whole blood brother or sister of a parent of the intestate.
7. Where the intestate leaves no surviving spouse, no issue, no parent, and no whole blood or sister, no half brother or sister, no grandparent, and no uncle and aunt from whole blood brothers or sisters of a parent; the residuary estate shall be held in trust for the uncles and aunts of the being half blood brothers or sisters of a parent of the intestate.
8. Where the intestate leaves no relation of any of the class mentioned above, the residuary estate shall belong to the state as '**bona vacantia'** that is property without owner, in lieu of any right to escheat i.e. in the absence of any right of reversion.

Intestate Succession under Customary Law

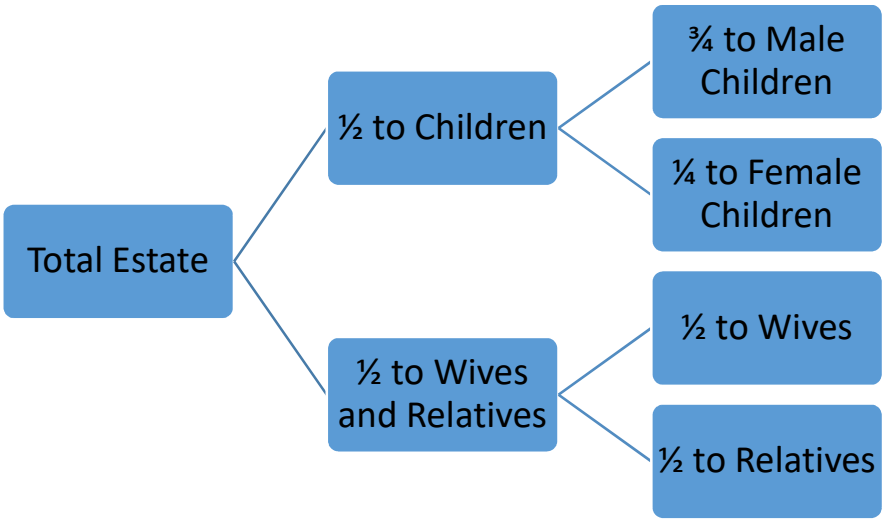
The rules governing intestate succession under the statute is only applicable where the intestate had married under the Marriage Act or a Marriage Law in any of the states. Where the intestate married under the customary law, the provisions of the Administration of Estates Law do not apply. Different

customs are applicable in different parts of the country. These reflect the customary practices of the Hausa, Igbo and the Yoruba.

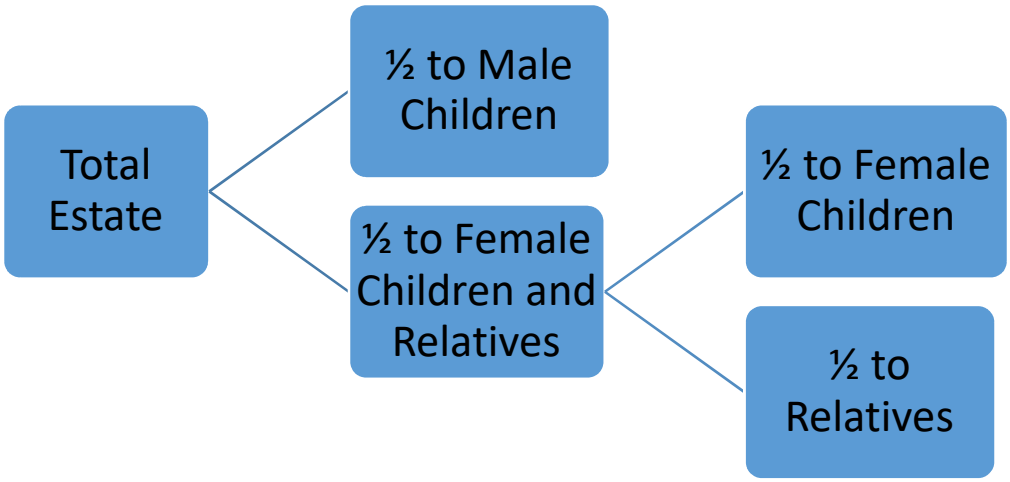
HAUSA CUSTOM

The practice among the Hausa appears to be more equitable and detailed than what obtains in the other two customs. While only the children participate in the sharing of real property (land, houses etc.); wives and relatives join and participate in the sharing of money and chattels (personal effects including jewelleries). After all necessary burial rites and the settlement of the deceased's debts, if any, the family members will share the deceased's estate along the following line:

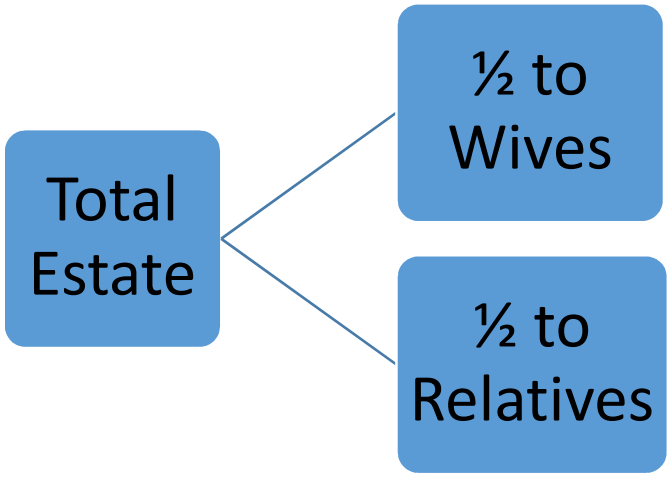
1. Where he is survived by a wife (or wives), children and relatives: the estate will be shared into two halves; one half will be given to the children, while the other half will be given to the wives and relatives. The portion given to the children will be shared into two halves, one half will be given to the male children, while the other half will shared into two – one half will be added to the share of the male children and the other half will be given to the female children.



2. Where the intestate leaves no surviving wife but children and relatives: his estate will be shared into two halves. One half will be given to male children while the other half will also be shared into two. One half of this will be given to the female children, while the other half will be given to the relatives.



3. Where the Intestate leaves no children, but wives and relatives: the estate will be shared into two halves. One half will be given to the wives, while the other half will be given to the relatives.



Igbo Custom

In Igbo land, after the necessary burial rites and the settlement of the deceased debts, if any, only the male children will participate in the sharing of their parent's property; and the first son will hold the property in trust for all the other children until they are of age to collect their own share. All the male children have equal rights; and if anything is given to the female children at all, they are likely to be some chattels with little or no use to the male children. Female children do not share in real property like land and houses. However a decision of the Court of Appeal (1998) sitting at Enugu declared the custom which forbids female children from inheriting their father's real property as being repugnant to natural justice, equity and good conscience, hence female children in Igbo land now have the same rights as their male counterparts to their father's inheritance.

Yoruba Custom

In Yoruba land, when a person dies intestate after all the necessary burial rites and the settlement of the deceased debt's, if any, the elders in the family will fix a meeting for the purpose of distributing the deceased's estate among his children . Two customary practices are followed depending on which is applicable in a particular case:

1. Idi-Igi: it implies according to the number of wives, and this practice is in use when the deceased is succeeded more than one wife. Here the deceased's estate is shared among the children on the basis on the number of wives.
2. Ori-Ojori: this implies that 'all heads are equal,' and it is in use where the deceased is married to only one wife. The deceased's estate is shared equally among the children.

In Yoruba land both male and female children have equal rights to their parent's property, even though in practice male children are normally more favoured (especially where the sharing of real property like land and houses are involved).