

## THE CHANGING SECURITY SYSTEM OF GHANA'S INTESTATE SUCCESSION LAWS, A CRITIQUE

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### ABSTRACT

*Society evolved because of the realization of the inadequacies and insecurity inherent in the life of an individual. Every society is therefore based on an inbuilt security system. Every society then, has a scheme of laws to maximise its security system. These laws are perpetuated in the form of succession from one generation to the next.*

*Since a security system is dynamic depending on stage of development of the society, the laws also change to meet the changing situation. Changes may come either through the process of evolution or by legislative intervention.*

*The social setting in Ghana has not changed drastically. It still is based on strong Kinship bonds and consanguinity. Any legislation on intestacy cannot therefore gloss over this factor.*

*The drift of this article is to examine the rules of intestacy under pristine customary law and legislative inroads to determine which of the two addresses the issue of security under Ghana's current social setting in so far it relates to children and spouses.*

**Keywords:** Intestate Succession, Spouses, Family, Children, Security.

### INTRODUCTION

Analysts of laws of succession have given account of it in a way that appears that our succession laws have not afforded adequate protection to certain persons who ought to be objects of the law i.e. children and widows. Professor E.V.O. Darkwah states that; 'Custom and tradition have relegated the wife to the duties of housekeeping, raising and caring for children.'<sup>1</sup>

In that article the writer was however concerned with

proprietary rights of widows. But proprietary rights are different from the security of women. Security encompasses but is not limited to proprietary rights. This article focuses on two areas in which our customary succession laws afforded security. This article discusses the security afforded to children and spouses under our customary laws in the past and present.

Since past and present are relative terms, for the purpose of this article the past is the period before legislative intervention in our Intestate Laws and the present is the post legislative intervention i.e. Pre and Post 1985.

### THE FAMILY

It is desirable first to determine the role of the family in our inheritance system and what security was afforded wives and children by the family. It is trite knowledge that there are two main families in Ghana. The concept of the family depends on whether the system of inheritance is patrilineal or matrilineal.

For the purpose of this article Bentsi Enchil's definition of the family as a legal entity is pertinent. He says:

The FAMILY is the group of persons lineally descended from a common ancestor exclusively through males (in communities called patrilineal for this reason) or exclusively through females starting from the mother of such ancestor (in communities called matrilineal for this reason) and within which group succession to office and to property is based on this relationship.<sup>2</sup>



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If there is any security system which accrues to the wife and children under our succession laws it must derive from the family i.e. the relationship of such family to the wife and children. The family's importance permeates every branch of the customary law, such as the law of marriages, the exercise of domestic authority and responsibility, legal transactions and legal proceedings, and rights in property of all kinds.<sup>3</sup>

It is within the umbrella of the family system that the security of children and widows can be meaningfully, analysed.

### The Widow Under Customary Law

Since under Customary Law marriage was an affair between two families a marriage did not automatically terminate on the death of a spouse. The widow was offered marital security depending of course, on the relationship between her and the husband's family during the lifetime of her late husband. Margaret Field states: 'If the man who inherits the widows does not want them as his wives, he may publicly release them - just as a man may dismiss a wife who has not been unfaithful by giving them 'road money'. In such a case he is usually made to give them a portion of the farms that they have helped his uncle or brother to make ... if the widow herself objects to becoming the wife to her husband's successor she is not forced to it, but while she remains dependent on him she must perform a wife's secondary duties such as cooking and working on the farm. If she wishes to leave him altogether and go to another man she can do so only on the terms of which any marriage is dissolved by the wife, that is, her people must return marriage fees paid by her husband.'<sup>4</sup> Professor Kludze says that in the case of Ewes a man is found for the woman in the family.<sup>5</sup> This does not make his position radically different from the Akan situation; the important thing being that the widow is rehabilitated in the family of her late husband. Kludze describes as absurd a possible situation of a successor being required to marry his own mother and father's wives when the logic of the Akan system is applied to the paternal system.<sup>6</sup> This absurdity is a conjuration of Kludze's own imagination since Customary Law does not operate on such a tight rope logic as to make a son marry his own mother. In any case among the patrilineal Konkomba tribes of the Northern Region of Ghana the eldest son of a deceased man can marry his father's wives apart from, of course, his own mother.

In both the patrilineal and matrilineal system therefore there is an inbuilt security system for the widow on death intestate of a husband. Rattray says of the Ashantis:

The widow and children remain in the house which they always occupied and are maintained by the late husband's heir.<sup>7</sup>

There is an Ashanti proverb which says that the one who takes the gun of the deceased also takes the widow.<sup>8</sup> The 'gun' symbolises an item of protection. AN ALLOT also says that succession could therefore be onerous and unprofitable and a successor might choose to decline succession on that account.<sup>9</sup> The case of *Quartey v Martey*<sup>10</sup> is often cited as a general proposition that when a wife helps the husband to acquire property the property belongs to the husband. But this case should not be taken as a carte blanche for such a proposition of Customary Law. In that case Ollenu relied on the decision of *Okwabi v Adonu*<sup>11</sup> but this concerned property rights between a father and a son. In that case the Court of Appeal endorsed the trial court's decision that whatever proceeds accrued from the efforts of a father and a son are not the joint properties of the father and son. But in case of husband wife relationship it might turn on the extent of contribution of a wife. If a wife was able to lead evidence indicating substantial contribution there is no reason why Customary Law would not recognize this.

Customary Law recognised the right of a wife to hold property apart from her husband's,<sup>12</sup> and it has never been suggested that the husband has an inheritable interest in such property, whereas there is overwhelming authority to suggest that the wife's interest in her husband's property is not completely extinguished on the latter's death. Again if the estate was insolvent the wife was not called upon to bear any liabilities. The widow, contrary to popular belief was a free rider at Customary Law. Since the widow was to be married into the family the question of her ejection from the matrimonial home did not arise. And if such a widow had children, the children were automatically adopted into their father's family.

In *re Kofi Antubam (Deceased)*<sup>13</sup> the Deceased in that case died intestate leaving two widows who were both married under Customary Law. He hailed from Wassaw Amenfi traditional area. The head of family of Kofi Antubam took out an originating summons to determine inter alia, whether the widow had any interest in the estate of the deceased and if so the nature and size of that interest. After affirming the Customary Law rule that widows are entitled to be maintained by their husbands head of family or

successors during widowhood by the payment of adequate allowance, Archer-J. specified that these payments may be either periodical or amount to annuities. He went on to state that the interest of the widow ... is equivalent to a determinable life tenancy which entitles them to a share of the incomes accruing from houses in which they are entitled to reside. Indeed Archer went on to hold that the widow was entitled to an interest in the estate if it were sold.

It is instructive to note that there was no such corresponding right to a widower under Customary Law. The widow's entitlement to the estate of her husband was without prejudice to the fact that the widow might be more pecunious than the value of her husband's estate.

#### Children in the Patrilineal System

Kludze argues that in the patrilineal communities children inherit as of right. This tends to down play the role of the family system and the security it affords children. It would appear nonetheless, that the authorities cited by Kludze in support of this proposition fly in the face of the proposition.

In *Attipoe v Shoucaire*<sup>14</sup>, it was held that in native custom (Ewe) all succession is a question of election not of inherent right; the only rigid rule is that the election shall be constitutionally carried out at a prior meeting of the relatives.... In *Khoury v Tamakloe*<sup>15</sup>, it was also held that succession is not a matter of right but by appointment at a family meeting. In *Husunukpe v Dzegblor*<sup>16</sup>, it was also held that on the death of a daughter who inherits her father the property goes to the family. Besides in almost all the patrilineal systems it is the family that manages the property when the children are minors. The security that is afforded children in the patrilineal system inheres in the interest which the family has in the estate of a deceased member. Children in the patrilineal system are not an enclave unto themselves as has been made out by Kludze.

#### Children in the Matrilineal System

In the matrilineal communities even though children did not inherit their father's yet the system conferred some large measure of security on the children. Children in the matrilineal communities were entitled to residence in their fathers houses during 'good behaviour'. Kludze suspects that 'good behaviour' could mean that such a child could not deny the title of the successor.

This interpretation appears misleading. Good

behaviour means just what it says. It was unthinkable for a child in the matrilineal system to deny the title of the successor. In any case title was not vested in the successor but in the family, and children in the matrilineal communities knew their limitation. Besides if a child had plausible ground for denying title of his father's successor, this would not undermine his right of residence. Apart from right of residence, children were entitled to be maintained from the father's estate. In *Manu v Kumah*<sup>17</sup>, where the supreme court held:

"We consider that the responsibility of a successor to maintain and train the child of his predecessor is a legal one ... we say therefore that a successor under Customary Law is under an enforceable obligation not only to maintain but also to educate the children of his predecessor to the extent of the property of the deceased which has come to his possession and his dealings therewith. The above decision is indicative of the fact that under Customary Law successors are only managing trustees for children."

#### PRESENT LEGISLATION

Before PNDC Intestate Succession Law<sup>18</sup> there had been minor legislative incursions in the area of intestacy. But these laws were limited in scope and not as all embracing as PNDC Succession Law.

The most important features of PNDC Intestate Succession Law which are pertinent to our present discussion are:

- i The law enhances the position of the nuclear family against the extended family system.
- ii It creates the impression that there are always assets to be distributed and concentrates on the distribution of assets while remaining silent on the liabilities.
- iii The manner of distribution of assets holds out a potential for the fragmentation of estates.

PNDC LAW 111 brings along its trail a vortex of insecurity for spouses and children to the extent to which it creates the conditions for the demise of the family system and the security that it afforded spouses and children. The memorandum to the Intestate Succession Law observes that the nuclear family is gaining in importance. This observation may be true from a snappy glance of the urbanised elite. However, the extent of disintegration of the family system in the largely agrarian rural population is not very patent. Any changes that may be occurring may be flowing

from the implications of the PNDC law itself.

Having given a larger share of the assets (and this is fictional in most cases) to the spouse and children, the family system cannot both legally and ethically be expected to play the role that it played under Customary Law. Whatever security system there is must derive from and be relevant to the assets and liabilities of a deceased as an individual that is, even if the view is adopted that security under our circumstances derives from assets only.

The logic of the law is that spouses ought to be sued in respect of the liabilities of an estate of the other spouse. The atmosphere of insecurity arising out of death of a spouse will further be compounded by having to assume responsibility for liabilities.

#### Fragmentation of Assets Under a PNDC LAW III

It is desirable to reproduce the manner of distribution of a deceased assets to indicate the potential for fragmentation. The surviving spouse and children are "entitled absolutely to the household chattels of intestate."<sup>19</sup> If the deceased spouse left only one house, the surviving spouse and/or children are entitled to it as tenants-in-common.<sup>20</sup> Where, however, the intestate estate consist of more than one house, the surviving spouse and child are entitled to select one of the houses; and they hold it as tenants-in-common.<sup>21</sup> After this selection, the residue is divided as follows:

- (a) three-sixteenth to the surviving spouse
- (b) nine-sixteenth to the surviving child
- (c) one-eighth to the surviving parent; and
- (d) one-eighth in accordance with Customary Law.

But, if there is no surviving parent one-fourth of the residue of the estate devolves in accordance with Customary Law.<sup>22</sup> Where the deceased is not survived by a child one-half of the residue goes to the surviving spouse.<sup>23</sup>

If a man died leaving a 4 bedroom flat with 11 children, 5 of who belong to a different mother it would be difficult for them to live together as tenants-in-common. Eventually the house will be sold and the resultant income accruing therefrom, possibly will only be sufficient to pay rent advance for a single room for each person. The security that would be afforded children of a deceased who are not biologically related to a spouse cannot be equated to that offered by the family system who are bound together by consanguinity.

## CONCLUSION

PNDC LAW III sends out symbolic signals for the demise of the family (even though the legislator might only obliquely have intended this).

We criticize successors at Customary Law for an apparent neglect of spouse and children. But often times there is a casual connection running through lack of assets of a deceased person to the neglect of their spouses and children. The accusation of neglect may therefore stem from a lack of fair assessment of the circumstances of the deceased vis-a-vis a customary successor. There is a need to make deeper incursions into the factors responsible for neglect before any positive assertion can be made, relating to the defects of our inheritance system.

PNDC LAW 111 has removed (by necessary implication) the security which was afforded by the family system (subject to whatever limitations there were). However, the limitations inherent in the vesting of security in spouses and children are more drastic than in the family system.

The ideal situation for the smooth functioning of PNDC LAW 111 do not exist as of now. Our Customary Law marriages (or possibly a distortion of customary marriages) have ill defined status. Sometimes there are no clear cut distinctions between when a marriage is a marriage and when divorce is a divorce. The only institution about which there is no dispute is the family one belongs to. Hence Ghanaians still seek refuge under the system even though PNDC LAW 111 wishes it away.

The average life expectancy in Ghana hovers around 55 years. This means most Ghanaian die young leaving children and spouses much younger. PNDC LAW 111 is seriously flawed in not addressing the issue of the security of minors. In addition to the above, per capita incomes are very low. The nuclear family is therefore a micro portion of a larger socio-economic extended family system. Rights and liabilities dovetail into each other and are diffused into a larger collectivity. It was possible for members of an extended family to be beneficiaries of assets which were not acquired by their natural parents or spouses.

At Customary Law it was held that children were entitled to residence in their fathers houses during 'good behaviour'. This phrase is hollow of meaning in so far as it gives the impression that this right of residence is strictly conditional. It is the writer's view that this was a right which was a preserve of a father



in the maternal system resulting from the implications of the system. Granted even that the family exercised these rights after a father's death they would be doing exactly what the father could have done in his life time. But it is instructive that this right was rarely exercised considering the strength of kinship ties in traditional society. It meant that the right of residence of children was virtually perpetual.

Ghanaians are still largely clinging onto the wisdom of their ancestors reflected in the inheritance system largely because the issue of security in the old system has not been adequately addressed in the present legislation. Currently then, both the practices of the people and what legislation says ought to be the practices of the people are looking sideways. We have moved a step forward then, from a pan which was frying to a huge consuming fire which might engulf us all leaving no trails of wisdom of our forebears at the end of it all.

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