LAW

TO 'WILL OR NOT TO 'WILL'

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ABSTRACT

Law can be, and indeed sometimes is used, as an instrument of social engineering. Societal ideas, which are seriously in arrears of socio-economic dynamics, can be legislated away; whether successfully or not is another issue. Such a step becomes even more compelling and pertinent when society itself articulates certain values and demands, which are at variance with existing ideas. It is in this vein that polygamy was legislated away in China in 1950.

However, there is a danger in making legislation, which is far ahead of societal ideas, values, and norms. An antiquarian legislation has as much problem as utopian legislation. This is the crux of the problem. The issue in legislation is how much of it is enough, i.e. how to hold the balance between what the society needs and what the legislator thinks society needs.

It is the aim of this article to examine the trend of legislation relating to testate and intestate succession in Ghana with a view to exposing the aspirations, dangers and or loopholes in such legislation.

In this article the writer seeks to examine the legislative in-roads into both testate and intestate succession and more particularly, judicial in-roads which appear to impinge upon the concept of testamentary freedom. The issue which the writer seeks to open up for discussion is whether or not there is any need to make a will, in view of the factors that determine the final effect of a will.

Keywords: *Testate, Intestate, Conscience, Testamentary, Freedom, Reasonable.*

INTRODUCTION

There has been drastic legislative in-roads into the areas of both intestate and testate succession in Ghana. These in-roads have been necessitated because it does appear from the legislators point of view that the existing customary law has a lot of inadequacies and cannot cope with the expanding emphasis on the nuclear family, and the dynamic socio-economic setting.

Intestate legislation therefore has de-emphasised the extended family system in favour of the nuclear family. It tends to enhance the position of spouses and children. There is an element of commonality in the inheritable interest of husbands and wives.

However, legislation has transcended the area of intestacy and seriously assailed the area of testacy as well, leaving Ghanaians virtually with little or no discretion in this area.

Testacy and Intestacy

A will is a declaration of intention by a person of sound mind and full age, known as the testator, concerning how the property he has or to which he will be entitled at the time of his death, should be disposed of and also his other affairs should be managed on or after his death. A will takes effect after the death of the testator and until then, it is a mere declaration of intention and has no legal effect.[1]

A will may be in writing or nuncupative (oral). A nuncupative will made in Ghana is called a SAMANSIW (in the Akan language). A person is deemed to die testate when after his death there is an existing valid will. Those persons who die without making a will at all or make invalid wills are deemed to die intestate. Again a person dies intestate in relation to certain specific properties owned by him which he fails or neglects to mention in his will.

In Ghana a will is not always documentary, it may take the form of 'Samansiw' or customary law oral will.

Testamentary Freedom

One of the major fundamental questions facing any legal system which recognises, values and protects the existence of privately amassed wealth or property owned by individuals is the extent to which the individual owner of property should be permitted to determine his or her own successors in relation to that property. In the history of the common law, the idea of testamentary freedom once held sway. Over time however remedial measures in the common law and legislation based on society's concern for the plight of the disinherited led to the creation of restrains on testamentary freedom in many common law systems. It is these restraints and the interpretation that is attached to these restraints that agitate the jurisprudential mind whether or not the making of a will is necessary. Viewed analytically a will is more and exercise in ethics that law. Its form is legal but its substance is ethical. When a testator decides to disinherit an exceptionally bad spouse or child what forms the basis for a variation of this will by a judge or legislator? Yet this is what happens in practice.

Reasonable Provision for Dependants

Until 1st June 1971 a Ghanaian testator could dispose of all his property, as he deemed fit. There were no limits on testamentary freedom except in the case of Muslims who had contracted Mohammedan marriages who could not dispose by will more than 1/3 of their self acquired property. However by "S 13 of the wills Act of 1971 the courts were empowered to vary a will if it fails to make reasonable provision for the maintenance of dependants of a deceased testator.

"S 13 (1) reads: If upon application being made not later than three years from the date upon which probate of the will is granted, the High Court is of the opinion that a testator has not made reasonable provision whether during his lifetime

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or by his will, for the maintenance of any father, mother, spouse or child under 18 years of age of the testator, and that hardship will thereby be caused, the High Court may, taking account of all relevant circumstances notwithstanding the provision of the will, make reasonable provision for the needs of such father, mother, spouse or child out of the estate of the deceased.

(2) Without prejudice to the generality of subsection (1), such reasonable provision may include:

(a) payment of a lump sum, whether immediate or deferred or grant to an annuity or a series of payments;

(b) grant of an estate or interest in immovable property for life or any lesser period".

The above provision was applied in a recent case of Re Anim Addo:[2] The situation in Re Anim Addo was that the testator, a man of apparently substantial means had left to his wife (the applicant) "Adjoa Anane ¢100,000. "I consider it enough because she caused one of her grandsons to steal almost all my trinkets and also I have built a house for her in her hometown Abetifi". The applicant's marriage to the deceased had lasted some 57 years. She was now aged 78, and had been infirm for some 20 years and bedridden by the time of the application, as a result of the effects of a stroke.

Additionally, an accidental fall had resulted in a fracture of her right thigh, which was responding slowly to treatment. Her condition was that of an invalid, and she was wheelchair-bound. She needed to be nursed and to receive constant care and attention from others. The deceased in his lifetime had given her a monthly allowance of ¢600 as pocket money. There was no suggestion by the widow to the effect that the marriage to the deceased had been unhappy nor that the deceased had been unkind to her in any way prior to his death.

It was also not shown that the deceased in his lifetime had refused to assume responsibility for the maintenance and well being of the applicant. The applicant, feeling that the deceased, her late husband, had made grossly insufficient and most unreasonable provision for her maintenance sought reasonable provision under Section 13. She claimed that the financial provision made for her would be insufficient to discharge the unavoidable costs and expenses of her daily living and upkeep. Her difficult financial circumstances were occasioning her hardship.

Accordingly, she applied for reasonable provision to be made for her out of the estate of the deceased "particularly out of the devise and bequest made to Abena Asantewa", a niece of the deceased who had been given substantial gifts of immovable properties and other benefits by the deceased testator.

The trial judge in granting the application of the widow directed that there should be provision for her "maintenance, enjoyment and comfort". This was the holding of the court inspite of the clear words of the statute which state that provision should be made for the "needs". By liberally introducing words like enjoyment and comfort the trial judge was expanding the scope of the statute because the needs of a person are more limited in scope than 'enjoyment and comfort'. The net effect of the decisions is that the judge in applying her own ethical standard rewrote Dr. Anim Addo's will. The court was so carried away by its own emotions that it failed to take into consideration the reasons stated by the testator, i.e. that the widow had been adequately catered for during his (testator's) life time by the provision of a house and adequate maintenance. Indeed the reasons assigned by Dr. Addo did not carry any weight with the court. The court held:

> "Whatever the reasons expressed by the testator thE law says that if the Court is of the opinion, that a testator has not made reasonable provision, whether during his lifetime or by his will for the maintenance and needs of a named class of persons, including spouse and a child under 18 years, the Court has the power, taking account of all relevant circumstances, notwithstanding the provisions of the will to make reasonable provision, for needs of such mother, father, spouse or child".

It means that if the testator had said his spouse had tried to abrogate his life by poisoning, the Court's position would remain unchanged. It is of much interest to note that in expanding the applicant's interest to include 'enjoyment and comfort' the court shrank the devise made to the testator's niece leaving her also seriously disillusioned!

The wills Act and the judicial decision above have further been concretised by a constitutional requirement. By SS 22(1) - A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

What constitutes reasonable provision? This is a judicial discretion. How will it be interpreted? Is the reasonable provision to be related to what other beneficiaries have been given or what contribution the applicant might have made to the testator's acquisition of wealth? What standard should be applied by the courts? Is it subjective or objective?

Intestate Succession

The most far reaching intestate succession law is PNDC LAW III and 112 as amended.[3] There have been however some historical antecedents to this law. In 1961 for instance the government published a white paper on marriage, divorce and inheritance in which proposals for reform of the aspects of family law were outlined and the public invited to submit views on them. [3,4] This was followed in 1962 with marriage Divorce and Inheritance bill.[5]

There were however some difficulties in the way of the bill and it was shelved till 1963 when a revised version was published.[6] This was later withdrawn without explanation. In 1975 the law reform commission published a draft proposal for a law on intestate succession. Again no legislation was enacted.

All these attempts from a prologue to the intestate succession law 1985 (PNDC LAW III) customary marriage, Divorce and Registration Law (PNDC LAW 112) as amended) and Head of family accountability law (PNDC LAW 114). The intestate succession law also repeals S 48 of the marriage of Mohammedan ordinance (Cap 129), the statutes of England relating to intestate succession immediately before the coming into force of this law intestate succession law have ceased to apply with the coming into force of the intestate succession law. The sum effect of all

these laws is that the provisions which gave 1/3 property to the family and the elaborate Koranic provision relating to succession have ceased to be valid.

Provisions of PNDC Law III

On death intestate a deceased person's estate is distributed as follows:

The surviving spouse and children are entitled absolutely to the household chattels of the intestate.[7] If the deceased spouse left only one house, the surviving spouse and/or children are entitled to it as tenants-in- common. [3]8 Where however, the intestate consists 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.[9] 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-eight to the surviving parent, and
(d) one-eight 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.[10] Where the deceased is not survived by a child one-half of the residue goes to the surviving spouse.[11]

PNDC succession law states the manner of distribution of a deceased person's assets if any. There is no discretion to a judge or successor. It is mathematical in its effect. It is a will made by the legislator in case of intestacy.

Conclusion

Any person who makes a will does so on the basis of a private consideration that the existing customary law and or legislation fail to address the ethical issue he has. It is the writers, considered opinion that the reason why will making is rare in the patrilineal communities in Ghana is because there is general satisfaction with the existing customary law situation. The maternal system of inheritance appears to be litigation loaded and almost invariably those who make wills do so because they want to opt out of it or make modification. But in either situation, as has already been referred to the will is a potential subject matter of judicial scrutiny and analysis.

Both PNDC LAW III and S 13, of wills Act and constitutional provisions are legislative 'Wills'. Added to this and this is more overriding, is the judicial will, which applies its standards of reasonableness. The judicial will is used to expand or restrict the horizon of a will contemplated by a testator. Judges are free to manipulate the horizon of a testator's will in their own language and supreme wisdom. The question which should agitate the minds of the living is "is there any need to make a will when at the end of the day a judge has the right to determine the effect to be placed on it in a way that could not reasonably or remotely have been contemplated by him. Hence to 'will' or not to 'will'. That is a multimillion-dollar question?

References

1. Da Rocha, B.J. and Lodoh, C.H.K.: Ghana Land law and conveyancing, p.141.
2. K.K. Ampofo: University of Ghana Law Journal, p. 188 (Unreported).
3. This amendment makes the registration of marriages unnecessary and makes it a criminal offence to evict a spouse from the matrimonial home.
4. White Paper on Divorce and Inheritance, Accra. (May, 1961) Int. and Comparative Law Quarterly, Vol. 36, p.390.
5. Ibid, p. 391
6. Working paper No. 5/75
7. PNDC LAW III, 1985 S3.
8. Ibid, S4. (a)
9. Ibid, S4 (b)
10. Ibid, S5
11. Ibid, S6