AN EVALUATION OF ESTATE PLANNING MECHANISMS IN NIGERIA

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ABSTRACT

Estate planning focuses on preserving the estate of a person beyond his death. The major aim of estate planning, in the Nigerian context, is to simplify the administration of the estate of a deceased person, minimise probate fees and ensure that property passes to the intended beneficiaries. This paper surveys estate planning mechanisms in Nigeria and how tax obligations as well as other expenses can be reduced to the minimum. The paper further explores the various ways by which a person ensures that his wishes for beneficiaries of his estate are achieved and respected.

Keywords: *Estate Planning, Wills, Administration of Estate, Probate.*

INTRODUCTION

Ordinarily, an 'estate' means the whole of the property owned by anyone, the realty as well as the personality.[1] An estate is the amount, degree, nature, and quality of a person's interest in land or other property; especially, a real estate interest that may become possessory, the ownership being measured in terms of duration.[2] The following constitute an estate: motor vehicles, jewelries, household items, cash, bank balances, dividends, shares and real estates. The Administration of Estate Law of Lagos State[3] did not give a definition of an estate but defines "real and personal estate" as every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate which (otherwise than in right of a power of appointment) he could, if of full age and capacity, have disposed of by the will".[4]

What then is Estate Planning? It is the way a person prepares for the distribution and management of his/her estate at death …especially, to reduce administration costs and transfer tax liability.[5] It is the preparation for the orderly administration and disbursement of a person's estate. The preparation includes taking actions that will minimise taxes and distribute assets to the appropriate heirs.[6] Estate Planning minimises the risk of disputes which often arise from failure to put up a plan on administration and management of a deceased's estate. When a testator plans his estate, it helps to prevent unnecessary litigation and place assets in control of persons who would ensure the assets fulfill their purpose and are not wasted. Estate Planning saves both tangible and intangible resources including time, money and energy in deliberating on estate distribution or management. It aids the fulfillment of the wishes of a deceased after his demise as to how assets in the estate are to be administered or managed and a veritable means of transferring tax liability of the deceased. Estate

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1. *Kwara State Ministry of Agriculture & Natural Resources v Societe Generale Bank* (1996) FHCLR 555 at 592, adopting the definition in Black's Law Dictionary, page 491.
2. Bryan A. Garner, *Black's Law Dictionary*, (Eight Edition) 1654.
3. Cap A5, Laws of Lagos State 2015.
4. Section 57, *ibid*.
5. Garner, (n 2) 1661.
6. *David L. Scott*, *Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* (3rd edn, 2003); Estate planning defined. <https://financial-dictionary.thefreedictionary.com/estate+planning> accessed 7 November 2017.

Planning mitigates the effect of customary law on inheritance, and helps to avoid the ridicule and public embarrassment which are the natural consequences of failure to have an estate plan.

Under customary law of succession, there are various traditional practices and beliefs surrounding inheritance. For example, the inheritance rule of the Igbo ethnic group, though local variations exist, generally follows the principle of primogeniture in the sense that the eldest son of the deceased succeeds to his estate.[7] Therefore, when a man dies intestate, the largest share of his individual land would devolve to the eldest son, with other sons sharing the rest equally.[8] If the deceased does not have sons, his individual land devolves to his brothers to be shared according to seniority.[9] Although Igbo women are by and large excluded from inheritance, some localities permit female children to inherit their father's compound in joint tenancy with their brothers; however, in these instances, the eldest brother remains in control of the property.[10]

In the case of *Lazarus Ogbonna Ukeje v Lois Chituru Ukeje & anor,*[11] the Supreme Court found that the Igbo inheritance rule that excludes women from inheritance violate the country's 1999 Constitution, confirming the decisions of the lower courts. Although gender-based discrimination by customary rights is banned, it appears that age-based discrimination remains acceptable.[12] The Supreme Court upheld as constitutional the principle of primogeniture under the Bini customary law of succession in which the eldest son is entitled to inherit the family's principal house, known as *Igiogbe*.[13]

Apart from the challenge of the customary law of succession, there are also expenses associated with grant of probate and letters of administration. In Lagos, as in most other states, an "Estate Duty" of 10% of the value of the estate must be paid to the probate registry before a probate or letters of administration is granted. The estate duty seems to be a variant of inheritance tax (IHT). Inheritance tax is primarily a charge on an individual's estate on death.[14] Inheritance tax was introduced by the Capital Transfer Tax Act[15] (CTTA) 1979 which was a Federal legislation that created a tax on the devolution or transfer of asset on the death of the owner of a property. However, since the repeal of the CTTA and the abolition of capital transfer tax in 1996, there appears to be no statutory authority to collect an inheritance tax of this nature. The shaky legal status of the estate duty is reinforced by the fact that taxes in states of the federation are collected by the state's internal revenue service. It seems doubtful that there is any provision in the laws of any state, or specifically in the high court or probate rules that authorises the collection of an inheritance tax or estate duty. The Taxes and Levies (Approved List for Collection) Act No. 2, 1998[16] contains the list of taxes that are approved for collection by the three tiers of government and nowhere in that legislation is an estate duty or

7. Obiora I. *et al*, 'Understanding Africa: Traditional Legal Reasoning' (2001) Jurisprudence and Justice in Igbo land, Catholic Institute for Development, Justice and Peace 118.
8. *Ibid*, 199.
9. Wigwe G. A., *'Igbo Land Ownership, Alienation and Utilization: Studies in Land as a Source'* in *Igbo Jurisprudence: Law and Order in Traditional Igbo Society* 32, 39 (G. M. Umezurike *et al.*, eds., 1986).
10. Onokah M.C., *Family Law* (Spectrum Books Ltd, Ibadan 2003) 343.
11. (2014) LPELR-22724(SC).
12. *Arase v Arase,* (1981) N.S.C.C 101,114.
13. *Agidigbi v Agidigbi,* (1996) 6 NWLR 302 - 303.
14. Inheritance Tax: Overview <https://uk.practicallaw.thomsonreuters.com/3-383-5652?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&comp=pluk> accessed 11 October 2017.
15. Cap 43, LFN 1990.
16. See also, Schedule to the Taxes and Levies (Approved List for Collection) (Act Amendment) Order, 2015; S.I. No. 25 of 2015.

inheritance tax mentioned. More so, state governments cannot enact any law to impose or charge such an inheritance tax or estate duty. By virtue of item 59 of the Exclusive Legislative List in Part 1 of the 2nd Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended), only the Federal Government can enact laws for charging or imposing taxes on profit, income and capital gains.[17]

In a bid to avoid some of the challenges relating to the administration of the deceased estate, such as the application of customary law and to minimise tax payment, estate planning is necessary. The essence of estate planning is to tidy up, and make inter-generational transfer of assets a seamless process as much as possible for the beneficiaries.[18]

This paper will consider some common mechanisms of estate planning in Nigeria such as: Will, Trust, Marriage, Life Insurance, Gift *inter vivos*, Family Investment Company, and Joint ownership of property with right of survivorship. The laws that impact mostly, and guide estate planning in Nigeria are: The Wills Act, The Wills Law of Lagos states, Administration of Estate Law of States,[19] Capital Gains Tax Act,[20] Companies and Allied Matters Act,[21] Companies Income Tax Act,[22] Marriage Act,[23] Pension Reform Act,[24] Personal Income Tax Act,[25] Petroleum Profit Tax Act,[26] Trustees Investment Act,[27] Lagos State High Court (Civil Procedure) Rules, 2012, and of other states. Though it is beyond the scope of this paper to fully consider the applicable provisions of the above listed laws, however they will be touched upon, in brief, in the course of this paper while examining the legal framework of the various mechanisms.

ESTATE PLANNING MECHANISMS IN NIGERIA

WILL

The will is probably the commonest and most widely used estate planning mechanism in Nigeria. A will is simply the intention and wishes of a person to be carried out after his death.[28] A will takes effect only upon the death of its maker (the testator), and until then, it is but a declaration of intention which can be varied or revoked at any time.[29] The will[30] must be in writing, be voluntarily made and executed by the testator, signed by the testator or signed in his presence and by his direction, in such part of the will so that it is apparent on the face of the will that the testator intended[31] to give effect to the signature or to the writing signed as his will. The testator makes or acknowledges the signature in the presence of at least 2 witnesses present at the same time.[32] In *Apatira v Akanke*, the testator had

17. Lawfields Lawyers, 'Probate Estate duty: A strange Tax' <http://www.lawfieldslawyers.com/tag/probate-estate-duty/> accessed 12 October 2017.
18. Animashaun T. G. and Oyeneyin A. B., *Law of Succession, Wills and Probate in Nigeria*, (MIJ Professional Publishers, Lagos 2002) 28.
19. CAP A5, Laws of Lagos State, 2015.
20. CAP C1, LFN 2004.
21. CAP C20, LFN 2004.
22. CAP C21, LFN 2004.
23. CAP M6, LFN 2004.
24. CAP P4, LFN 2004 (as repealed by the Pension Reform Act (Repeal and Re-enactment) Act 2014).
25. CAP P8, LFN 2004 (as amended in 2011).
26. CAP P13, LFN 2004.
27. CAP T22, LFN 2004.
28. Y. Y. Dadem, *Property Law Practice in Nigeria*, (second edition, Jos University Press Limited 2012) 266.
29. Egwuatu, 'Limits of a Testator on Freedom of Will Testament' p. 1,
30. <Http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/LIMITS%20OF%20A%20TESTATOR%20ON%20FREEDOM%20OF%20WILL%20TESTAMENT.pdf> accessed 13 April 2017.
31. Section 4, Wills Law Lagos State.
32. Harpum C. *Megarry & Wade, The Law of Real Property*, (6th Edition, Sweet & Maxwell, London 2000) 590-591.

already signed the will before witnesses were brought in and he acknowledged his signature in the presence of one witness. The court held that the will was invalid. Also, there should be no disposition after the signature. The testator should be above 18 years old[33] and of sound disposing mind.[34] The will must not be witnessed by a beneficiary of the will or his spouse unless the gift to the beneficiary is a charge or direction for payment of debt, else the gift to that beneficiary fails.[35]

Wills should be properly drafted. There should be reasonable provision for taxes and other financial considerations. Besides, there should also be clear description of the beneficiaries (adopted children, children by birth, godchildren, etc.). If there are any changes after execution, the will should also be promptly updated. These changes may include significant change on assets, change in marital status, change in beneficiaries, change in country of residence, change in any other circumstances that will affect the will, etc. On the demise of the testator, the executors of his estate may execute deeds of assent in favour of the beneficiaries of his real estate.[36] This is a better option than the practice of getting the executors to sign deeds of assignment whenever a beneficiary wishes to sell a property comprised in the will. A deed of assent is registrable at the Land Registry without the need for Governor's consent.

The law relating to will in Nigeria is not uniform. Different states have enacted their own Wills Law. In the states in which the Wills Act of 1837[37] 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. Section 3(1) of Wills Act 1837 makes it lawful for a testator to dispose of his estate as he wishes.

Testamentary freedom is a cardinal principle in the law relating to wills whereby a person is free to dispose of his property however and to whomever he wishes.[38] It is 'the idea that a person has the right to choose who will succeed to things of value left behind at death'.[39] There are however certain limitations to testamentary freedom in Nigeria. This became necessary due to the hardships faced by relatives and dependants of the testator when excluded from the will. Accordingly, testamentary

33. Section 3 of the Wills Law of Lagos State; section 6 of Wills Law Kaduna State; section 5, Wills Law Abia State; section 5, Wills Edict of Oyo State.
34. In *Okelola v Boyle* (1998) 2 NWLR (Pt. 539) p 533, Onu JSC observed that no person is capable of making a will who lacks sound mind, memory and understanding. His memory should be able to recall persons who possibly might be considered as beneficiaries.
35. Section 8, Wills Law of Lagos State.
36. See section 37 of the Administration of Estate Law of Lagos State. Assent is used only in the States of former Western Region of Nigeria and Lagos State. In States of the former regions of Northern and Eastern Nigeria, a formal assent is not required and the beneficiary takes his/her gift from the will. Assent in these states is simply recognition by the executor(s) that the land is not required for the purpose of administration and the beneficiary's title is founded on the will. See Dadem, (n 28) 396-397.
37. It remains a statute of general application in Nigeria by virtue of section 32(1) of the Interpretation Act, Cap I23 LFN, 2004.
38. Law-Pedia.com, 'Testamentary Freedom', <www.law-pedia.com/testamentary-freedom.htm> accessed 13 April 2017.
39. L. M. Friedman, 'The Law of Succession in Social Perspective' *in Death, Taxes and Family Property*, (E. C. Halbach Jr. ed., 1977) 9, 12, in Daniel B. Kelley, 'Restricting Testamentary Freedom: *Ex Ante Versus* Ex Post Justifications' (2013). *Scholarly Works.* Paper 950, <http://scholarship.law.nd.edu/law_faculty_scholarship/950> accessed 13 April 2017.

freedom has been restricted by either preventing a person from disposing his property entirely as he wishes on his death or by making it impossible for his disposition to be altered after his death. They are as follows:[40]

Reasonable financial provision to dependants

The Wills Law of Lagos[41] makes provision for the spouse(s) and children of the deceased to apply to the court for reasonable financial provision. "Reasonable financial provision" in the case of a spouse(s) is such as would be reasonable in all the circumstances of the case for a spouse to receive regardless of it being for maintenance.[42] The right to make the application is exercisable within a period of six months from the grant of probate.[43]

Customary law restriction

The Wills Law of Lagos makes it lawful to dispose of an estate by will except a property subject to customary law.[44] The effect of the customary law restriction is a limitation on the freedom to dispose property by the testator. The Supreme Court in *Idehen v Idehen*[45] explained that the restriction only applied to disposition of certain properties in the will and not the testamentary capacity of the testator. The customary law restriction is so absolute that a testator cannot seek to exclude it. This was the position held by the Supreme Court in *Lawal Osula v Lawal Osula.*[46] Here, the testator inserted a declaration in the will as follows: "*I DECLARE that I make the above devise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this Will. It is my will that the native law and custom of Benin shall not apply to alter or modify this Will*". Despite this declaration, a devise by the testator, who was subject to the Bini customary law of his *Igiogbe* to persons other than his eldest son was held to be invalid.

Islamic law restriction

By the principles of Islamic law, a testator cannot dispose of more than one-third of his properties by a Will without the consent of his legal heirs (his heirs under Islamic Law).[47] Section 2 of the Wills Law of Kaduna makes it unlawful to dispose by will the whole estate of a Muslim testator.

The advantage of making of a will is that it removes the application of customary law rules of succession upon the disposition of the testator's estate.[48] This is because the testator gives directives as to the disposition of his property upon demise. He gives additional directives as to his burial. Wills can also be used to create a trust in form of donations to institutions/ charity homes. The authority of executors to administer a will arises directly from the will, and probate is only granted as a confirmation of their authority.

In Nigeria, payment of estate duty is a major challenge that confronts beneficiaries of a will. Most times the estate is unable to raise the 10% estate duty, which is a *sine qua non* before probate is

40. Akinnubi O. Adeleke, 'Intestacy in Testacy' (2011) 2(4) Nigerian Journal of Business and Corporate Law 23-38.
41. Section 2, Wills Law Lagos State.
42. Section 2(2).
43. Section 2(3).
44. Section 3, Wills Law Lagos State.
45. (1991) 7 SCNJ (Pt. II) 196.
46. (1995) 9 NWLR (Pt. 419) 259.
47. Section 4(1), Wills Law of Kwara State Cap 168, Laws of Kwara State 1991; section 2, Wills Law Kaduna State; section 3(1)(b), Wills Edict Oyo State, 1990; Cap 168, Laws of Bauchi State 1989; Cap 155, Laws of Jigawa State 1998. Itse Sagay, *Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries,* (Malthouse, Lagos 2006) 140.
48. Dadem, (n 28) 272- 273.

granted by the probate registry. At other times, the amount payable is so high that the beneficiaries are tempted to make false declaration in the application form. Also, making a will may not enhance community and affinity in the family of the deceased or the preservation of a family business or legacy, as wills tend towards 'individualism' of giving things out, rather than leaving them as the property of the family. Mistakes on the formal requirements may also easily vitiate a will. Disputes within the family may lead to long and expensive litigation which may frustrate the grant of probate, or the implementation of the wishes of the testator. Where the deceased has property in several states or jurisdictions, the resealing of the probate in the several states may be expensive, while gifts in a will may lapse by ademption by reason of a bequeathed asset ceasing to be part of the estate at the time of the testator's death. These challenges ensure that testators search for other means of planning their estates.

MARRIAGE

Marriage is also another device for estate planning; this may be either by conscious or default application and consequence of the law, especially where the estate owner dies intestate. Where an individual marries validly under the Marriage Act, he can exclude the application of customary and Islamic law limitation to wills, by simply failing to write a Will![49] In this case, his estate would be governed by the Administration of Estates Law of his residence while alive.[50] The spouse and children of the intestate have priority in the distribution of his estate. Section 46(1) of the Administration of Estate Law of Lagos State provides that where the intestate leaves issue, the spouse takes the personal chattels absolutely, and the residuary estate (other than personal chattels) in the ratio of 1/3 to the surviving spouse and 2/3 to the issue(s) of the marriage.

Succession to the estate of a deceased married under customary law is according to the custom of the deceased as at the time of his death.[51]

TRUST

A trust is an equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in who resides the title or ownership, recognised by law.[52] The Supreme Court, in the case of *Huebner v Aeronautical Industrial Engineering & Project Mgt. Co. Ltd*[53] adopting the definition of Professor Keeton in his Law of Trust, defined a trust as:

> ..the relationship, which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestuis que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee but, to the beneficiaries or other object of the trust.

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49. Akinnubi, (n 40) 37.
50. See Administration of Estate Law of Lagos State, Cap A5 LLSN 2015, section 46(1). In *Kekereogun v Oshodi* (1971) ANLR P. 95, the Court of Appeal in interpreting s. 49, now s. 46 held: "from the deductive conclusion, it is clear that the surviving spouse and children of the deceased person take priority and exclusive right to the estate of the deceased". See also *Salubi v Nwariaku* (2003) FWLR (Pt. 154) 401 where the Supreme court held that succession to the estate of a person married under the Marriage Act will be regulated by the provisions of the Administration of Estates Law notwithstanding any native law and custom of the deceased.
51. See *Olowu v Olowu* (1985) 3 NWLR (Pt. 13) 372; (1985) LPELR- 2604 (SC); where the Supreme court stated that the deceased who died intestate though of Ijesha origin had naturalized to the status of a Bini man, therefore, Bini custom governed succession to his intestate estate.
52. See *Goodwin v McMinn*, 193 Pa. 046, 44 Atl. 1094, 74 Am. St. Rep. 703; *Beers v Lyon*, 21 Conn. 613.
53. (2017) LPELR 42078 (SC).

A trust is an obligation arising out of confidence reposed in the trustee who has legal title to the property conveyed to him, that he will faithfully apply the property according to the confidence reposed, or, in accordance with the wishes of the grantor.[54] A trust conventionally arises when property is transferred by one party to be held by another party for the benefit of a third party. Although, it is also possible for a legal owner to create a trust of property without transferring it to anyone else, simply by declaring that the property will henceforth be held for the benefit of the beneficiary.[55] There are different types of trust, including, fixed trust, discretionary trust, public or charitable trust, private trust, living trust, corporate trust, testamentary trust, and trusts arising by operation of law (resulting, implied or constructive trusts). A typical example of a testamentary trust was the one created by the will of the late Chief Ganiyu Oyesola Fawehinmi (popularly called Gani Fawehinmi) which ensures that his law publishing company survives his demise, and is managed professionally by a trust company.

Trust is a very flexible legal instrument which commences immediately it is executed and the settlor can amend or revoke it at any time provided he is of good mental capacity at the time of doing so. A trust ensures that assets are transferred to the intended beneficiaries, and fosters provision for beneficiaries who lack the knowhow to manage the assets. It allows the settlor and the trustees (or successor trustees) to manage the trust assets while the settlor is still alive in a professional and accountable fashion without the permission of the court. Trusts ensure confidentiality and private management of assets, unlike a will which must be filed in a public probate registry.

There is no comprehensive legal framework for corporate trusteeship in Nigeria, but the relevant instruments are the Investment and Securities Act, Trustees Investment Act, Companies and Allied Matters Act, Personal Income Tax Act and the Companies Income Tax Act (CITA). The Securities and Exchange Commission regulates corporate trust companies. A corporate trust fund scheme is subject to the applicable provisions of the CITA and the Capital Gains Tax Act (CGTA)[56] as it relates to estate planning. Where the object of the corporate trust fund relates to an ecclesiastical, charitable or educational institution of a public character, capital gains tax shall be exempted from its profits in so far as such profits are not derived from a trade or business carried on by such company.[57] Where the object of such corporate trust scheme relates to the business of petrol, tax is imposed on its chargeable profits under the provisions of the Petroleum Profit Tax Act.[58] Practitioners should take due care in structuring trust schemes, as there is a prohibition of artificial transactions in respect to any trust related disposition.[59]

The trust deed is the most important document in a trust arrangement. It spells out the obligations and duties expected of the trustees, who the beneficiaries are, or how they are to be determined, trustee powers, trustee remuneration, trustee protection, change of trustee, initial vesting of trust fund or property. A typical discretionary trust deed will also include schedules detailing underlying investments, authorised investment, investee companies, power to borrow etc. Another typical document in a discretionary trust is the 'Letter of Wishes'. This is a memorandum which generally

54. *Beers v Lyon*, 21 Conn. 613. See also Kodilinye G., *An Introduction to Equity in Nigeria*, (Sweet & Maxwell, 1995) 57 58.
55. Ibrahim A., 'Trust Law and the Administration of Real Property in Nigeria' (2011) 2(1) International Journal of Advanced Legal Studies and Governance 215.
56. Cap C1, LFN 2004.
57. Section 26(1)(a) of CGTA.
58. Cap P13, LFN 2004. See sections 8 and 9 of PPTA.
59. See section 22 of CITA.

sets out the wishes of the settlor on the administration of the trust without legally fettering the discretion of the trustees. Though not legally binding, trustees hardly depart from the letter of wishes except in rare instances.

The main snag in a trust arrangement is that legal ownership of trust property must reside in the trustees. Where the settlor had acquired property in his personal or other names, there will still be the need to effect a transfer of title to the trustee, and this comes with its attendant registration cost. There is also the possibility of double taxation of income when it is distributed to the beneficiaries of the trust.[60] Under the Trustees Investment Act, trustees can only invest in specific investments.[61] Also, trust has less legal protection, less judicial intervention and less public accountability. Interpersonal issues between the beneficiaries and the trustee may arise if the beneficiaries resent the trustee's role or believe that he or she is not acting in their best interest; though this can be prevented by the settlor making his beneficiaries both trustees and beneficiaries of the property or by appointing a Protector,[62] to ensure that the trustee does not jeopardise the interests of the beneficiaries and mismanage the trust assets.

FAMILY INVESTMENT COMPANY

This investment vehicle affords an estate owner the opportunity to be a shareholder in a private company with intended beneficiaries of his estate. Assets are then acquired by the estate owner in the name of the family company, with the consequence that on his demise, there is no need to process probate or letters of administration in respect of those assets held in the name of the family company. One of the major advantages of the family company is that no estate tax is paid since the proprietary rights in the assets is held by the company, which is an entity with perpetual succession and subsists even after the death of its founder. In practice, the estate owner allots shares in the family company to his heirs, in the proportion he would have given them if the assets were to be distributed in a will.

This estate planning device has become popular in recent years because of its flexibility. It allows family residences, heritage, legacies and businesses to be held jointly without being partitioned and balkanised as may be the case if otherwise distributed in a will. It also ensures that the assets are well managed, and fosters provision for children or family members who lack the knowhow to manage the assets. Since family company is a corporate entity, it is liable to pay company income tax, but if it does no business, and only holds assets, the tax payable will be minimal as taxation of companies in Nigeria is generally based on profit (sections 9 and 40 of the CITA), or exceptionally on turnover (section 30 CITA).

This device is more valuable where the estate owner starts acquisition of real and personal property early enough in the name of the family company, as he will have to pay transfer and registration costs if he had originally acquired the assets in his personal name, and was later transferring to the family company. There should be at least three members of the company, so that the company would still exist on the death of the estate owner. There should also be a clause restricting the transfer of shares in the articles of association. In practice, there is usually a comprehensive shareholders agreement which spells out the right of shareholders/family members in the company, share transfer and

60. See sections 16 and 27 of the Personal Income Tax Act, P8 LFN 2004 (as amended in 2011).
61. See section 2 of The Trustees Investment Act 1957. The investments include, securities issued by the Federal government; government of a State, securities issued by a corporation established by the law of the National Assembly or House of Assembly, debentures and fully paid up shares of public companies.
62. A protector is usually appointed by the settlor under the Trust Deed to exercise certain powers especially in deadlock situation, or as a restraint on the powers of the trustee.

transmission, management and use of company assets, etc. If the company is a trading one, be sure to include a detailed management and operational manual as an appendix to the shareholders agreement.

The major issue with the family company is that feud or dissension in the family may affect its workability and operation. If the settlor holds shares in the family company, who takes over his shares on his demise? Unless this is expressly stated in a will, the shares of the estate owner may still be subject to the incidents of customary law of succession. If the estate owner holds no shares, he could be 'kicked' out of the company and management, by disenchanted family members/shareholders whilst still alive.

LIFE INSURANCE POLICY

A life insurance policy is a contract between a person (the "insured/policy holder") and an insurance institution (the "insurer"), where the insurer promises to pay a named beneficiary, a sum of money (the "benefits") upon the death of the insured. A payment (the "premium") is usually made to the insurance institution monthly or as otherwise agreed, for the maintenance of the life insurance policy.[63]

The Pension Reform Act (PRA) 2014 makes it compulsory for employers to maintain life insurance policy for their employees *for a minimum of three times, the annual total emolument of their employees.*[64] Contributions to the scheme by the employer (and the employee) is tax deductible.[65] 8(1) of PRA provides that, *"Where an employee dies, his entitlements under the life insurance policy maintained under section 4(5) of this Act shall be paid to his retirement savings account".*

Premiums paid under a life insurance policy is tax deductible. Section 33(4)(d) of the Personal Income Tax Act (as amended in 2011) provides:

> the deduction allowed under subsection (2) of this section shall be a deduction of the annual amount of any premium paid by the individual during the year preceding the year of assessment to an insurance company in respect of insurance on his life or the life of his spouse, or of a contract for a deferred annuity on his own life or the life of his spouse;

A settlor has the freedom to choose the beneficiaries of a life insurance policy, and he can use it to provide for his family on his demise, to cover the costs of estate taxes and legal fees associated with distributing trust assets, and funeral expenses. The Insurance Act[66] and other regulations by the National Insurance Commission (NAICOM) ensure that insurance companies have enough assets to cover their liabilities under life insurance policies, thereby reducing the risk of their liquidation.

Most life insurance policies cover individuals for a limited period of time. Many policies last for only one year or for five-year increments up to 30 years. Old age or poor health can turn the flexibility of premiums into a disadvantage, because premiums are known to increase substantially in cases when death becomes more likely. Those in poor health may be unlikely to get life insurance for reasonable premiums. This is because their situation allows limited opportunities for providers

63. ARM LIFE, 'Life Insurance in estate Planning', p. 1 <http://armlife.com.ng/download/LIFE-INSURANCE-IN-ESTATE-PLANNING_websitearticle.pdf> accessed 13 April, 2017.
64. Section 4(5) of the Pension Reform Act 2014.
65. Section 10(1) of the Pension Reform Act 2014.
66. Cap I18, LFN 2004.

of life insurance to make a profit. Policy holders forego some current expenditure to pay policy premiums. Cash surrender values are usually less than the premiums paid in the first several policy years and sometimes a policy owner may not recover premiums paid if the policy is surrendered.

GIFT *INTER VIVOS*

An estate owner may also decide to make a gift of his assets to beneficiaries during his life time. The gift is made gratuitously to a recipient and without any consideration paid by the recipient. A gift takes effect when the donor is still alive.[67] Disposition of estate by a deed of gift is advisable where a will is likely to be contested, or the estate owner wants to relieve himself of the burden of managing the property in his lifetime, or the property is likely to be tampered with or stolen, or the testator wishes to see how 'responsible and competent' his heirs are in managing their affairs.

The following conditions must be present for a gift *inter vivos* to be valid:[68] The intention of the donor to make a gift; the gift must be delivered in the presence of witnesses who must witness the actual handing over of the property to the beneficiary, who must accept the gift[69] and take immediate possession of the gift.

Benefits of gifting assets include the following: income tax is not paid on rent from the property; estate duty will not be paid since the property has already been transferred (though the deed of gift has to be registered and requires Governor's consent); the gift could be owned and enjoyed irrespective of the validity of the donor's will.[70] However, the gift might be squandered by the beneficiary because once the beneficiary accepts the gift, the donor's right over it is destroyed and he cannot lay claim over it[71] except for vitiating circumstances such as fraud, mistake, misrepresentation or total failure of the gift.[72]

JOINT PROPERTY OWNERSHIP WITH RIGHT OF SURVIVORSHIP

A joint tenancy is created when at least two persons, hold an undivided interest in a piece of property. When a joint tenancy indicates that it includes "a right of survivorship", the property is automatically transferred to the surviving joint owner(s) if one joint owner dies. This type of property cannot be transferred to anyone by a will. Joint tenants do not always have to be spouses, though in practice, it is always between husband and wife. One should ensure when acquiring property as joint owners, that the full names of all owners are set out. For instance, Mr. Brian Oliyide Olowu and Mrs Bridget Oyindamola Olowu, and never as Mr. and Mrs Olowu.

In *Chinweze v Mazi,*[73] the Supreme Court held that by operation of law, joint tenancy leads to the doctrine of survivorship by which if one joint tenant dies without having obtained a separate share of the property for him or herself during his or her lifetime, his or her interest will not pass to his or her estate but such interest will accrue to the other surviving joint tenants. Also, in *Obasohan v*

67. Dadem, (n 28) 5.
68. *Ibid* at 271.
69. *Achodo v Akkagha* (2003) FWLR (Pt. 186) at P. 612.
70. K. Abayomi, *Wills: Law and Practice*, (Mbeyi & Associates, Lagos 2004) 5- 6.
71. I. O. Smith, *Practical Approach to Law of Real Property in Nigeria*, (ECOWATCH Publications Limited, Lagos 1999) 57; *Anyaegbunam v Osaka* (2000) FWLR (Pt. 27) p. 1942.
72. *Imah v Okogbe* (1993) 12 SCNJ, 57 at 1957 1958.
73. (1989) 1 SC (Pt. 11) 33 at 46. The Supreme Court also held that the title documents did not contain words of severance; therefore, the half-brothers to the 2nd defendant's sister could not take any benefit in the contested property due to the applicability of the rules of joint tenancy to the disputed property.

Omorodion,[74] the Supreme Court per Ayoola JSC opined as follows: "the rule is that where a joint tenant dies without leaving a separate share in the joint property, his interests passes to the remaining joint tenants and not to his successors or personal representatives".

A joint tenancy can meet the estate planning goals of simplifying the administration of an estate, minimising probate fees and ensuring that property passes to the intended person because of the right of survivorship. This is used mostly by married couples under the Marriage Act who own assets, such as their home, as joint tenants. The right of survivorship ensures that when the first spouse dies, the assets passes immediately to the surviving spouse without being subject to the delays and expense of an application for probate. The right of survivorship also ensures that ownership of the assets will not be affected by claims under a will, if there is a will, or by the rules for intestate distribution under the Administration of Estate Law, if there is no will.[75] The jointly owned property is also protected from creditors of the deceased joint owner.[76]

Where the property is jointly owned between spouses, in the event of divorce or remarriage, the joint ownership is difficult to adjust. Joint tenancy with right of survivorship does not apply to land subject to customary law.[77] A joint owner cannot sell a part of the property without the consent of other owner(s). However, in the case of spouses, a "tenancy by the entirety" requires the consent of both spouses when disposing of any such property. Where the property was jointly owned by a parent and child, the surviving child might refuse to share the property with other siblings which can lead to a resulting trust except when compelled by a court to share the property with siblings.[78] A transfer to joint ownership with another person makes the property subject to income tax.[79]

CONCLUSION

Estate planning is a dynamic and engaging topic which straddles law, finance and taxation. What we have considered here are basic mechanisms that an estate planner may consider in Nigeria. Some situations may be more complicated. Imagine a situation where a person born in Nigeria, is ordinarily resident in England, is married to a German, has homes in USA and Italy, and bank accounts in Spain, UAE and Luxembourg. In planning such an estate, necessarily, consideration must be given to the laws of several jurisdictions and how the assets of the estate owner will benefit his heirs, and not be 'lost' or unrealisable on his demise.

Estate planning ensures that assets are preserved, and beneficiaries of a deceased estate owner benefits therefrom. Estate planning is also an effective tax avoidance mechanism. Not one

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74. (2001) 13 NWLR (Pt. 729) 206 at 224; (2001) LPELR-SC.131/1996.
75. Del Elgersma, 'Joint Tenancy as an Estate Planning Tool Pros and Cons' <http://beaconlaw.ca/joint-tenancy-as-an-estate-planning-tool-pros-and-cons/> accessed 12 October 2017.
76. What is joint tenancy with right of survivorship in Fayetteville Arkansas? Deborah Sexton Law Office. <https://www.arkansas-estateplanning.com/joint-tenancy-with-right-of-survivorship-in-fayetteville-arkansas/> accessed 12 October 2017.
77. *Obasohan v Omorodion, supra*. Per Ayoola JSC, "it is misconceived to assume that a joint acquisition of property subject to customary law creates joint tenancy in the meaning in which the term is known at common law. In my opinion, what is created is co-ownership to be attended by its own incidents as developed in regard to family property and there is no reason why such incidents should not apply by analogy to joint acquisition of property as in this case. It may well be noted that the feudal origins that fashioned the rule of *jus accrescendi* in English law has no place in customary law".
78. *Madsen Estate v Brooks* (2007) SCC 18; (2007) 1 S.C.R. 838. Compare with *Pecore v Pecore* (2007) SCC 17.
79. See section 16 of the 5th schedule of PITA, "a reference in this Schedule to an asset shall be construed whenever necessary as including a reference to a part of an asset (including an undivided part of that asset in the case of joint interest therein) and when so construed any necessary apportionment shall be made as may, in the opinion of the relevant tax authority, be just and reasonable".

mechanism may be enough, though, for effective estate planning, and in practice several devices are creatively combined to achieve the aim of an estate owner in providing for his heirs, minimise estate taxes and ensure that his assets are seamlessly transferred to, or managed for the benefit of his beneficiaries.

The restriction on testamentary freedom of a testator by the Wills Law is, in our opinion, unwarranted. Trust when combined with will, in testamentary trust, is a useful way of estate planning. A typical example of a testamentary trust was the one created by the will of the late Chief Ganiyu Oyesola Fawehinmi (popularly called Gani Fawehinmi) which ensures that his law publishing company survives his demise, and is managed professionally by a trust company. Trust companies are becoming active in Nigeria, and the practice of establishing trust will catch on with time. The absence of a comprehensive legal framework for trust in Nigeria is however discouraging, and we recommend the enactment of a legislation that will safeguard the investment of settlors, and prescribe rules of engagement, and appropriate regulation for trust companies. The practice of collecting estate duty should be scrapped, or an Act of the National Assembly to enable it passed. The present illegality does no justice to the memory of deceased estate owners whose families have had to scrape to pay estate duty, even though it is not backed by law.

Finally, we recommend that the Nigerian Bar Association, and/or the Chartered Institute of Taxation of Nigeria should begin a certificated programme on estate planning for members, to deepen knowledge in this area and support trust companies with adequate manpower, as done by the *Society of Trust and Estate Practitioners (STEP), UK.*