THE IMPLICATION OF LEGAL ADOPTION OF A CHILD IN RELATION TO TESTAMENTARY POWERS UNDER NIGERIAN LAWS: A DISCOURSE

Olugbemisola T. Odusote[1], Titilola Hameed[2], and Saka Toyin Abdulrahman[3]

Abstract

The concept of testamentary freedom implies that a testator is free to dispose his estate as he wills. This freedom is however curtailed by Customary/Islamic law and other statutory stipulations, to wit, reasonable provisions to dependants, among others. Adoption of a child is permissible under the laws in Nigeria. Upon the handing down of the adoption order by the court, the adopted child is entitled to the rights and privileges as would have a biological child, including the right of succession. This position is further enforced by the Nigerian Constitution which provides that no citizen shall be subjected to any disability or deprivation merely by reason of the circumstances of his/her birth.[4] Therefore, for a will to be valid, it must make provision(s) for such an adopted child or children, and even, by reason of Customary/Islamic law, the child is entitled to certain devises and bequests which must not be withheld from him/her on grounds that he/she is adopted. Thus, adoption confers on a child, all the rights vis-à-vis his adoptive parent(s) as if the child had been born in lawful wedlock, as well as, imposing on the adoptive parent(s) responsibilities equivalent to that of the natural parents of the child. This paper uses doctrinal methodology, by providing background information on adoption, the various forms of adoption and the historical information on the evolution of adoption laws in Nigeria. The authors also discuss the testamentary freedom of a testator, the curtailments of the freedom and the position of an adopted child within the socio-cultural context of Nigeria.

Keywords: adoption, testamentary freedom, inheritance, will

[1] LL.M, Barrister-at-Law, Director, Head of Academics, Nigeria Law School, Lagos Campus, Nigeria. olugbemisola.odusote@nigerianlawschool.edu.ng.
[2] PhD., Barrister-at-Law, Deputy Director, Head of Professional Ethics and Skills Department, Nigerian Law School, Lagos Campus, Nigeria. titilola.hameed@nigerianlawschool.edu.ng.
[3] LLM; Barrister at Law, Senior Lecturer/Head, Property Law and Practice, Nigerian Law School, Enugu Campus; toyin.abdulrahman@nigerianlawschool.edu.ng.
[4] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) s 42.

1.0 Introduction

Against the backdrop of the essential relationship between population issues and development,[5] the United Nations World Population (UNWP) plan of action adopted in 1974 at the Third World Population conference called for facilitating child adoption so that involuntarily sterile and low-fertile couples could achieve their desired family sizes.[6] Implicit in this recommendation was the idea of adoption being a means to approximate biological parenthood for couples who would otherwise be unable to bear children. More than four decades later, the socio-economic challenges have become prevalent in our society resulting in marriages being increasingly delayed, childbearing postponed, levels of biological childlessness on the rise and children becoming victims of societal vices.[7] Increasing numbers of persons now resort to alternative means of experiencing parenthood, including through adoption. [8] The factors that necessitate the adoption of a child range from childlessness, whether caused by infertility or the desire to replace a dead child, acquiring a companion for an only child, stabilizing childless marriages, legitimizing an illegitimate child, sustaining a particular line of descent, and to rescue such children who are in irreversible situations of abandonment or to relieve parents who are unable to take care of their children.

This paper discusses the statutory framework regulating child adoption in Nigeria and its effect in the exercise of testamentary powers of a testator. The focus is to assess the extent to which an adopted child is protected in a testamentary instrument, especially where testamentary freedom is not absolute.[9] The paper also seeks to suggest possible changes in our laws that would ensure that adoption remains a viable medium for ensuring the sustenance of the family institution and in correcting the imbalance in society.

The paper further conducts an analysis of regulatory frameworks on adoption in relation to testamentary provisions, with special focus on possible limitations in the exercise of devolution of testamentary power as it relates to adopted children. The discourse concludes with the recommendation that in a pluralised society, where the statutory and customary laws have a bearing on the future wellbeing and entitlements of an adopted child, there is need to streamline our laws to ensure adequate protection to avert situations where an adopted child is disinherited by reason of the consequence of his/her birth.

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[5] United Nations, 'World Population Conference' in 'Outcomes on Population' (Belgrade, August - September 1965) < https://www.un.org/en/development/devagenda/population.shtml> accessed 21 June 2021.

[6] United Nations, World Population Conference' in 'Outcomes on Population' (Bucharest, August 1974) < https://www.un.org/en/development/devagenda/population.shtml> accessed 21 June 2021.

[7] United Nations, Department of Economic and Social Affairs, Population Division, < https://www.un.org/en/development/desa/population/publications/fertility/wfr-comparative-tables.asp> accessed 21 June, 2021.

[8] Unicef, Adoption and Alternative Care < https://www.unicef-irc.org/research/adoption-and-alternative-care/> accessed on 22 June 2021.

[9] In Nigeria for instance, testamentary freedom is curtailed by customary or Islamic law: See S. 3 Wills Law of Edo State, Cap 172 Laws of Bendel State of Nigeria, 1976, applicable to Edo State; *Idehen v. Idehen* (1991) 7 SCNJ (pt. 11) 196; *Lawa- Osula v. Lawal-Osula* (1995) 9 NWLR (pt. 419) 259; *Ajibaye v. Ajibaye* (2007) ALL FWLR (pt. 359) 1321.

2.0 What is Adoption?

Adoption is a legal process that creates a parent-child relationship between the adopted child and adoptive parents.[10] It is a statutory process of terminating a child's legal rights and duties towards the natural parents and substituting similar rights and duties towards the adoptive ones. The adopted child is entitled to all the privileges that a natural child of the adoptive parents are entitled. Amongst these privileges is the right to inherit. Once legally adopted, it follows that the adopted child gains legal status as a member of the family and subsequently relinquishes all former rights to his roots. Consequently, the link between the adopted child's biological parents is permanently severed as he/she gains a legal status as if he/she were originally and biologically born by the adoptive parents. In contrast with guardianship and fostering, the transfer of legal rights is irreversible.[11] Adoption also distinctly differs from legitimation in the sense that while the former relates to an act between persons unrelated by blood, the latter is established on basis of blood relations.[12] In relation to the adoptive parents, they are expected to meet and fulfil the basic rights and duties of the adopted child. Included within this framework of rights, it is crucial that in the disbursing of wills and settlements, the adopted child must be treated as a lawful blood child of the adoptive parents in the same way as a biological child would, and not as a stranger.[13]

Adoption is recognized as one of the forms of alternative care for children who have been temporarily or permanently deprived of their family environment and also for children who are unable to remain in their families.[14] There is no strict age limit for the person being adopted. An adult person of 18 years or older can be adopted based on peculiar circumstances. At that time, the only consent required is that of the adult wishing to be adopted and, of course, the person willing to adopt.[15] Nevertheless, adoption touches upon the adoptee's status; hence it affects his/her legal rights, welfare and obligations.[16]

2.1 Sources of Adoption Laws in Nigeria.

Under Nigerian law, adoption may be affected either under statutory law or under the rules of customary law. The institution of adoption is wholly a statutory creation and the process is formalized by way of legal adoption.[17] Under customary law, the process of adoption seems to overlap with guardianship as one may wonder what the determining factor for adoption under customary law is.[18] The characteristics or effects is what makes the difference between adoption under the statute and one

[10] Brian A Garner, Black's Law Dictionary (9th edn West, 2009).
[11] Difference Between.com < https://www.differencebetween.com/?s=foster+parent> accessed 21 June 2021.
[12] See Ibiam *v Ibiam* (2017) LPELR – 42028 (CA).
[13] https://nigerianorphanages.blogspot.com.ng: accessed 17 October 2020.
[14] Evans Ufeli, 'Child Adoption Under the Nigerian Law' http://www.cadrellchildright.com/child-adoption-nigerian-law-part-1-evans-ufeli/ accessed 21 June 2021.
[15] Adoptive Families, 'Nigerian Adoption Fast Facts', < https://www.adoptivefamilies.com/how-to-adopt/nigeria-adoption-fast-facts/> accessed on 21 June 2021.
[16] See United Nations Convention on the Rights of the Child, 20th November 1989.
[17] Nwogugu, E.I. *Family Law in Nigeria* (Rev edn. HEBN, 2011) 312.
[18] U O Ngozika, 'Adoption, Guardianship and Fostering: Practice and Procedure – Customary Law Perspective' (National Judicial Institute, Abuja, 18th – 22nd March 2019) 15.

under the rules of customary law.[19] Common law does not recognize nor provide for the concept of adoption, as the legal relationship between a child and his parents is believed to be inalienable under it.[20] However, Nigerian adoption orders are recognised at common law in the United Kingdom.[21]

Prior to 1965, there was no statutory basis in any part of Nigeria for the adoption of persons. The first attempt was made in 1958 to provide a statute on adoption for the (then) Eastern Region of Nigeria through a private members Bill presented to the Eastern Region House of Assembly.[22] Unfortunately, this attempt was thwarted in the House and the Bill was withdrawn.[23] Subsequently, the Bill sailed through and birthed the earliest statute on adoption in Nigeria.[24] This law applies to states in the defunct Eastern Region of Nigeria.[25] Virtually all the states of the southern part of Nigeria have adoption laws as other states of the federation have now followed suit in enacting legislation on adoption. However, there are substantial similarities in these legislations, although significant differences also exist.[26] By contrast, aside from Benue state, legislation on adoption are non-existent in the northern states of Nigeria. This is due to the fact that the states are predominantly inhabited and largely guided by Islamic law on issues of inheritance which do not recognize adoption but rather encourage foster parenting.[27]

Adoption is a process known to some systems of customary law in Nigeria. However, customary law adoption is rare as against guardianship.[28] Most cases of adoption under customary law are between blood relations as it is usual to adopt the orphan child of a relative. A child adopted under customary law often takes the name of his adopter and such is regarded as his legitimate child.[29] In Yako,[30] for instance, an adopted person and his children are forbidden to intermarry or have love affairs with the people of his adopter, as such relationship is regarded as incestuous. The adopted child, along with the other legitimate biological children of the adopter, will enjoy the right to inherit the adopter's property. Nevertheless, a major defect of customary law adoption is that, unlike in statutory adoption, it does not seem to effect a clear and permanent severance of the parental rights and obligations between the infant and his natural parents.[31] There are no clear rules which deprive the adopted child of succession/inheritance rights in his original natural family. He may, where there is no

[19] See *Chibuzor v. Chibuzor* (2018) LPELR – 46305 CA.
[20] (n 17).
[21] See *Re V (A Child)* (Recognition of Foreign Adoption) [2017] EWHC 1733.
[22] Eastern Region (Welfare of Illegitimate Children) Adoption Bill, April 1958.
[23] ibid Nwogugu, (n 17).
[24] The Eastern Nigeria Adoption Law, No. 12 of 1965
[25] Now Anambra, Enugu, Imo, Ebonyi, Abia, Rivers states. See also Nwogugu (n 17) 313.
[26] See Nwogugu, ibid.
[27] See E. Ufeli, 'Child Adoption Under the Nigerian Law' (n 14).
[28] Nwogugu, (n 17) *326.* Cases of adoption should be distinguished from guardianship as both terms are often confused under customary law. While guardianship involves the exercise of some parental rights especially as regards custody, control and maintenance of an infant, cases of adoption have to do with guardianship arrangements. See also *Chibuzor v. Chibuzor* (n 19).
[29] *Chibuzor v. Chibuzor* ibid.
[30] Also called 'Yakurr' – An ethnic group in Cross River State of Nigeria.
[31] See *Chibuzor v. Chibuzor* (n 19); see also N Kalz Sanford, 'Judicial and Statutory Trends in the Law of Adoption', *(1962) Georgetown Law Journal* (51) 62. Note that the arrangement and procedure for customary law adoption is largely unwritten and informal.

opposition or dissent from the adopter's biological children, succeed in inheriting property both in the family of his adopter and also in respect of his natural parents.[32]

2.2 Adoption Under the Child's Rights Act (CRA) 2003.

The CRA 2003[33] makes elaborate provisions for the adoption of a child. It requires a person intending to adopt a child to apply to the court.[34] On receipt of an application, the court shall order an investigation to be conducted by a child development officer or a supervision officer in order to assess the suitability of the applicant as an adopter and the child to be adopted.[35] The court in reaching a decision relating to the adoption of a child shall give first consideration to the need to safeguard and promote the welfare and best interest of the child all through childhood, and to ascertain, as far as practicable, the wishes and consideration of the child having regard to his/her age and understanding.[36] The court shall in all situations ensure that the adopter(s) is or are persons found suitable to adopt the child in question by the appropriate investigating officer. The court will only make an adoption order if the parent or guardian of the child, as the case may be, consents to the adoption or if the child is abandoned, neglected or persistently abused or ill-treated and there are compelling reasons in the interest of the child for the adoption.[37] The court may in making an adoption order impose such terms and conditions as the court may deem fit and may require the adopter, by bond or otherwise, to make for the child such provisions, if any, as in the opinion of the court are just and expedient.[38] The Act requires the Chief Registrar to maintain a register to be known as the 'Adopted Children Register'.[39] The register shall contain such entries as may be directed by an adoption order.[40] A certified copy of an entry in the register bearing the stamp or seal of the Chief Registrar's office shall be proof of the adoption.[41]

The Act provides for the legal effect of an adoption order. It provides that:

> on an adoption order being made – (a) all rights, duties, obligations and liabilities including any other order under the personal law applicable to the parents of the child or any other person in relation to the future custody, maintenance, supervision and education of the child, including all religious right to appoint a guardian and to consent or give notice of dissent to marriage shall be extinguished; and (b) there shall vest in, and be exercisable by and enforceable against the adopter – (i) all rights, duties, obligations and liabilities in respect of the future custody, maintenance, supervision and education of the child; and (ii) all rights to appoint a guardian, to consent, to give notice of dissent to marriage of the child, as would vest in the adopter

[32] See *Ibiam v. Ibiam* (n 12); see also Nwogugu (n 17) at p. 329.
[33] Cap C 50 LFN 2004.
[34] CRA s 126(1).
[35] ibid s 126(2).
[36] s 126(3).
[37] s 129.
[38] s 134.
[39] s. 142.
[40] s 142(1).
[41] See *Ibiam v. Ibiam* (n 12).

as if the child were a natural child of the adopter, and in respect of those matters, the child shall stand to the adopter in the relationship of a child born to the adopter.[42]

The legal effect of an adoption is primarily two-fold. First, it severs all parental rights and obligations between the child and his natural parents. Second, and of immense importance, it establishes the legal relationship of parent and legitimate child between the adopter and the adopted child.[43] In respect of custody, maintenance and education, the child shall stand to the adopter as if he were born in lawful wedlock, particularly where a person promises or acts in a way that precludes the person and his/her estate from denying the adopted status to the child.[44] Where the child is jointly adopted by husband and wife, in respect of the custody, maintenance and education of the juvenile, they will occupy the position of his parents.[45] The CRA provides for the effect of an adoption order on the devolution of property upon the intestacy of the adoptive parents and in the exercise of his/her testamentary powers.[46]

3.0 Statutory Adoption in Relation to Devolution of Property.

A will or testament is defined as the declaration in a prescribed manner of the intention of the person making it with regards to matters which he wishes to take effect upon or after his death.[47] As in many other parts of the world, a single or married person in Nigeria can dispose of his/her property by will and this can be done under either of the dual systems (customary or statutory).[48] However, a will cannot be of any effect until it is activated by the death of the testator. In other words, the benefit conferred by a will cannot take effect prior to the death of the testator.[49]

In Nigeria, a statutory will cannot be valid unless it complies with the rules of English common law as contained under the English Wills Act 1837, the Wills (Amendment) Act 1852 and the Wills (Lord Kingdown's) Act 1861. These Acts operated in every part of Nigeria until 1959 when a local legislation abrogated their operation in the western states (the then Western Region) of Nigeria. The local enactment, the 1959 legislation[50] is modelled after the English Acts (1837-1852) and it incorporates various provisions of the latter.[51] Section 3(1) of the Wills Law[52] provides for the testamentary powers of a testator. It states that:

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[42] CRA s141 (1).
[43] Nwogugu, (n 17) 321.
[44] See *Ibiam's case*. An equitable decree of adoption treating as done that which ought to be done. This is also known as adoption by estoppel.
[45] See Matrimonial Causes Act (MCA) s 69.
[46] CRA s 141.
[47] See *Hand & Anor. v. George* (2017) EWHC 533 (Ch. D); *Banks v. Goodfellow* (1870) Q.B. 549; see also Halsbury's Laws of England, (3rd edn.) (3) 842.
[48] See P. I. Tom and S T. Abdulrahman 'Effects of Will on those subject to Customary Law in Nigeria', (2020) International Journal of Law 6 (3) 64.
[49] M C Onokah 'Family Law' (Spectrum Books Limited, 2007) 293.
[50] Wills Law of Western Region.
[51] English Wills Acts.
[52] Cap 141 Laws of Lagos State 1973. This law is a whole adoption of the Wills Law of 1959 applicable to the Western State (Now applicable in Edo and Delta States).

> **Subject to any customary law relating thereto**,[53] it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or executrix.

It is clear that the intent of the law is to enable a testator, subject to customary law, to freely bequeath or dispose any property to which he is entitled to by means of a will.[54] The law neither defines a 'child' nor does it include within its contemplation, the definition of an adopted child. Reference to a child in a testamentary instrument under the law has been defined to mean a 'legitimate child' under English law.[55] A child is defined under the CRA as 'any person under the age of eighteen years'[56] With the introduction of the adoption laws in the various states of Nigeria and the Child's Rights Act, a community read of sections 141 and 277 of the CRA indicates that an adopted child would be considered as a legitimate natural child of a testator or intestate in a testamentary disposition. The Act, in part, reads as follows:

> In a disposition of property made after the date of an adoption order, reference, whether express or implied, to – (a) the child or children of the adopter shall, unless the contrary intention appears, be considered as including, a reference to the adopted child; and (b) a person related to the adopted child in any degree shall, unless the contrary intention appeared, be construed as a reference to the person who would be related to him in that degree if he were the natural child of the adopter and were not the child of any other person.[57]

In any disposition of property made by instrument *inter vivos* or by will after the date of an adoption order, any reference to the 'child', or 'children' of the adopter, includes the adopted person.[58] It is necessary to note that a disposition by will or codicil takes effect from the date of the testator's death rather than on the day it was made.[59] Consequently, it may transpire for example, that 'Y' made a Will in April 2018. In July 2019, he adopted 'M'; he died in August 2020. 'M' will be entitled to share in any gift or disposition made under a general legacy to the 'children' of 'Y'. As a corollary, the adopted person ceases on his adoption to be regarded as a child of his natural parents in respect of testate and intestate succession.[60] A person adopted jointly by two spouses will be regarded as a brother or sister to the natural or adopted

[53] *Emphasis added*.
[54] This also applies to the Wills Act.
[55] See the English Case of *Re Pearce* (1941) 1Ch 254.
[56] See s. 277 of the Act; See also O S Akinwumi, 'Legal Impediments on the Practical Implementation of the Child Right Act 2003', (2009) International Journal of Legal Information 37 (3) 387.
[57] CRA s 141 (4).
[58] s 141
[59] Wills Law s 17; Wills Act s 24.
[60] Section 141(3) provides that "for the purposes of the devolution of the property on the intestacy of the adopter, an adopted child shall be treated as a child born to the adopter".

children of the adopters for the purpose of administration of estates.[61] Moreover, a person related to the adopted person in any degree shall, unless a contrary intention appears, be regarded as if he would be related to him in that degree if he were the child of the adopter.[62]

3.1 Attitude of the Courts

Although not decided within the context of a testamentary disposition, there are judicial authorities where the courts have recognised that proof of adoption was necessary for the purpose of devolution of property on intestacy. In *Remilekun Olaiya v. Mrs. Cornelia T. Olaiya (Olaiya v Olaiya)* [63] the respondent as plaintiff instituted an action seeking a declaratory order that she as the wife of the deceased and three children, two of which were adopted during the lifetime of the deceased were the exclusive beneficiaries to the estate of the deceased. The respondent also sought injunctive orders against the defendants, comprising the brothers and sisters of the deceased. The trial court entered judgment for the respondent. Following the judgment of the High Court, the appellant, being a biological child of the deceased, appealed against the judgement. The Court of Appeal dismissed the appeal. Upon a further appeal to the Supreme Court, the court allowed the appeal and set aside the decision of the lower court in part. The court held that:

> I think, with the greatest respect, that the court below did not fully appreciate that from the pleadings and evidence, the issue of adoption was canvassed before the lower court. Both in the pleadings and evidence, the question whether Emmanuel and Sarah were the children of Mr. Solomon Kayode Olaiya (deceased) was a major one. It was not in dispute that the appellant was the only natural child of the man. Therefore, if Emmanuel and Sarah were to be regarded also as his children, then how this became so was made an issue and in a sense was decided by the learned trial judge when he accepted that they are his children…. A half-hearted effort was made by the plaintiff (now respondent) to give evidence of the so called legal and valid adoption under the applicable law when she testified thus: "The first two children (i.e., Emmanuel and Sarah) were adopted by myself and my late husband. My husband and the family recognised them as our children. Before my husband died the family knew that the children were with us. After my husband's death the 2nd defendant wrote to inform the acceptance of the children within the family." This cannot be evidence of legal and valid adoption under the applicable law.
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> The Adoption Law of Lagos State (Cap.5) which came into force on 21st September 1968 was the only applicable law on adoption in Lagos at the material time. It has not been shown that the said adoption of Emmanuel and Sarah was done under that law. If that had been so, the best evidence would have come from the Adopted Children Register established under section 16 of that law. The burden is on the respondent to produce that evidence. The

[61] See also Adoption Law of Lagos State, s.15.
[62] ibid s. 14(b).
[63] (2002) 5 S.C (Pt. I)122.

> law is that he who asserts the affirmative has the onus of proving it by virtue of sections 131-135 of the Evidence Act.[64]

In that case, proof of adoption was required in order for the adopted children to be entitled to inherit upon the death of the alleged adoptive father who had died intestate. It is clear that the Supreme Court had recognised that the adopted children would have been entitled to the inheritance of their alleged adoptive father but for the absence of proof of a legal adoption under the applicable law. Also, in *Chinweze v. Masi*[65] the appellant as plaintiff instituted an action against the defendant, seeking declaratory orders in respect of a contested land. There was no dispute that the appellants were the children of Mrs. Elizabeth Chinweze, the deceased. The contested property originally belonged to Peter Chinweze and upon his death was transferred to his wife Mrs. Elizabeth Chinweze and the defendant who was the biological child of Peter Chinweze. The appellants were born several years after the death of Peter Chinweze, and they did not claim to be the children of Peter Chinweze by the operation of any 'native law and custom' or natural law or under English law. Both the High Court and the Court of Appeal entered judgment in favour of the Respondent. Upon a further appeal to the Supreme Court, the court held that:

> "The appellants were born long after the demise of Peter Chinweze, the husband of Elizabeth Chinweze (also now deceased). Though she remained in the matrimonial home after the demise of her husband, conceived and gave birth to the appellants in the said matrimonial home, that is No.5 Ogui Road, Enugu, that alone is not enough to confer on them any legally enforceable interest in the property. The property was assigned to Elizabeth Chinweze, herself and on behalf of Veronica (1st Respondent), the legitimate and surviving daughter of Peter Chinweze and who was a minor at his death. The effect of this is that Elizabeth would have a life interest in the property, and which would on her death cede to Veronica, the 1st respondent. The question of application of Ibo Native Law and Custom to give the appellants any interest and locus in the matter did not arise since that was not pleaded, nor would the question of either adoption or legitimation of the appellants by Mr. Peter Chinweze, since they were born by Elizabeth, his widow, long after his demise. The appellants, therefore, being not issues of late Peter Chinweze by his widow, Elizabeth, have no common interest in the disputed property. They have no locus to institute the action."

Based on the above, it is clear that an adopted child is considered under the law as the natural child of the adoptive parent for the purpose of testamentary disposition and there is no restriction to the testamentary power of a testator in respect of a child adopted pursuant to an adoption order (statutory/legal adoption). The Act however does not cover a child adopted otherwise than by means of a statutory adoption in which case the testamentary instrument must expressly regard such child as one entitled to inherit under the instrument. It is therefore important for adoptive parents to ensure that they comply with laws relating to adoption, by obtaining necessary

[64] Per S. O. Uwaifo, JSC: See also *Odukwe V Ogunbiyi* (1998) NWLR (Pt. 561) 339.
[65] (1989) 1 NWLR (Pt. 97) 254.

documentation that prove legal adoption from the court. Such steps shall ensure that adopted children are not disentitled from their legitimate inheritance by reason of failure to produce evidence affirmative of an adoption under the statute, a position which principles of customary law cannot circumvent.

For instance, in *Olaiya's case,*[66] regardless of incontrovertible evidence before the court, such as for instance, where members of the deceased family had written to concede that both children were recognized adoptees by the deceased in his lifetime, the court, nonetheless, refused to acknowledge that such proof was sufficient to ground the existence of an adoption by the deceased. The Supreme Court appeared to give no consideration as to whether actions or relations by the deceased (towards the children) in his lifetime were sufficient to establish an adoption in the light of customary law adoption practices.

On the face of it, the decision of the Supreme Court in the *Olaiya's case* appears discriminatory, contrary to the plight of the 'adopted children' and tantamount to a disregard of section 42(2) of the Nigerian Constitution.[67] On closer examination as it relates to the facts as presented by the case, it is intriguing to note that the apex court was unable to establish any equitable justification, such as relying on a defence of estoppel, mainly to ensure that the children in question were not outrightly disinherited. This is more so that there was glaring evidence by the respondents to show that the deceased's adoptive father had undisputedly and unreservedly approved of the said children, as his adopted children by the integration of them by him into his family in his lifetime.[68] It is the position of this paper that this was a chance for the Supreme Court to demonstrate the efficacy of existing equitable principles as recognized under the Nigerian legal system.

3.2 Adoption & Inheritance: Customary Law Vs. Statutory Provisions

The question may however arise as to whether a testator, in making a will, can supplant the testamentary rules of customary law, especially under customs that prohibit or subordinate the succession rights of an adopted child. The need for this question is emphasised by the phrase 'Subject to any customary law relating thereto' contained in section 3(1) of the Wills Law suggesting that the testamentary freedom of a testator is subject to customary law[69]. The prevailing view, in this regard, is that a testator can circumvent the rule of customary law on intestacy by making a will. This rule however admits of the exception that customary law will apply to restrict testamentary power regarding properties which are not bequeathable under customary law.[70] It is doubtful that the testamentary powers of a testator will be restricted by prohibitive/discriminatory customary law rules on the succession right of an adopted child. Any such customary law rules will, in any event, amount to discrimination

[66] (n 63).
[67] CFRN (as amended) 1999.
[68] See *Aduba v. Aduba* (2018) LPELR-45756; see also *Ibiam's case* (n 12).
[69] See Will Law s 3.
[70] For instance, 'Igiogbe' custom of inheritance in Bini Kingdom.

which will be unconstitutional and invalid if tested.[71] The testamentary freedom of a testator is shared by some Nigerian legal authors, notably Okany, who wrote that:[72]

> … A Nigerian can by testamentary disposition defeat the course of inheritance in an intestacy under customary law. In fact, there will be no need for him to make a will at all if all he can do by it is to confirm the scheme of inheritance that would have resulted upon an intestacy under customary law. Not only can a will alter the nature of the interest to be taken by the beneficiary, but it can also alter its quantum, for example, by giving some children a greater interest than others.

It is submitted that the view expressed by the learned author in this regard is valid as subjugating the testamentary freedom of a testator to customary law rules is bound to render nugatory, the entire objective of the Wills Law.[73] This view was also affirmed by the Supreme Court in the case of *Adesubokan v. Yunusa*,[74] which raised the question of the effect of customary law on the power of the testator to make a will under the Wills Act. In this case, the deceased, who was a Moslem had devised his estate to his three sons via a will made under the Wills Act, 1837. He devised his residuary estate, a house and a plot of land to his two younger sons to be shared in equal proportion and bequeathed £5 to his eldest son. The eldest son sought a declaration that the probate granted to the defendant (the sole executor of the will) be revoked on the ground that the testator was a Moslem and therefore not entitled to dispose of his property under the Wills Act 1837 which was in a manner contrary to Moslem law. The plaintiff contended that under Moslem law, a testator was only entitled to dispose of one-third of his estate by will, that such disposition must be to persons who were not his heirs; and that the remaining two-thirds must be shared amongst his heirs as though he died intestate (i.e., equal shares to the male children and half share to each female child). The trial court held in favour of the plaintiff and revoked the will.

Upon further appeal to the Supreme Court, the court set aside the decision of the trial court and affirmed the will. In reaching its decision, the court considered the provision of section 34(1) of the Northern Nigeria High Court Law which provides that:

> "The High Court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication, with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom."

[71] Section 42(2) of the 1999 Constitution (as amended) provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his/her birth.
[72] Cited by M C Onokah, (n 49) 312
[73] See A A Oba, 'Can a Person Subject to Islamic Law Make a Will in Nigeria? *Ajibaiye v Ajibaiye* and Mr. Dadem's Wild Goose Chase' (2008) Review of Nigerian Law and Practice 2(2) 131-144.
[74] (1971) 1 All NLR page 225; (1971) NNLR 77.

The court held that under the Wills Act, a testator had unrestricted power of testation and Moslem law could only apply to the extent that it was not incompatible with the Wills Act.

It is significant to note that this case was decided in the context of the received Wills Act 1837 which does not contain a similar phrase "Subject to any customary law relating thereto" as contained in the local Wills Law subsequently enacted.[75] It is however clear, by reason of this decision, that in relation to the self-acquired property of the deceased, the customary law rules of intestacy will not limit the exercise of his testamentary powers. This view has also been affirmed by a number of judicial authorities decided within the context of the Wills Law 1959. For instance, in *Eyo v. Garrick,*[76] the testator's will did not make provisions for the widow and the three children of the marriage. However, it provided for the maintenance and education of the deceased's sister's children up to university level. The court dismissed the widow's contest and affirmed the genuineness of the will. Also, in *Igboidu v. Igboidu,*[77] the testator made a will under section 3(1) of the Wills Law. In setting aside, the decision of the trial court, the Supreme Court held that the testator was entitled to dispose of his property – real or personal as he liked and that the trial court was wrong to have modified the will of the testator in respect of the 'well' of the family compound.

The recognised exception to this rule was established in the case of *Ogunmefun v. Ogunmefun,*[78] which is to the effect that property subject to customary law (i.e., family or communal property) cannot be disposed of by a family member in his will. Also, in the case of *Oke v. Oke,*[79] the plaintiff (the eldest son of the deceased) and the eldest daughter were granted letters of administration of their father's estate in the belief that he had died intestate. A couple of years later, the defendants produced a will made by the deceased and were accordingly granted Letters of Probate. The plaintiffs contested the will as being fake and sought its revocation and for the exclusive entitlement of the deceased's eldest son to succeed in inheriting the property (i.e., the property where their father lived until his death) in accordance with Warri native law. The court held that under Urhobo and Itsekiri (Warri) native law, such property cannot be lawfully inherited by or given to any issue of the deceased other than the eldest son who performs the burial rites. Such an estate, in the words of the court, 'does not form part of the distributable estate'. The rationale according to the court is that the eldest son steps into the father's shoes upon his death and takes charge of the family as well as inheriting and taking charge of the property, the family house, which the deceased left behind. Therefore, the will was declared invalid and of no effect for being contrary to Urhobo and Itsekiri native laws.

Without questioning the rationale behind the holding of the court, confirming that eldest sons under Urhobo and Itsekiri customary law are entitled to inheriting the dwelling place of their deceased fathers, this paper reckons that it would have been

[75] See (n 59).
[76] Suit No. LD/526/76 of 11/12/86 (unreported) Lagos High Court; see also *Onokah* (n 49) 315.
[77] (1999) 1 NWLR 27; *Onokah,* ibid.
[78] (1931) 10 NLR 82.
[79] (1970) MWSNLR 132.

judicious of the court to declare a particular gift invalid rather rendering an entire will a nullity ,merely on account of an irregular disposition made in favour of the eldest child, who happened to be just one of other beneficiaries under the will. The action by the court, in the writers' view, amounts to, for want of a clearer expression, distorting the wishes of the testator to the extent to which he was allowed by law.[80] Curious, though, is whether there was any suspicion of the part of the court when it voided the will in its entirety. This action was demonstrated by the court when it also rejected the contention by the defendant stating that customary law must be subject to the power of testation. In the words of the court, it stated thus:

> … it is the lawfulness of the disposition that is made subject to any customary law relating to the disposition of the property. In other words, if it is lawful under customary law to dispose of the property in the manner referred to in the will, it shall be lawful to make the devise otherwise, the devise shall be unlawful by virtue of the native law stipulations.[81]

It is significant to note that in 1989, the Lagos State Government enacted another Wills Law.[82] The Law, unlike the 1973 Wills Law, expressly restricts the right of a testator to freely bequeath "property which the testator had no power to dispose of by his will or otherwise under customary law".[83] By this amendment, there is no controversy under the Wills Law of Lagos State regarding the exact restriction placed on the testamentary power of a testator. Also, under the current law, reference to a 'child' in the testator's will includes:

> … a child whose paternity has been acknowledged in accordance with the customary law applicable in the state, a child adopted whether before or after the commencement of this law in pursuance of an adoption order made under the Adoption Law, Cap. A5 Laws of Lagos State, and a child legitimised under the Legitimacy Law Cap. L65, Laws of Lagos State.[84]

The provision eliminates any dichotomy between the natural child and an adopted one. Under the law, both are regarded as a child for purposes of testamentary dispositions. The legal effect of this is that, in Lagos State an adopted child is accorded a similar recognition as the natural child of a testator in a testamentary disposition and such a child ought not to be discriminated against by reason of the circumstances of his birth.

Other than family or communal property, there is no known judicial authority that has subjugated the testamentary freedom of a testator under statute to the customary law rules of succession applicable to an adopted child. The position of an adopted child as regards succession under customary law in most customs remain hazy. There is however the notion across customs that the right of an adopted child is inferior to

[80] See *Lawal-Osula v. Lawal-Osula* (n 9) 259; Banks v Goodfellow (n 47).
[81] *Oke v. Oke* (n 79) 134.
[82] Cap. W2 Laws of Lagos State 2003 repealed the Wills Law, Cap. 141 Laws of Lagos State, 1973.
[83] See Wills Law, Cap. W2, Laws of Lagos State, s.1(1).
[84] ibid.

that of the legitimate child of the blood.[85] For the Yorubas, an adopted child cannot inherit from his/her adoptive parent. In *Administrator General v. Tuwase,*[86] the estate of a yoruba woman from Ijebu land who had died without a child was claimed by a consortium of persons, namely, her husband from whom she had been separated for 44 years before her death; her adopted child who had predeceased her (through the adopted child's descendants); and by several collateral of descendants from her maternal grandfather, including an adopted daughter of an aunt. The claim of the husband was rejected by the court. The court ordered that the descendants, including the adopted children of the deceased grandfather, should take one share each, while her direct descendants i.e., the surviving adopted child should share per stripes. This judicial authority supports the notion that under the customary law of *Ijebu's* of Ogun State, Nigeria, the right of an adopted child is inferior to that of a legitimate child of the blood, as the direct (blood) descendants of the deceased would have inherited the estate of the deceased to the exclusion of all other claimants.

It is however clear that under the Wills Law of Lagos State, any such prohibitive or discriminatory customary law on the succession rights of an adopted child will not operate to subjugate or restrict the testamentary powers of a testator, given that the law expressly limits testamentary freedom to non-bequeathable property under customary law. In states where the received Wills Act 1837 or the Wills Law of 1959 apply, it is doubtful that prohibitive or discriminatory customary law rules on succession rights of an adopted child will operate to restrict or subjugate the testamentary powers of a testator. In any event, any such attempt to subjugate or apply prohibitive or discriminatory customary law rules on the succession rights of an adopted child will be unconstitutional for being discriminatory.[87] Certain native customs are so deeply rooted that judicial notice is taken of them as upper-class customary laws.[88] Under the Igiogbe custom of Bini ethnicity in Edo State, the eldest surviving son of a testator, who has performed the full burial rites of the testator is the rightful person to inherit the property, that is, the dwelling (Igiobge) where the testator lived and died.[89] The testator cannot by his will, based on his testamentary freedom, devise his property to any person except his eldest surviving son. Invariably, if the eldest surviving son, as has been seen in the cases of *Idehen,*[90] *Lawal-Osula,*[91] *Aduba,*[92] *Ibiam*[93] *and Chibuzor*[94] were to be legally adopted with proof, such an adopted child would have been the rightful one to inherit the 'Igiogbe'

[85] Chioma Unini, The Discrimination of Property Inheritance Under the Nigerian Customary Law, (The Nigerian Lawyers < https://thenigerialawyer.com/the-discrimination-of-property-inheritance-under-the-nigerian-customary-law/> accessed on 21 June 2021.
[86] (1946) 18 NLR at 88.
[87] See (n 71).
[88] For instance, the 'Igiogbe' native custom of inheritance of the Bini ethnic group. Also, the 'Nkolo' in Igbo land representing the traditional home where the deceased lived and died'; see *Chibuzor case.*
[89] See *Idehen' case* (n 8).
[90] ibid.
[91] (n 9).
[92] (n 68).
[93] (n 12).
[94] (n 19).

or 'Nkolo, Onu Nkolo' (the house where the deceased lived and died) as the case may be, respectively, in the estate of a deceased adoptive father.

The implication of adoption, when all the mandatory requirements and procedures have been duly followed, is that the adopted child is treated as if born as a child of the marriage of the adoptive parent(s) and not otherwise.[95] The adopted child therefore acquires the same status in the family of his/her adoptive parent(s) as the legitimate child or children of the blood. For the purpose of devolution of the estate on the testacy or intestacy of the adoptive parent therefore, an adopted child would not be subjugated or treated as being inferior to the natural biological child of the adopter.[96] Where for example, a person adopted a male child from the relevant adopting body, in Nigeria's case, the Ministry of Social Welfare, after satisfying the formal requirements and procedures,[97] regardless of the circumstances of his birth, the adopted child is entitled to inherit/succeed, even if the adoptive parent(s) had previously or subsequently had other biological child or children. If the adopted child was the first child of the adoptive parents, he shall nonetheless enjoy all the rights (customary or otherwise) accruable to a child or first male child, as the case may be.[98]

Consequently, the well-known Bini customary law of Igiogbe or the Igbo customary law of Nkolo, Onu Nkolo,[99] or other like cases which recognize the surviving first male child as the rightful heir to such inheritance, should neither disentitle the adopted child from such inheritance nor from partaking in sharing his/her deceased adoptive parent's estate, as such an action would be in breach of section 42(1)(2) of the CFRN 199. [100]

4.0 Conclusion

The effect of a statutory legal adoption is that an adopted child is considered under the law, as a natural child of the adoptive parent(s) for the purpose of testamentary disposition. There appear to be no restrictions on the testamentary powers of a testator in respect of a child adopted, pursuant to an adoption order via a statutory adoption process. It is unlikely that the statutory provision on testamentary disposition will apply to customary law adoption. It is therefore recommended that intending adoptive parents must embark on statutory adoption processes in order to safeguard the succession rights available to the adopted child, ensuring that the wishes of the testator, that is, the adoptive parent(s), upon their death are not scuttled by unanticipated frustrating events.

Although it appears that prohibitive/discriminatory customary laws on succession rights of an adopted child will not operate to render nugatory the testamentary powers of a testator, it is recommended that in a pluralized society such as Nigeria's, where the statutory and customary laws bear on the future wellbeing on the entitlements of

[95] See Adoption Act 1976, s.12 (1); *Chibuzor's case*; *Aduba case*; *Ibiam's case*. See also Caroline Sawyer and Miriam Spero, 'Succession, Wills and Probate' (Routledge Taylor and Francis Group, 2015) 332.
[96] See CRA s.141; see also CFRN 1999 (as amended) s 42(2); *Ukeje v. Ukeje* (2014) LPELR- 2272 SC.
[97] See CRA, ss 126,130 and 133.
[98] See *Aduba's case; Idehen's case; Lawal-Osula' case*.
[99] *Idehen's* case; *Chibuzor*'s case.
[100] CFRN, 1999 (as amended). See also *Igbozuruike & ors v. Onuador* (2015) LPELR-25530; *Idehen's case.*

an adopted child, there is need to streamline relevant laws to cater for adequate protection of these vulnerable children, in a bid to averting unpleasant situations where an adopted child becomes disinherited by reason of the circumstances of his/her birth. It is therefore suggested that amendments be made to laws, emulating those of the Wills Law of Lagos State, [101] that expressly restrict the testamentary powers of a testator to non-bequeathable property under customary laws and one which also recognizes an adopted child within the definition of a (biological) child. This will ensure that the controversy surrounding the inapplicability of a testamentary disposition over customary law rules on succession rights will be eliminated as it relates to statutory adoption. Such act will give hope to providing the desired effect of the testamentary wishes of the adoptive parent upon their demise.

It is clear from the attitude of the judiciary that affected parties laying claims to inheritance in the case of adopted children must strictly prove adoption requirements as provided for by the laws. This is done in an attempt to prevent 'strangers' from inheriting the property of a deceased, thereby reaping benefits not accruable to them. The logic here cannot be faulted. However, it is suggested that a more liberal approach be exercised by the courts, bearing in mind the vulnerability of adopted children, whose rights must remain protected. Decisions in cases such as that of *Olaiya*[102] are capable of working hardship and it is hoped that due consideration be given in favour of a purportedly adopted child or children if such a case were to re-present itself before Nigerian courts. This, in the view of the writers, is the cautious path to thread.

[101] Cap. W2, Laws of Lagos State 2003.
[102] (n 63).