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Estate Planning: Understanding Wills & Trust Law in Nigeria

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Introduction

In the journey of life, mortality remains a constant, emphasizing the necessity of estate planning as individuals accumulate assets. Estate planning extends beyond mere property transfer, encompassing the assurance of loved ones' futures and the preservation of wealth's enduring purpose. This article delves into the significance of estate planning, exploring the foundational pillars of Wills and Trusts that shape legacies in Nigeria.

Wills

A Will is a testamentary disposition of a person (the “**Testator**”) which takes effect upon the death of the Testator. It is an instrument by which a Testator can absolutely and freely dispose of all of his property – owned before or acquired after the date of the Will – in any manner, and to named persons (the “**Beneficiaries**”), subject to certain qualifications imposed by law. These qualifications include the responsibility of a Testator to make reasonable financial provisions for his or her dependents (spouses and children)¹, customary law on the disposition of property that governs the testator,² and Islamic law. A Will can also be used to issue posthumous instructions such as where and how the Testator should be buried.

A Will must be freely declared, and can be amended or withdrawn at any point during the Testator's lifetime. However, to ensure its validity and voluntariness, it must be signed by the Testator and the signing by the Testator must be witnessed by at least two persons. Usually, a Will is lodged at the probate registry of the High Court of a State in which the Testator resides. In most states in Nigeria, the person in possession of a Will must lodge same at the Probate Registry between 2 (two) weeks to 3 (three) months from the Testator's death. Although a Will is not invalidated where it is not lodged, any person who fails to lodge a Will within the required timeframe is liable to pay a fine to the Court. He may also be summoned by the Court and cited for contempt.

Executors of A Will

Executors are persons tasked with managing and distributing the wealth of a deceased person. They could be appointed expressly or impliedly in a Will or through a nominee charged with appointing the executors of the Will. Where a Will does not name an executor, a competent court in Nigeria can appoint the executor of a testator's estate. The law also recognizes certain persons, who, though not expressly appointed as executors, take concrete steps to manage the estate of a deceased (executors *de son tort*). Executors must obtain probate in accordance with the laws of the State where the Will is lodged. Probate is the process of authenticating the validity of a Will and authorizing the executors of an estate to administer the Will.

Trusts

A Trust is a legal vehicle by which a person or a legal entity (the “**Trustee**”) holds and/or manages assets on behalf of another person (the “**Beneficiary**”). The Trust is created by an individual who holds legal title to the assets (the “**Settlor**”). The Settlor creates the Trust, appoints the Trustee(s) and names the Beneficiary(ies) as the person(s) who would take benefit of the Trust.

¹ Section 2 of the Wills Law of Lagos State.

² Uwaifo v. Uwaifo (2013) AFWLR, part 689, p.1116.

There are two general categories of Trusts in Nigeria, viz; Private Trusts and Public Trusts. However, for the purpose of estate planning, the most commonly used category is the Private Trust. A Private Trust could be created during the lifetime of a Settlor (the “**living trust** or “**inter vivos trust**”) or it could be set up after the Testator’s death according to the terms of a Will (the “**Testamentary Trust**”).

Yet, for a Private Trust to be valid and enforceable, it must have the following features:

- **Certainty of Intention:** The Settlor’s intention to create the Trust must be certain. This intention may be expressed by the Settlor formally or through his conduct.
- **Certainty of Subject Matter:** The subject matter of the intended Trust must be certain, that is, the property to be given to the Beneficiaries must exist, must be identifiable, or capable of being identified upon the creation of the trust, otherwise the Trust fails.
- **Certainty of Objects:** The intended Beneficiaries of the trust must be clearly identified or ascertainable.

The creation of a Trust must also involve the vesting of the Settlor’s property in the Trustee(s). At the initial appointments of the Trustees, the Settlor must transfer the property through a binding instrument. In the case of real property, a deed must be used to effect the transfer. However, for a Testamentary Trust, the Will operates to vest the property in the Trustees appointed therein. For subsequent Trustees, the property can be transferred again, either by a vesting declaration, a conveyance or transfer from the outgoing Trustee(s) to the incoming Trustee(s), or a vesting order by a High Court in Nigeria.³

Appointment and Replacement of Trustees

A Settlor has absolute power to appoint any legal entity or individual as a Trustee under a Trust. A Trustee may be an individual of full age and capacity, or a trust corporation, that is, a corporate body empowered by law to conduct trustee business. The Settlor of a living trust can appoint himself as a Trustee in the first instance. He can also retain and exercise the power to appoint additional trustees.

A Trustee can be removed and replaced under certain circumstances such as death or dissolution of the Trustee, refusal of the Trustee to execute the wishes of the Settlor, where the Trustee is deemed unfit to act as a Trustee, where the Trustee is removed pursuant to a Court order, where the Trustee is discharged from trusteeship, and where the Trustee is removed in accordance with the instrument that established the Trust.⁴

Responsibilities of Executors and Trustees

Trustees and Executors have the duty to observe the terms of the instrument which appointed them with utmost care and diligence. They must follow the terms strictly, failure of which they will be guilty of a breach of Trust. They are also empowered to take appropriate actions such as division and sale of property for the purpose of allotting property equally among beneficiaries.

Record keeping is another duty that must be upheld by Trustees and Executors. This would facilitate the provision of information to Beneficiaries concerning any property. Yet, whenever they are mandated to exercise discretion on a particular matter, they are not bound to disclose

³ Sections 25 and 26 of the Trustees’ Act.

⁴ Public Trustee Act and Public Trustee Law, Caps. 170 and 180 ss. 8 and 9, *Adeseye v. Williams* (1964) 2 All N.L.R 37 at p.39

their rationale in taking a decision to the Beneficiaries.⁵ They are not also allowed to benefit from the Trust except the instrument appointing them provides for remuneration. Further, they must not let their personal interests collide with their responsibilities.⁶

Deciding between the use of Trusts and Wills for Estate Planning in Nigeria

For the purpose of Estate Planning, Wills and Trusts can be used concurrently to achieve the intentions of a Settlor. For instance, a Will could bequeath the funds in a Settlor's bank account to a named Beneficiary, but even before, and after the death of the Settlor, a Trust could be established via which the same funds are administered for the benefit of the Beneficiary. While a Will can be only be used after the death of a Settlor, the Trust can operate during and after the lifetime of the Settlor.

The advantage of a Trust over a Will is that it allows for continuous management of wealth in favour of Beneficiaries. In the aftermath of a Testator's death, there is a strict legal process which must be followed before the estate of the Testator can be shared among the Beneficiaries named in the Will. This process can take weeks, and sometimes months. During this period, the Beneficiaries may be denied access to the Testator's estate. However, a Trust takes care of this inconvenience such that a Beneficiary can continue to take benefit of a Testator's estate immediately after the death of the Testator.

It is also worthy of note, that in law, upon the creation of a valid Trust, the assets included in a Trust cease to be part of the Settlor's Estate.⁷ Therefore, the Settlor cannot, through his will, redistribute the assets in the Trust to different Beneficiaries.⁸

Another advantage of a Trust is that it can ensure the effective management of a Settlor's wealth. Instead of giving the property directly to the Beneficiaries, the Settlor's intentions may be more effectively implemented by appointing Trustees who will manage and apply the Trust in the manner directed under the Trust Deed.

Trusts can also be used to ensure cost-effective distribution of wealth. It is a veritable tool to reduce the tax burden which a Testator's estate would incur. Trusts may protect the estate of the Settlor from creditors or lawsuits. Creditors cannot claim the assets that are subject to a Trust as the assets are no longer the assets of the Settlor. It shields the estate from potential claims thereby preserving the wealth for the beneficiaries.

Despite the numerous advantages of Trust, establishing and maintaining a trust might be expensive. Corporate trustees typically charge between 1 to 2% of the total value of the asset of the trust as their yearly service fee. Additionally, a trust may be subject to abuse or breach of fiduciary duty by the Trustee because there is no probate and no court oversight.

Conclusion

In navigating the complexities of estate planning, individuals are advised to seek legal guidance to ensure compliance with legal requirements and to safeguard the interests of Beneficiaries. By leveraging Wills or Trusts, individuals can lay a solid foundation for the preservation and equitable distribution of their wealth, thereby fostering financial security and peace of mind for generations to come.

⁵ Re Londonderry's Settlement [1965] Ch. 918 at 928.

⁶ Bray v. Ford [1896] A.C. 44., H.L., at p.51.

⁷ Underhill and Hayton's Law of Trusts and Trustees 11th Edition at page 5

⁸ Williams & Anor v. Ogundipe & Ors (2006) LPELR-7593(CA)



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