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CONTESTED WILLS AND TESTAMENTS IN GHANA: EXPLORING THE LEGAL CLAIM FOR REASONABLE PROVISION FOR DEPENDANTS

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ABSTRACT

Ghanaian law allows persons to execute Wills as the legal means by which property acquired during one's lifetime could be disposed of, in the event of death. The law follows the intentions of the testator by leaving everything to the unfettered discretion of the testator since the law presumes that the instincts and sentiments of the testator may be safely trusted to secure a better disposition as compared to a distribution prescribed by the stereotyped and inflexible rules of a general law. However, there are instances where dependants of the deceased, whether deliberately or inadvertently, are not provided for in the Will of the deceased testator. This Article seeks to explore the legal claim for reasonable provision out of the Will of a deceased testator in favor of dependants of the testator. The article would identify the safeguards in the laws of Ghana which allow for dependants who are somewhat left out of the Will of a deceased testator to be catered for. The article would also consider the jurisprudence of the Superior Courts of Ghana on the legal claim for reasonable provision out of the Will of a deceased testator in favor of dependants of the testator. As a whole, it is believed that this study would go a long way to highlight the mechanisms for assessing the legal claim for reasonable provision for dependants out of the Will of a deceased testator and would further make suggestions towards strengthening the law and jurisprudence on the area of law.

Keywords: Contested wills, Testament, Ghana, Dependents Deceased

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> There is something about Wills which brings out the worst of human nature. People who under ordinary circumstances are perfectly upright and amiable, go as curly as corkscrews and foam at the mouth whenever they hear the words "I devise and bequeath.[2]

Introducing Wills and Testaments in Ghana

One of the certainties of the human life is that it is not perpetual and surely does come to an end. That notwithstanding, during the currency of one's life, humans do acquire a lot of properties, be them movable and immovable, which they are unable to carry along after the unfortunate but certain event of death.

It is for this reason that the Ghanaian law and the Common law in general allows a person to execute a Will as the legal means by which property acquired during one's lifetime could be disposed of, in the event of death.

A Will is thus a written document in a form prescribed by law by which the person making it known as the testator makes provision for the distribution or administration of his or her self-acquired property and which takes effect only after the death of the testator.[3] Under Ghanaian Law, a Will is said to include *"a codicil and any other testamentary instrument."*[4]

Accordingly, a Will represents the aggregate of a person's "*testamentary intentions so far as they are manifested in writing and duly executed according to the statute."*[5] The common types of Wills include a Simple Will; Joint and/or Mutual Wills; Holographic Wills; Living Wills; Nuncupative Wills; Deathbed Wills; Living Trusts; Testamentary Trusts amongst others.

In Ghana, the *Wills Act*[6] is the statute enacted to regulate the making of Wills and to give effect to the provisions therein. The Act ensures that the true declaration of the last Will of a testator is that which is done after the death of the testator.

As can be gleaned from the above, a Will is capable of disposing of all real and/or personal property of the testator. Another characteristic of a Will is that it takes effect only after the death of the testator[7] since until then, a Will simply represents a declaration of an

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[2] Dorothy L. Sayers, Strong Poison (Lord Peter Wimsey, #6).

[3] Samuel Azu Crabbe, *Law of Wills in Ghana*, pg. 53 (Vieso Universal (Ghana) Ltd, 1998).

[4] Wills Act of Ghana, 1971 (Act 360), Section 18.

[5] Per Lord Penzance in *Lemage v Goodban* L.R. 1 P & D 57.

[6] Wills Act of Ghana, 1971 (Act 360), Section 2(1).

[7] Hebrews 9:17 NIV Version: *"…because a Will is in force only when somebody has died; it never takes effect while the one who made it is living."*

intention. A Will is also said to be ambulatory since it has the capacity to be changed or revoked[8] at any time once the testator is still alive. More so, a Will has the effect of applying to property that was not in existence at the time of its execution by the testator which later became owned by the testator after his death.

One last and very important characteristic of a Will is that the testator should possess full sense and mental sanity to have confirmed and executed the Will after perfectly understanding the contents of the Will as well as the legal consequences of the testator's actions. This is commonly referred to as the testamentary capacity or the *animus testandi*.

The *Wills Act*[9] provides that *"*no person suffering from insanity or infirmity of mind so as to be incapable of understanding the nature or effect of a Will shall have capacity to make a Will during the continuance of that insanity or infirmity of mind." This presupposes that at the time of making a Will, the testator's mind must not be under the influence of any mental infirmity or disability, coercion, fraud or mistake, duress or any factor that makes it difficult for the testator to sufficiently comprehend the effect of the testator's actions.[10]

The testator must "have the capacity to comprehend and recollect the extent of his property and the nature of the claims of others whom by his Will he is excluding from participation in that property. Mere forgetfulness to comprehend some property, or to recollect the claims of those excluded, would not seem sufficient to invalidate the will, unless such forgetfulness establishes incapacity…"[11]

Ghanaian law presumes sanity in the testator at the time when the Will is made until the question of sanity becomes an issue.[12] The presumption is that a testator had the sound disposing mind both at the time when instructions for the Will were given and when the Will was executed.[13]

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[8] According to Section 9 of the Wills of Act of Ghana, 1971 (Act 360), a Will may be revoked by tearing or other physical destruction by the testator or some other person in the testator's presence and by his direction with the intention of revoking it. A Will can also be revoked by the execution of another Will which expressly seeks to revoke the previous Will. Another way is by a Written declaration of intention to revoke the Will executed in the same manner as a Will.

[9] Wills Act of Ghana, 1971 (Act 360), Section 1(2).

[10] Samuel Azu Crabbe, *Law of Wills in Ghana*, pg. 78 (Vieso Universal (Ghana) Ltd, 1998).

[11] Ibid.

[12] Samuel Azu Crabbe, *Law of Wills in Ghana*, pg. 57 (Vieso Universal (Ghana) Ltd, 1998).

[13] In Re: Sackitey (Decd); Dzamioja alias Ashong v Sackitey and Ano. (19982-83) GLR 128.

Once sanity of the testator is in issue, the burden is on the person challenging the Will to prove by satisfactory evidence that the testator was of unsound mind at the time the Will was made. Such a person must show that the human instincts and affections of the testator was perverted by some disease or some form of delusion which contributed to the loss of reason and judgment of the testator thus disturbing the testamentary disposition of the testator.[14]

Essential Formalities of a Valid Will

Under the *Wills Act*,[15] a Will is invalid unless it is in written form and also signed by the testator or some other person at the direction of the testator. Also, a Will must be signed with the signature[16] of the testator which signature must be made or acknowledged by him in the presence of two (2) or more witnesses present at the same time.[17]

The jurisprudence of the Superior Courts of Ghana regarding signature by the testator is that the signature of a testator is not invalidated on the basis that "a testator was weak to be assisted to hold a pen to sign his will… [and was] assisted in signing his name if his fingers were neither strong nor mobile enough to hold and manipulate a pen provided he accepted it as his signature."[18]

In the case where a person other than the testator signs at the direction of the testator, the signature of that person must be made in the presence of the testator and two (2) or more witnesses present at the same time[19] and the witnesses are further required to attest and sign in the presence of the testator.[20]

For the signature of the testator to be operative in order to give effect to any disposition or direction contained in the Will, the said signature must be underneath all the dispositions or directions.[21] In the instance where the testator of the Will is blind or illiterate, the law makes it mandatory for a competent person to carefully read over and explain to the testator the contents of the Will before it is executed and also declare in

[14] Per Cockburn C.J. in the case of *Banks v Goodfellow* (1870) L.R. Q.B. 549 at pg. 565.
[15] Wills Act of Ghana, 1971 (Act 360), Section 2(1).
[16] Interpretation Act of Ghana, 2009 (Act 792) defines a signature to include *"the making of a mark and of a thumb print."*
[17] Wills Act of Ghana, 1971 (Act 360), Section 2(3) and In re: Essien alias Baidoo (Decd.), Essien v Adisah & Others (1987-1988) 1 GLR 539.
[18] Per Asare-Kwapong, J. in the case of In re: Sackitey (Decd.), Dzamioja alias Ashong v Sackitey & Another (1982-83) GLR 128.
[19] Wills Act of Ghana, 1971 (Act 360), Section 2(4).
[20] Wills Act of Ghana, 1971 (Act 360), Section 2(5).
[21] Wills Act of Ghana, 1971 (Act 360), Section 2(2).

writing upon the Will that the Will has been so read over and its contents thoroughly explained to the testator and that the testator has fully understood same before having executed it.[22] Annan J.A. in the case of Re: Mensah (Decd.); Barnieh v Mensah and Others[23] was quoted as having said that:

> It would seem reasonable to say then that the intention was to put upon the person who reads and explains the Will of an illiterate or blind testator a responsibility additional to that put-on persons who attest and subscribe such a Will. In each case the person concerned is required to do an act in relation to the blind or illiterate testator, that is, attest his mark or signature or read and explain the Will to him, then he is also to do another act upon the Will itself, on the face of it, that is subscribe it or make a declaration upon it…It would seem then that with regards to a person who reads and explains the Will it is the intention of the Act that words be put on the face of the Will to show that he had complied with the requirement of reading and explaining the Will to the testator before execution. As I have already said that requirement is a condition precedent to valid execution of a Will of an illiterate or blind person and must be seen in the same light as the requirements for writing, signature attestation and subscription.

The above constitute the prescribed formalities that must be observed in order for a Will to be legally compliant. In other words, a Will can only be said to be valid under Ghanaian law if it is in *writing* and duly *executed* in accordance with law. Where a Will which is in writing is also duly executed in accordance with the requirements of the law, the *omnia presumuntur rite esse acta* maxim applies unless the contrary is alleged and proven.[24] Such a Will is presumed as having been carried out according to the requirements of the Ghanaian Wills Act and accordingly only strong evidence would be required in order to show that indeed it was not properly executed.[25]

Interpretation of a Will

There are generally two (2) rules of interpretation of Wills. The *primary rule* is that the Court should strive to give effect to the subjective intentions of the testator by

[22] Wills Act of Ghana, 1971 (Act 360), Section 2(6).
[23] [1978] GLR 225.
[24] In re: Duncan (Decd.), Duncan v Duncan (1982-1983) GLR 384 – 398.
[25] In re: Kotei (Decd): Kotei v Ollenu [1975] 2 GLR 107 at pg. 111.

reviewing the Will as a whole and interpreting it based on the words used.[26] This is usually referred to as the golden rule.

The *golden* rule was formulated by *Lord Wensleydale* in the case of Grey v Pearson[27] as follows:

> in construing Wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency in the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no further.

Similarly, in In Re: Allen[28] the Master of Rolls observed that *"it is in general the function and duty of a court to construe the Testator's language with reasonable liberality and to try if it can, to give sensible effect to the intention he has expressed."* In other words, the Courts must lean towards the construction which preserves than destroys.[29]

In applying this rule, the courts presume that a testator did not intend to die intestate. Thus, should it turn out that a Will has two (2) or more possible constructions one of which would make an effective disposition of all or part of the estate result in intestacy, a Court would prefer the former.

In order to determine the testator's intention, the Court will usually invoke the *second rule* known as the "arm-chair rule" of interpretation. In doing so, the Court attempts to "sit in the place of the testator". In the case of Re Burke[30] this rule was summarized as follows;

> …a court must ascertain the testator's subjective intention at the time of execution of the Will. Each Judge must endeavor to place himself in the position of the testator at the time when the Will was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property.

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[26] Holgate v Holgate, 2015 ONSC 259, at para 15, citing Smith v Chatham Home of Friendless, 1932 CanLII 12 (SCC).
[27] (1857) 6 HLC 61.
[28] (1953) WLR 637 at p. 645. Also see Re: Atta (Deceased) Kwako v Tawiah (2001-2002) SC GLR 461 SC per Adzoe JSC and Otoo v Otoo (2015) 81 GMJ 90 per Dotse JSC.
[29] Langston v Langston (1834) 2 Cl & Fin 194 p. 24.
[30] (1960) O.R. 26 (C.A.) at p. 30.

Usually, aside the Will itself, evidence of the testator's actual intention i.e. direct extrinsic evidence of intent e.g. instructions which the testator gave to a Solicitor for the preparation of the Will or declarations as to the persons or property which were meant to be included are inadmissible except where there is the occurrence equivocation.[31] An equivocation occurs where the words of the Will apply equally well to two (2) or more persons or things, when construed in the light of surrounding circumstances or in the light of the Will as a whole. It is only in such cases that the Courts allow that extrinsic evidence be admitted so as to resolve the equivocation. Regarding the invitation of handwriting experts to offer expert opinion where the authorship of a Will is in dispute, the position of the law is that the opinion of the expert is meant to assist the judge in forming an opinion as to the authorship of the writing and thus is not binding on the Judge. The Judge rather has the final say as to who the author of the Will is.[32]

The justification for the application of the subjective approach to interpretation of Wills is that every person is bound to make a Will in a manner as he or she wills. Thus, as Knight Bruce said in the case of Bird v Luckie,[33] *"*no man is bound to make a Will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard might be able to answer most satisfactorily. *"*

This means that a Court is given little or no power to redraft the Will of a testator but rather is duty bound to construe the Will so as not to make a new one for the testator. Thus, once it is shown that the Will was freely made by the testator; was duly attested to by two (2) witnesses who were present at the same time and also that the testator at the time of executing the Will was corpus mentis i.e. not suffering from any impairment of mind, then it is presumed that the Will is valid.[34]

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[31] T.G. Feeney, The Canadian Law of Wills, 3d ed. (Markham, Butterworths, 1987) at pp. 66-67.

[32] Commey v Bentum-Williams [1984-86] 2 GLR 303 and In Re Blay Miezah (Decd); Ako Adjei & Anor v Kells & Another [2001-2002] SC GLR 339.

[33] (1850) 68 ER 373.

[34] In Re Blay-Miezah (Decd); Ako Adjei & Another v Kells & Another [2001-2002] SC GLR 339 and Dodoo & Another v Okine & Others [2003-2005] 1 GLR 630.

Reasonable Provision for Dependants in a Will

It is very common to find in Wills that a testator may decide to dispose of his properties in a Will and in the process leave out one or more persons that others would have presumed the testator should make a disposition of property to. This mostly becomes glaring when a testator makes a Will and decides to leave little or no provision for dependants such as a spouse, child, parent and the like.

An investigation into what may have accounted for the testator's decision to leave out some dependants may reveal elements of deliberateness on the part of the testator or forgetfulness in some other cases. The general rule, however, is that a testator is under no obligation to leave any fixed portion of his estate to his family. Thus, in the case of **Banks v Goodfellow**[35]**,** Cockburn C.J. stated that:

> The law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion or power of the new ties, or artful contrivance or sinister influences, may lead to the neglect of claims that ought to be attended to, yet, instincts, affections and common sentiments of mankind may be safely trusted to secure on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, that could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

The learned Chief Justice continued by saying that:

> It is obvious…that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties…

The above legal position, notwithstanding, Ghanaian law does not leave dependants without a remedy.

[35] [1870] L.R.Q.B. 549 at 564.

To relieve the family of the testator of unwarranted hardship[36], the Republican Constitution of Ghana[37] provides that "a spouse shall not be deprived of a reasonable provision of the estate of a spouse whether or not the spouse died having made a Will." Similarly, the Republican Constitution of Ghana[38] further provides that:

> (1) Parliament shall enact such laws as are necessary to ensure that –
>
> (b) every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents;

By these provisions, a duty is imposed on Parliament to ensure that a spouse or a child of a deceased testator is adequately provided for in the Will of deceased testator. Once such provision in the testator's Will is absent, the law allows the spouse or child to seek redress from the Court for an order making reasonable provision out of the estate of the deceased spouse or parent.[39] Furthermore, the *Wills Act*[40] provides further safeguards for dependants who are somewhat left out of the Will of a deceased testator.

Section 13 of the Wills Act provides as follows:

> (1) If, upon application being made, not later than three years from the date upon which probate of the will is granted, the High Court is of the opinion that a testator has not made reasonable provision whether during his lifetime or by his will, for the maintenance of any father, mother, spouse or child under 18 years of age of the testator, and that hardship will thereby be caused, the High Court may, taking account of all relevant circumstances, notwithstanding the provisions of the will, make reasonable provision for the needs of such father, mother, spouse or child out of the estate of the deceased.

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[36] Samuel Azu Crabbe, *Law of Wills in Ghana*, pg. 106 (Vieso Universal (Ghana) Ltd, 1998).

[37] 1992 Constitution of Ghana, Article 22(1).

[38] 1992 Constitution of Ghana, Article 28(1)(b).

[39] The provisions of the 1992 Constitution were similar to those contained in its predecessor Constitution being the 1979 Constitution of Ghana. Article 32 of the 1979 Constitution of Ghana provided as follows:

> *"2) No spouse may be deprived of a reasonable provision out of the estate of a spouse whether the estate be testate or intestate.*
>
> *3) Parliament shall enact such laws as are necessary to ensure:*
>
> *c) that every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents."*

[40] Wills Act of Ghana, 1971 (Act 360), Section 13.

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

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

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

The effect of the above provision in the Wills Act is to provide a limited statutory avenue to modify the right of a testator in the disposal of his or her self-acquired property. This provision allows the Court to overlook the testamentary freedom of the testator so as to make reasonable provision for the needs of the testator's parents, spouse or children, in the event that the testator makes little or no provision for them.

The *Wills Act*[41] defines "a spouse" to mean "the wife or husband of a deceased person" and a "child" to include "a person adopted under any enactment for the time being in force relating to adoption, any person recognized by the person in question to be his child or to whom he stands in loco parentis, and in the case of a Ghanaian, includes also any person recognized by customary law to be the child of such person."

In exercising the power to make reasonable provision for the needs of a dependant who was not adequately catered for under the testator's Will, the Court is empowered to order the "payment of a lump sum, whether immediate or deferred, or grant an annuity or a series of payments"[42] or the "grant of an estate or interest in immovable property for life or any lesser period."[43]

In order for the provisions of the Constitution and Wills Act to be properly invoked for an order for reasonable provision to be made by a Court, the Supreme Court in the case of Akua Marfoa v Margaret Akosua Agyeiwaa[44] stated that the following must be satisfied by the dependant/applicant who makes an application to the Court:

a. that the applicant is a dependant on the testator;

b. that the application has been brought within three (3) years after the granting of the probate of the will;

[41] Wills Act of Ghana, 1971 (Act 360), Section 18.
[42] Wills Act of Ghana, 1971 (Act 360), Section 13(2)(a).
[43] Wills Act of Ghana, 1971 (Act 360), Section 13(2)(b).
[44] Suit No. J4/42/2012 Per Baffoe-Bonnie JSC.

c. that the testator failed, either during his lifetime, or by his will, to make reasonable provision for the applicant;

d. that the applicant is suffering, or likely to suffer hardship, and

e. that having regard to all the relevant circumstances the applicant is entitled to support out of the estate of the testator.

The powers of a Court to make reasonable provision to a dependant of a testator in the Will of the testator are exercised with circumspection taking into consideration the *"relevant circumstances notwithstanding the provisions of the Will."*[45] In doing so, the Courts look at facts that touch the matter in question so much so that a judicial mind has no option than to regard it as something that ought to be taken into consideration.

The Courts look at the facts that are necessary in order to properly decide the application before it and these facts may include the relationship between the applicant and the testator and/or the behavior of the applicant during the lifetime of the testator. Thus, in the case of Re White[46], an application by a daughter of a deceased testator for an order for reasonable financial provision was refused on the basis that the ordinary relationship of mother and daughter had never existed between them.

Similarly, in Re Smallwood[47] extrinsic evidence was admitted in order to show that during the lifetime of the testator, the testator had complained of the conduct of the applicant towards the testator as a basis for refusing an application for reasonable financial provision.

The Jurisprudence of the Superior Courts of Ghana Regarding Reasonable Provision for Dependants

a. In re Anim-Addo (Decd): Nkansah alias Anane and Another v Amomah-Addo and Another[48]

In this case, the Widow/applicant of the testator brought an application under section 13(1) of the Wills Act in the High Court of Accra praying for an order for financial provision for herself and for her eight (8) year old son. In her affidavit in support, the

[45] Wills Act of Ghana, 1971 (Act 360), Section 13(1).
[46] (1914) Sh. 192.
[47] (1951) Ch. 369.
[48] [1989-1990] 2 GLR 67-70.

applicant stated that the contents of the Will were made known to the family on 19 April 1988 through the normal means. Furthermore, that the Will provided that the widow be given the sum of ¢100,000. The provision made for the said infant son was that he should be educated to secondary school level. The bulk of the estate was left to a niece of the testator and it comprised of 45 houses including the matrimonial home, shares in companies, plots of land, government stocks and cash balances.

Two (2) affidavits in opposition were filed on behalf of the respondents by Amomah-Addo, one of the executors, and Abena Asantewaah, one of the beneficiaries under the testator's will. Their claim was that the number of houses listed in the Will were twenty (20), out of which seven (7) had already been given out as gifts by the testator in his lifetime. They further claim, inter alia, that the testator in his lifetime built a house for the applicant in her hometown. That in spite of that fact, it was the intention of the family, the executors and the beneficiaries of the Will to allow the applicant to continue to live in her apartment in the matrimonial home and enjoy all the facilities in the house for life. This intention they have made known to the applicant.

Before the application could be moved, however, the executors of the estate of the deceased testator, through their Counsel, raised a preliminary legal objection to the said application on the grounds that the application was not properly before the Court because it could only be brought under section 13(1) of the Act when probate had been granted and that was yet to be done. This was premised on the contention that since the executors had no access to the properties to enable them execute any orders that the court might make, the application was premature and the court had no power to consider the application.

The Court per Emilia Aryee AG. J. *(as she then was)* dismissed the preliminary objection by stating that:

> when an executor was appointed by a Will, he derived title from the Will and the property of the deceased vested in him from the moment of the testator's death, so that probate was said to have relation to the time of the of the testator's death. Section 13 of the Wills Act, 1971 (Act 360), had its purpose: it was to warn beneficiaries and other persons claiming any interest in the estate of the testator or under the will to come forward within three years before the estate was shared out. Executors, unlike administrators, derived their power under the will and not from the grant of probate or letters of administration. The instant application for reasonable provision under section

> 13(1) of the Act was therefore properly before the court and the court had power to entertain it even before the grant of probate.[49]

It is submitted that the decision of the Court in this matter is sound and accords with the practice and jurisprudence of Ghana. It is worthy of note that the Court showed a willingness to allow the right of dependants of a deceased testator to appear before a Court of law requesting for an order of the Court making reasonable provision out of the Will of the deceased testator. Thus, a Court would not allow mere technicalities to deny a dependant of a share in the estate of a deceased testator.

b. Allotey (Decd.) In Re; Allotey v Otoo[50]

In this matter, the deceased made a nomination under the Pensions Ordinance, Cap. 30 (1951) Rev.), by which he apportioned his gratuity equitably amongst his three (3) children born at the time. Subsequently he had two (2) children with a second wife. The deceased made no alteration or amendment in the nomination paper. In an application for an order of variation of the nomination to enable all the five (5) children to share the gratuity equally, Counsel for the applicants (being the parents of the deceased on behalf of two (2) of the deceased's children) argued on behalf of the applicants that an analogy should be drawn between a nomination paper and a Will since both were to take effect after death. It was argued that since the court was empowered under section 13(1) of the Wills Act to male reasonable provision for the maintenance of dependants who had been catered for, the nomination paper should be varied to include the two (2) children who were left out.

The application was vehemently opposed by the three (3) elder children of the deceased on the grounds that such an order for maintenance should be made from the residue of the estate of the deceased. The Court per Cecilia Koranteng-Addow J. (as she then was) dismissed the application by stating that the "Pensions Ordinance, Cap. 30, under which a public officer had a discretion to make nominations in respect of his gratuity, did not give any discretion to the court to tamper with or vary the specific nominations of the deceased public officer. The applicants should therefore seek relief under section 17 of the Ordinance as amended by section 10 of the Pensions and Social Security (Amendment) Decree, 1975 (S.M.C.D. 8)."[51]

The Court further held that where a Court found out under the discretionary powers conferred on it by the Wills Act that no reasonable provision had been made for the

[49] Holding 1.
[50] [1981] GLR 393-397.
[51] Holding 1.

maintenance of the dependants of a deceased person, "the liability to make such provision for maintenance was in the same position as any other charge lawfully imposed on the estate. But where specific bequests had been made and there was residue then it would be ideal to make such statutory provision from the residue."[52]

Furthermore, the Court held that, "a gratuity did not form part of the estate upon which the provision for maintenance under the Wills Act, Section 13 (1) could be charged. The position of an applicant under section 13 (1) of Act 360 was the same as any other creditor of the estate. The amount should be levied upon a fund which was attachable; a gratuity was not attachable. In the view of the court the exception made for maintenance under Cap. 30, s. 12 (2) should be in respect of gratuity which had not been granted to anyone by the deceased and had been paid to a successor or an administrator."[53]

It is also submitted that the reasoning of the learned judge in this matter is sound and accords with the practice and jurisprudence of Ghana. The Courts expressed their continuous willingness to allow dependants of a deceased testator to appear before a Court of law and request for an order of the Court making reasonable provision out of the Will of the deceased testator as long as it is just to do so.

c. Humphrey-Bonsu and Another v Quaynor and Others[54]

In this matter, Mr. William Bart-Plange ("P" or the "deceased"), an accomplished businessman, died in March 1987 survived by seven (7) children, including the second and third plaintiffs as well as the first and second defendants. The second plaintiff who was a student at the time of P's death and the third plaintiff who was *crippled and mentally* retarded from birth, were only two (2) of four (4) surviving children of the deceased by the first plaintiff who claimed that she was still married to P at the time of his demise; while the first and second defendants were P's daughters by other women. The second and third plaintiffs were both aged over 18 years at the time of P's demise. By his will, probate of which was taken in May 1989, the deceased *inter alia* made devises of properties which included not less than four (4) self-acquired houses in the city of Accra to a number of his children particularly the first and second defendants; the second defendant was also an attesting witness to P's Will.

The devises to the first defendant under P's Will specifically include a house, No. CI42/4 at Kokomlemle in Accra. However, P did not make any provision in his Will in respect of

[52] Holding 2.
[53] Ibid.
[54] [1999-2000] 2 GLR 781.

any or all of the plaintiffs. Whereupon the plaintiffs (*with the first plaintiff suing for the third plaintiff as next friend*) jointly instituted an action under section 13(1) of the Wills Act against the defendants for an order to make provision under P's Will for the plaintiffs as the wife and children respectively of the deceased and for whom the deceased made no provision. The plaintiffs also alleged that the devises made to the second defendant were null and void in so far as the beneficiary was also an attesting witness to the will. The defendants opposed the plaintiff's action on the grounds inter alia that the first plaintiff was never married to P and that she only lived in concubinage with him so that she was not a wife to qualify as a dependent within the meaning of section 13(1) of the Wills Act.

In the course of the trial, however, the defendants shifted their position by an allegation that the first plaintiff had been guilty of desertion of P at the time of his death. The defendants further contended that since both the second and third plaintiffs were over eighteen (18) years of age at the time P died, they did not qualify as a *"child"* under section 13(1) of the Wills Act. At the trial there was unrebutted evidence from the plaintiffs to the effect, inter alia, that P and the first plaintiff were customarily married in 1950; that sometime in 1955 P deserted the first plaintiff but returned to live with her after about eight (8) years during which period the couple had about five (5) children before P deserted the first plaintiff again; that for a period of ten (10) years leading to P's demise the couple never co-habited and that it was P himself who allowed the first plaintiff to go and live in her mother's house for some time, except that he would not allow her to return to the matrimonial home because she had overstayed; that the first plaintiff tried to go back to the matrimonial home but P refused her the right for no just reason; that attempts by the families of the parties at reconciliation proved unsuccessful due to P's refusal to forgive the wife for overstaying the permission given to her to attend her mother's funeral; that no steps were ever taken to formally dissolve the marriage and that the first plaintiff was even permitted by P's family to perform customary rites assigned to surviving widows during P's funeral.

There was also overwhelming evidence that while they lived together P maintained the first plaintiff and the children and that even after the separation P continued to maintain the second and third plaintiffs but did not regularly maintain the first plaintiff. After the death of P, the responsibility for the upkeep and maintenance of the second and third plaintiff fell largely on the first plaintiff, a pensioner who, since 1980 when she received the sum of ¢12,000 as pension and gratuity from her employers, was not paid any monthly pension and had no significant source of income. At the end of a full trial on the merits, the learned trial judge found as a fact that the first plaintiff was a wife who was

lawfully married by custom to the deceased. The trial court also upheld the contention that the devises to the second defendant were contrary to section 3(4) of the Wills Act and thus fell into residue under section 8(1) of same. The court further held that since there was no residuary clause in P's will to cater for such eventualities the residue fell into intestacy to be distributed in terms of the Intestate Succession Law, 1985 (PNDCL 111).

Finally, the trial court, having found that the second plaintiff was still a student and that the third plaintiff was physically and mentally handicapped, held that they were dependants of P who would suffer hardship if no provision was made for them; hence the court upheld the plaintiff's claims. Specifically, the court *inter alia* ordered that under the provisions of section 13(1) of the Wills Act all rents obtainable from P's house, No. 142/4 Kokomlemle (which house was specifically devised to the first defendant) be paid to the chief register of the court as trustees for the reasonable maintenance of the first and third plaintiffs for the rest of their respective natural lives.

Being dissatisfied with the judgment and consequential orders of the trial court, the defendants filed the instant appeal on the grounds inter alia that:

i even if the status of the first plaintiff as a wife was conceded, she had on the evidence been guilty of desertion for ten (10) years and consequently had by her own conduct terminated the marriage;

ii to qualify as a dependant within the intendment of section 13(1) of the Wills Act, an applicant should have been substantially and regularly dependent on P and that since the second and third plaintiffs were more than eighteen years old at the time P died, they did not qualify as dependants under section 13(1) and

iii the trial judge erred when she ordered that all the rents obtainable from house No. C142/4, Kokomlemle which was a specific valid devise be applied as to the reasonable maintenance of the first plaintiff herself and the third plaintiff, the cripple and mentally retarded son of the deceased testator, when there were sufficient funds in the residue that could be used to give reasonable maintenance to the first and third plaintiffs.

The majority of the Court of Appeal presided over by Benin JA allowed the appeal of the defendants. On the issue of dependency which is of much relevance to this Article, the Court of Appeal held as follows:

> Although [the Wills Act] Act 360 did not define when dependency might arise, it would not be wrong to suggest that in the case of a child, if the evidence established that he or she relied on his or her parent wholly or in part for his or her means of subsistence, then a dependency would have been established; but in the case of a father or mother of a deceased, the evidence had to establish that they were, or either of them was, substantially dependent on the deceased testator. Gifts given to one's parent occasionally would not therefore qualify the parent as a dependant. However, in the case of a spouse the court would have to examine the extent of his or her earnings, earning capacity and contribution to the upkeep and maintenance of the other and if the surviving spouse was contributing more than the deceased or even in equal shares with the deceased, a dependency would not arise.

The majority of the Court of Appeal continued that:[55]

> In the instant case the evidence was overwhelming that P until his demise maintained the first plaintiff and the children while they lived together and that during their separation he continued to maintain the second and third plaintiff but his maintenance allowances to the first plaintiff was irregular. Yet since it was P himself who refused to allow the first plaintiff to return to the matrimonial home and thereby created the situation that enabled him to shirk his responsibility to the first plaintiff, the law would not permit him to say that because he was not maintaining the first plaintiff regularly, the latter was not his dependant."[56] In other words, the deceased having created the situation that enabled him to abandon his responsibility in a large measure, was not legally absolved and would consequently be held responsible for the maintenance of the first plaintiff, a pensioner with no significant source of income, even after the separation.

The decision of the majority on the issue of the dependency of the wife so as to qualify her as a beneficiary for reasonable provision under the deceased testator's Will, it is submitted, accords with the tenets of the 1992 Constitution, the Wills Act and the jurisprudence of the Superior Courts of Ghana.

On the issue regarding whether reasonable provision could be made out of the deceased testator's Will for the benefit of the third plaintiff, who was above eighteen (18) years,

[55] Ibid.
[56] Holding 2.

crippled and a mentally handicapped son of the deceased testator, the majority of the Court of Appeal held as follows:

> The language of section 13(1) of Act 360 admitted of no ambiguity whatsoever and in effect clearly prescribed that only a child of the testator under eighteen (18) years of age was entitled to the provision under the section. Hence the law maker clearly intended the natural age of a child to prevail. Consequently, the provision was to be enforced however harsh the result might be. In the instant case since both the second and third plaintiffs were eighteen years old at the time the testator died, they did not qualify as dependants under section 13(1), however much pain or grief one had for them, especially the third plaintiff." (emphasis mine)

Twumasi JA however dissented on the above issue regarding the refusal of the Court to order reasonable provision out of the Will of the deceased testator to the crippled and mentally disabled child of the testator on the basis that he was above the age of eighteen (18) and thus did not qualify as a dependant under the Wills Act. The learned Judge stated as follows:[57]

> The claim of the 3rd plaintiff provided the clearest archetype of the moral dimension in exercise of judicial discretion. This plaintiff suffers mental and physical disability from birth yet strict compliance with the letter of section 13 (1) of the Will Act 1972 (Act 360) disqualifies him from applying for a reasonable provision because the statute covers children under 18 years of age which he had passed at the date of the will. Counsel for the defendants relied on this case and reinforced his argument by quoting from a passage in the recent book "The Law of Wills" by the Hon. Justice Azu-Crabbe ex-Chief Justice of Ghana at page 111: as follows: "Unfortunately, the Act makes no provision for a child who though above the age of 18 years, is by reason of physical or mental disability, incapable of maintaining himself or herself. Nor does the Act make any provision directed towards alleviating the hardship of a child who is above the age of 18. In these circumstances the court is powerless, and it cannot make any order of relief.

The learned Judge continued as follows:[58]

> With regard to the question of the applicability of the provision of section 13(1) of Act 360 to the 3rd plaintiff I have found the construction placed on that

[57] [1999-2000] 2 GLR 781 at pg. 806.
[58] Ibid.

> subsection by the learned author of "The Law of Wills" to be too draconian and harsh with the greatest respect to the author. Clearly, he adopted the literal approach of statutory construction. But I conceive it to be a solemn duty of a court to construe a statue in such a way as would accord with commonsense and justice. (emphasis mine)

It is submitted in line with the reasoning of the learned Justice Twumasi that considering the circumstances of the 3rd plaintiff, specifically that he was crippled and mentally handicapped, the Court should have avoided the use of the strict-literalist approach to statutory interpretation and rather adopted a purposive approach which is more concerned with the policy rationale behind the restrictions imposed by the Wills Act. As the learned Judge put it, "the policy-rationale behind the age limitation to children under section 13(1) of the Wills Acts, 1971 (Act 360) proceeds on the understanding that at 18 a normal child would have been capable of maintaining himself or herself by his or her own effort."[59]

The jurisprudence of the Superior Courts of Ghana is that "in construing statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no further."[60]

Thus, in the circumstances, it is submitted that the majority of the Court of Appeal should have applied an interpretation of the provisions of the Wills Act which avoids a statutory result that somewhat "*flouts common sense and justice*"[61] thus rather holding that the 3rd plaintiff though above eighteen (18) years was to be treated as a dependant of the deceased testator due to his crippled and mentally unstable state. In his state, it was clear that the 3rd plaintiff should have been regarded as a *"child"* under the provisions of the Wills Act since he was incapable of maintaining himself by his own effort and abilities. Under no circumstances should the restrictive age limit of eighteen (18) years have applied to him.

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[59] [1999-2000] 2 GLR 781 at pg. 807.

[60] See Grey v Pearson (1857) 6 HLC 61 at 106 Per Lord Wensleydale and In re Dadzie (Deceased); Dadzie and Another v Addison and Another [1999-2000] 2 GLR 291.

[61] Re Margon-Wilson's Will Trust 1968 Ch 268 per Upgoed-Thomas J.

On the last issue regarding whether the learned trial judge was right in ordering that a specific valid devise be applied as reasonable maintenance of the first plaintiff and the third plaintiff, the majority of the Court of Appeal held that[62]:

> There was no specific law in place that an award under section 13(1) of Act 360 had to be made from the residue of the testator's estate, if any. Such a payment rather became a charge on the entire estate. However the ideal situation in practice in cases where the court considered it necessary to make provision to dependants of a testator was to apply the residue to begin with, as in its avowed duty of doing what was reasonable and just in the circumstance of any case, the court would not deprive specific legatees or beneficiaries of what was given them under the will where there was some other property or fund which could be applied to satisfy an award made under section 13(1) of Act 360. Hence the trial court, having found in the instant case that some of the properties devised by P had become void and thus fallen into residue and had become subject to the Intestate succession Law, 1985 (PNDCL 111), the order to pay compensation to the plaintiff should have fallen on the residue to begin with. It was not right in the circumstances to side-step the residuary estate in which the plaintiffs had a legal right and attach the specific property devised to the first defendant.

On this issue, Twumasi JA gave a dissenting opinion as follows:[63]

> The last criticism of the judgment was that the learned judge erred by not applying funds in the residue to settle the claim of the first and third plaintiffs. This ground of appeal has no merit because as I have already explained above the residue fell into intestacy and as such could not be applied under Act 360. Interested parties would therefore have to advise themselves as no application in relation the Intestate Succession Law, 1985 (PNDCL 111) was made before the High Court under the normal rules of procedure. I must explain that under PNDCL 111, interested persons extend beyond widows and children to parents and customary successors of intestate property. In such circumstances the ends of justice would not be served if the court which is called upon to provide reasonable provision under Act 360 assumed jurisdiction over property treated as residue as in the instant case.

[62] Holding 4.
[63] Ibid.

d. The Estate of Gideon Adofo-Koranteng Bridget Adofo-Koranteng v Edwin Effah and 6 Others[64]

In this case the Appellant, Bridget Adofo-Koranteng who was the surviving spouse of the late Gideon Adofo-Koranteng sought the intervention of the court for an order of reasonable provision for herself and of her child from the estate of her late husband, Gideon Adofo-Koranteng a retired Chief Inspector of the Ghana Police Service, under Article 22 and 28 of the 1992 Constitution and Section 13 of the Wills Act. She prayed the court to order that a three (3) Storey building at Frafraha be given to her and her seven (7) year-old daughter, Anita Adofo-Koranteng.

The deceased was survived by a wife and six (6) children. The deceased's Will was dated 20 June, 2014 and was made a day before he died. Probate of the Will was granted by the High Court on 30 September, 2014.There was no objection or caveat by anyone. The Appellant applied to vary the disposition in the Will and give the Frafraha property to her and Anita Adofo-Koranteng and the death benefits with Ghana Police Service and Bank Accounts in the following ratio:

- *30% to surviving spouse.*
- *40% to Anita Adofo-Koranteng.*
- *30% to other 5 children.*

Also, the applicant applied for an order that a Mercedes Benz car and other clothes be given to her and the property at Nkawkaw be given to the other children. The Appellant later amended the ratio of distribution of the Ghana Police Service Death Benefits by filing a supplementary affidavit that sought for 30% to the surviving spouse, 60% to Anita and 10% to the rest of the children. After considering the arguments of both sides, on 29 June, 2015, the High Court dismissed the application. Dissatisfied with the ruling, the Appellant filed an appeal primarily that the learned trial judge erred in law when she dismissed the Appellant's application as she failed to apply Articles 22 and 28 of the 1992 Constitution which mandates that reasonable provision be made out of the estate of a deceased person to his/her surviving spouse, and a child below eighteen (18) years.

The Court of Appeal presided over by Margaret Welbourne JA dismissed the appeal as lacking merit on the basis that what the appellant sought to do was to invite the Court to re-write the testator's Will and particularly, with regards to the distribution of the

[64] H1/34/15 dated 14th April, 2016, Court of Appeal, Accra.

death benefits from the Ghana Police Service, to grant a highly skewed distribution in her favor and her daughter which if acceded to would result in a 90% share of the Estate of the testator going to her and her daughter, whilst the remaining 10% share would go to the remaining five (5) children of the testator. The Court summarized it as being *"the height of covetousness and greed to put it mildly".*

The Court held that a situation under Section 13 of the Wills Act arises only when reasonable provision has not been made in the Will for the dependants and which would cause hardship to the dependant. In the present case, the Court was of the view that the contents of the Will showed that reasonable provision was already made for the appellant and her daughter. Thus, in order to invoke Article 22 of the 1992 Constitution to her aid, in the manner as the Appellant sought, the Appellant would have had to establish the fact that the property that she seeks was indeed and in fact jointly acquired by her and her late husband. This she failed to do.

This decision, it is submitted, seems sound having regard to the specific circumstances of the case in question. The decision of the Court resonates with a dictum of Amegatcher JSC in the Supreme Court decision of Thomas Tata Atanley Kofigah, Bilola Rose Atanley Kofigah (suing as the beneficiaries of the last Will and Testament of Thomas Atanley) v Kofigah Francis Atanley and Rev. Father Atsu[65] where he said that, "the practice whereby recalcitrant children challenge the Wills of their parents or guardians is becoming so rampant that it is time to call upon professional advisors to confront such children with the realities of life.." (emphasis mine)

e. Comfort Brew Anthony v Jean Anthony[66]

The Plaintiff who was the widow of the deceased testator, Lawrence Arthur Anthony, had her personal belongings thrown out of her matrimonial home by the Defendant who was an ex-wife of the deceased husband. The Plaintiff issued a writ when she realized that a Will of the late husband existed which makes the Defendant as the Executor/Trustee of the Will but did not make any provision at all, let alone a reasonable one for her. Accordingly, she sought, amongst others, a declaration that the Plaintiff is entitled to a reasonable provision from the estate of the deceased in accordance with section 13(1) of the Wills Act and Article 22(1) of the 1992 Constitution by reason of her being a surviving spouse. She also sought a further order directing the Defendant to give to the Plaintiff out of the estate of the deceased such reasonable provision as the Court determines.

[65] Civil Appeal No. J4/05/2019 Dated 22nd January, 2020. Supreme Court.
[66] Suit No. 1793/17 dated 15 May 2019, High Court Accra.

In a ruling in favor of the Plaintiff widow, the Court was satisfied that the Plaintiff fell within the class of persons specified under section 13(1) of the Wills Act and is actually a spouse under Article 22 of the Constitution for which reason she must not be denied a reasonable provision out of the estate of the deceased husband. The Court was of the view that having been with the testator for seventeen (17) years in a loving marriage, the circumstances are such that she must not be denied a reasonable provision out of the estate.

The Court concluded that the estate was substantial enough to accommodate a reasonable provision being made for the Plaintiff. The Court accordingly, after taking all the relevant factors in consideration, granted half of the interest in an Abelemkpe property but did not make any monetary award in addition to the interest in the Abelemkpe property. This decision, it is submitted, is sound law and should be upheld.

Conclusion

Indeed life, as precarious as it is, does have an end for which reason all mankind must prepare and put their *"houses"* in order before they eventually vacate it. In doing so, Wills have become very important and vital to ensuring that the last wishes of persons regarding their properties acquired during their lifetimes are honored after death.

The Ghanaian legal system has a comprehensive structure in place to ensure that the wishes of the deceased are carried out to the letter, no matter how unreasonable these wishes may seem. Courts as a general function and duty always seek to give sensible effect to the intentions of the testator and are mostly in favor of preserving the exact intentions of the testator as against modifying or destroying same. That notwithstanding, the law still envisages and caters for the scenario where persons who were dependent on the deceased before the time of the deceased's death and for whom adequate provision has not been provided for in the Will of the deceased, are able to apply for and receive reasonable provision out of the Will of the deceased testator.

In as much as Courts are reluctant to interfere with the exact wishes of a testator as contained in that testator's Will, the Courts have been emphatic (as highlighted in the above cases cited) that they are willing to make orders for reasonable provision out of the Will of a deceased testator in favour of a dependant who was for some reason omitted from the Will.

The Courts have highlighted that situations under Section 13 of the Wills Act would arise only when reasonable provision has not been made in the Will and which would

cause hardship to the dependant. Usually, the Court would consider that the applicant is indeed a dependant on the testator.

Furthermore, the application in question must have been brought within three (3) years after the granting of the probate of the will. In addition, it must be shown that indeed the testator failed, either during his lifetime, or by his will, to make reasonable provision for the applicant. An important point to establish is that the applicant is suffering, or likely to suffer hardship, and that having regard to all the relevant circumstances the applicant is entitled to support out of the estate of the testator.

For majority of the cases that have been decided, the Superior Courts of Ghana have shown through the decisions that they are willing to make orders for reasonable provision when it is just to do so. However, the Courts have not succeeded in providing clarity on which devises and bequests would have to be disturbed in order to make reasonable provision for affected dependants. It is suggested that the Superior Courts of judicature take steps to clarify what extent of disturbance of the Will would be allowed in order to make reasonable provision for the dependants of the deceased.

Also, the Superior Courts of Ghana seem to show fidelity to the strict wording of the statute to the extent that the strict constructionist approach has led to some unjust and unreasonable consequences as highlighted in the Humphrey Bonsu decision *supra*. Indeed, the interpretation adopted by the majority of the Court appears to be draconian and harsh and does not accord with a modern purposive approach to interpretation.

Clearly, the decision of the Court to adopt the literal approach of statutory construction so as to deny an applicant who was suffering from a *"mental and physical disability from birth"* in strict compliance with the wording of section 13 (1) of the Wills Act only resulted in unjustly disqualifying him from applying for a reasonable provision because the statute covers children under 18 years of age and this was unfortunate.

The Courts are duty bound to provide for the interest of an applicant as in the Humphrey Bonsu case who though above the age of 18 years, is by reason of physical or mental disability, incapable of maintaining himself or herself even though the Act did not make any provision directed towards alleviating the hardship of such an applicant. Such a result is the duty and expectation of every court who is required to construe a statue in such a way as would accord with commonsense and justice.

In conclusion, it is submitted that from the place of logic, the rules regarding the legal claim for reasonable provision for dependants out of the Will of a deceased testator

seem robust enough to stand the test of time. But like Oliver Wendel Holmes said, *"the life of the law is not logic but experience"*.

Accordingly, it is believed that through continuous application of the laws to fact situations, the jurisprudence on the subject would be developed through the agency of experimental judicial pronouncement so as to fashion out a more just outcome for all and sundry.

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