

ESTATE PLANNING OPTIONS: BEYOND A WILL AS A TOOL FOR ESTATE PLANNING.



When people talk about estate management, the first thing that comes to mind is a Will, and rightly so, as it is a document that sets the tone and gives instruction for the management of a person's estate. But is it truly the only and best way to plan one's estate? The answer to this question lies in several factors: the intention of the estate owner, the type of assets in the estate, the worth of the assets, and the custom and religion applicable to the estate owner. In this piece, we shall analyse the peculiarities of a Will, its usage, and the different estate management options which can be used as a guide in planning your estate. And just in case you are not ready to plan your estate, then the implication is that you are leaving to chance, to customs, to traditions, to family members including extended family, every single thing that you have laboured for, to be managed and disposed as they so please..

Estate Planning Objectives

Three major objectives must be borne in mind in the planning of an estate. One is to reduce the assets in the estate that becomes subject of the 10% estate duty payable to the Government. The second is easy access to funding of funeral rites amongst other post-death obligations. The third, is to ensure that the estate is simple and easy to manage. A simple estate reduces conflict, as well as the burden of the executors or administrators in its management. A Will alone does not guarantee the achievement of these objectives particularly for a large estate. A Will could be utilized in conjunction with other estate management options. The estate planning options that can be combined with a Will in the planning of an estate includes Trust, Gift, Life Insurance, Corporatization, Joint Tenancy, and Power of Attorney. These options serve different objectives, with the overall goal of reducing estate duty and simplifying the administration of the estate. Each option is also more suited for the different types of assets in an estate. Assets include real, personal, tangible and intangible assets owned by the estate such as; land, buildings, money, jewelries, cars, gadgets, art works, shares & stock, intellectual properties, pension, unpartitioned or unshared family inheritance, etc..

Peculiarities Of A Will

A Will is the most disputed of all the estate management options, and this is simply because of its testamentary nature. It takes effect after the death of the maker. Although, this is one of the reasons there are statutory provisions regulating the making, content, execution, location, and administration of a Will. It is however also a major clog, as the Will can be invalidated where it is established that there is non-compliance with any of the statutory provisions.

Two major factors that can invalidate a Will are; incapacity of the testator at the time of making the Will (which can be inferred from mental health, delusion, undue influence, and other suspicious circumstance); and lack of due execution of the Will.

The Will is usually challenged by either a beneficiary, who is dissatisfied with his/her gift or quantum; or a person who had expectations of being a beneficiary but was not made one. The Wills laws of most states in Nigeria permit instances for the amendment/alteration of a Will to accommodate new beneficiaries under the concept of reasonable financial provision.



This is to the effect that where the Will does not benefit a person that the testator was responsible for wholly or partly, and the testator made substantial contribution in money or money's worth towards the reasonable needs of the person during his/her lifetime, such a person can apply to the court for reasonable financial provision to be made from the testator's estate. This benefit is however limited to the spouse, children, parents, and siblings of the testator that the testator was responsible for during his lifetime. This is contrary to the other estate management options, where there need not be any connection or justification of the benefit to the beneficiaries, and no other person can apply to partake in it.

Furthermore, regardless of the testamentary freedom available to the maker of a Will, it is fettered with restrictions on the basis of religious and customary grounds. The restriction on customary grounds is tied to the property. The Wills Law of most States in Nigeria, exclude the properties which the testator had no power to dispose of by virtue of the customary law that the testator was subject to during his lifetime. What this means is that the testator cannot by Will give out a property contrary to the manner in which the custom of the testator dictates. As such, the testator can dispose of all properties in the manner he/she so desires, save for the property that custom has dictated the manner of inheritance. Examples of properties usually affected under this restriction in some customs are ancestral homes, the burial site of the testator, or the property where the testator lived and died, and they would usually devolve on the first son.

The second restriction, which is on religion, in this case Islamic law restriction, is to the effect that a person subject to Islamic law immediately before death cannot dispose of more than one-third of his/her properties to persons who are not his/her heirs. Two-third of the properties must be distributed in accordance with Islamic law, regardless of any contrary provision in the Will.

Another concern with Wills as an option for estate planning is the appointment of executors.

Administration of an estate by executors appointed in a Will, particularly where there are many assets, requires some level of administrative skills, financial responsibility, and trust. Also, the executors must be ready, willing, and available as it is no small task. The incentive to act as executor has to be right as well, particularly for individual executors. This could be financial (usually provided in the Will), loyalty and friendship with the maker of the Will. Practically, the maker of a Will would opt for reliable friends. They are usually within the age grade of the maker, and this increases the chances of the executors predeceasing the maker of the Will. This can be mitigated by the appointment of trust corporations as executors.

Notwithstanding all the above religious, customary and moral restrictions, the likelihood of invalidating a Will, and the applicable 10% estate duty, a Will is indeed fundamental in estate management, and may be utilized either alone or preferably in conjunction with the other suitable options for the following reasons:

- a. It is an instrument that is effective in giving standing instructions on the management of assets, burial instructions, instructions on provision for children, executors' instruction, etc.
- b. It preserves the residue of an estate and can provide for its beneficiary and management. This residuary will cover failed gifts, and other assets not mentioned by the maker or that was acquired after the making of the Will.
- c. It is also utilized to avoid the problems of intestacy which subjects the estate to customary law.

Other Estate Management Options

Corporatization

Corporatization here means the setting up of a special purpose vehicle and vesting the assets in it. What this means is that a company will be registered in Nigeria, and all relevant assets will be transferred to the company. This is appropriate for real estate, intellectual property, and even shares. Under this arrangement, the assets become that of the company. The estate owner can then be a director (preferably a life director), and the majority shareholder in the company. Other beneficiaries can be made shareholders as well. The Articles of Association of the company will provide for management of assets, such as subjecting the powers to dispose the properties to a majority vote of the Board of Directors and/or shareholders. Restrictions will also be placed on the transfer of shares.

One of the benefits of this option is that the property will not be subject to any customary/Islamic restriction, as it no longer belongs to the testator. Also, it is only the shares of the testator that will be subject to estate duty, and not the assets of the company. Furthermore, the testator can change the dynamics of shareholding in the Company either in his lifetime or through his Will. It thus eliminates beneficiary disputes, because the nature of each party's interest has been determined by the shareholding structure during the owner's lifetime.

This option has its downsides. First, the only instruction that the testator can give upon his demise is the transfer of his shares as provided in the Will. The shareholders will thus make decisions on the properties such as sale, lease, etc.



Also, where siblings or beneficiaries are not in one accord or there is lack of trust, this might slow down the process of disposing assets. The second disadvantage is the tax implication. Although, estate duty will not be paid, the disposal of the properties by the beneficiaries will attract capital gains tax of 10%. This is equally the case where the owner of the assets desires to transfer the properties to the company. Corporatization will also attract filings with Government agencies, taxes, and other costs associated with the running of a company. The filings include annual returns, post-annual general meeting filings, etc. The taxes include stamp duties on shares, withholding tax, companies' income tax, tertiary education tax, etc. The costs include cost of retaining a company secretary, auditor, etc.

Gift

This is where a person during his/her lifetime commences distribution of some or all of his/her assets by giving it out to the beneficiaries as a gift. All types of assets can be gifted including land, personal properties, cash, etc. A deed of gift will be required where the asset being transferred is a land. This option is cheaper, as all the beneficiaries need to do is to perfect their title in the case of real properties. This reduces the assets in the estate, and consequently, estate duty. This is also less contested, as it will take effect during the lifetime of the owner. The only disadvantage is that once given, it is not revocable. It becomes the property of the beneficiary to utilise or dispose as he/she pleases.

Power of Attorney

Under this option, the estate owner appoints a person to act in his/her stead on several subject matters during his/her lifetime, which will include the management and disposal of properties, access to bank account, etc. This is particularly useful where the estate owner is ill or incapacitated or has any physical impairments that makes it difficult for him/her to manage his/her affairs. The power of attorney can either be made revocable or irrevocable. It could be for a fixed term, and the powers can also be general or specific to a subject matter. It can also take effect upon the happening of an event.

The advantage of this option is that it does not prevent the estate owner from carrying out the acts that has been delegated, particularly where the power of attorney is revocable. Also, the estate will still be managed smoothly where the owner is either temporarily or permanently incapacitated.

Life Insurance

Life Insurance is a viable option where the estate owner intends to set aside money for the beneficiary(ies) upon his/her death. This is suited to monies and is better than leaving it in bank accounts because, monies left in bank accounts will not be accessed by the estate until probate is concluded and 10% paid to the Government. The claim payable on life insurance on the other hand becomes due to the named beneficiaries upon the demise of the assured. One advantage of this option is that it can be flexible to permit the assured to recall the premium during his/her lifetime. The beneficiaries can also be changed. This option provides quick access to fund for burial and probate process. The claim will also not be included in the computation of the estate duty.

Trust

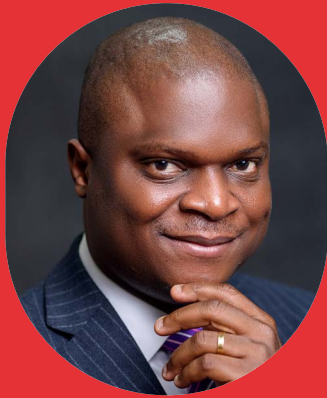
A Trust is a tripartite fiduciary agreement which allows the estate owner to transfer assets to a trustee for the benefit of the beneficiaries. This can be created during the grantor's lifetime or via a Will, otherwise known as living trust and testamentary trust respectively. It is however important to note that a testamentary trust makes the subject of the trust part of the estate and consequently makes it liable to estate duty. Living trust is more beneficial as it can be made revocable, and it gives the grantor control over the assets. This is more suited for landed properties, and the terms of the trust can include management of the assets and rent collection.

Conclusion

In conclusion, a Will is not the only estate management option. It is however a vital estate management option for providing instructions and capturing the residuary of the estate. The customs, religion, and the applicable Wills Law of the State must be considered in the preparation of a Will. The other options should however be utilized to simplify and reduce assets in an estate.

It is thus necessary for an expert in estate management to be consulted, to properly guide the estate owner in the identification of suitable option(s) and navigating the nuances of a Will.

KEY CONTACTS



TAIWO ADESHINA

*Expert in Estate Management
Head of the Private and
Commercial Services Group*

taiwo.adeshina@jee.africa



OBIOMA OKONKWO

*Expert in Estate Management
Member of the Private and
Commercial Services Group*

obioma.okonkwo@jee.africa



Jackson, Etti & Edu

RCO Court 3-5, Sinari Daranijo Street, **t:** +234 (1) 4626841/3, +234 (1) 2806989
f: +234 (1) 2716889 Victoria Island, Lagos, Nigeria. **e:** jee@jee.africa www.jee.africa