ILLEGITIMACY AND THE RIGHT TO INHERITANCE OF PROPERTY

Chinemere M. Oluigbo, Esq.

Abstract
The provisions of Section 39(2) of the 1979 Constitution (now Section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) altered the dynamics and changed the landscape of our law with respect to the issue of legitimacy in relation to right to succession. The rule in *Alake v. Pratt* and *Cole v. Akinyele* erstwhile regulated and guided our courts in determining the status of a child born outside wedlock and as a corollary, his right to inherit the property of the intestate father. Thus a child who was born out of wedlock, but whose paternity was not acknowledged by the putative father or was acknowledged but by the rule in *Cole v. Akinyele* such acknowledged was a nullity, could not partake in the inheritance of his late father's estate. This paper seeks to argue that in the light of the provisions of Section 42 (2) of the 1999 constitution, that the principle in *Cole v. Akinyele* or any other principle of law predicating the right to inheritance on any form of acknowledgment cannot be the barometer in determining the status of a child born outside wedlock in relation to his right to share in the inheritance of his biological father's estate. It is further argued that public policy which has served as an anchorage for some of these erroneous judicial decisions is itself a continuum; to be applied with great circumspection and should be juxtaposed with contemporary civilized norm.

BODY OF WORK.

The issue of legitimacy which is hardly inseparable from the question of status has provoked so much controversy and has continued to question and task the ingenuity of Nigerian Judges. It has always presented itself as a socio-legal conundrum partly because of the socio-cultural stigma attached to the status of illegitimacy and chiefly because to a very large extent, it determines the right to inheritance of the property of an intestate.

In *Osho v. Phillip*[1] Madariken JSC opined;

> We think that, on the accepted facts of this case, what we need to consider first is the status of the plaintiffs who were born as a result of the association of the deceased with another woman during the subsistence of a valid legal marriage under the Marriage Act on the authority of the case of *Cole &Anor v. P.A Akinyele&Ors*…. we have no doubt that the plaintiffs were illegitimate...there can be no question that the defendants being legitimate children of Solomon Ajibola Phillips deceased by his legal wife had a right to succeed to the property of the deceased to the exclusion of the plaintiffs.

The facts of the above case are as follows:

Chinemere M. Oluigbo, Esq.
* LL.B Hons. (Nig.), B.L,.Onitsha-based Legal practitioner.
Pupil, Afuba, Anaenugwu, Obi & Partners.
Email: oluigbochinemere@yahoo.com; 08069358242.

* In this paper, the word "illegitimate" is loosely used to refer to a child born outside wedlock.

[1] (1972) 7 NSCC 172 @ 178 & 179 (50),180 (35)

The plaintiffs/respondents brought an action for a declaration that they were entitled to share in the distribution of the real estate of one Solomon Ajibola Philips with the defendants/appellants. The case of the respondents was that being children of the intestate Solomon Ajibola Philips, they were entitled to share in the estate with the appellants who were also children of the intestate.
The appellants on their own part claimed that they were issues of a statutory marriage and that the respondents were not entitled to share in the estate of the deceased insofar as they were born during the lifetime of their mother, Mrs. Christiana Philips and the currency of the marriage between her and the deceased. They sought to prove this by tendering a copy of the marriage certificate which was issued and endorsed by the church.

The trial court held that the said marriage certificate was insufficient to prove a valid marriage under the Marriage Act and gave judgment in favour of the respondents.
Dissatisfied, the appellants appealed to the Supreme Court which overturned the decision of the trial judge and held that the production of the marriage certificate was sufficient proof of the marriage between the deceased and Mrs. Christiana Philips.
The court went further to hold that:

> The defendants being the legitimate children of the intestate by his legal wife under the Marriage Act, they have a right under Section 36 of the Act to succeed to the deceased's property to the exclusion of the plaintiffs, who were as a result of the deceased's association with another woman during the subsistence of a legal marriage under the act and are therefore illegitimate.[2]

The above case was preceded by and in fact relied upon the earlier case of *Cole v Akinyele*.[3]
In that case, the deceased Albert Cole, in the course of his lifetime was married under the Act on two occasions. The first respondent was his sole surviving child by the first marriage, which was terminated by the death of the wife, while the second respondent was his wife of the second marriage who survived him. During the subsistence of the first marriage the deceased maintained an irregular association with the mother of the two appellants. The first appellant was born during the subsistence of the first marriage and the second, some six weeks after the death of the first wife, when the deceased was a widower. Albert Cole died intestate and the appellants claimed to be entitled to share with the children of the first statutory marriage in the distribution of his estate.

Holding that the first appellant was not entitled to share in the estate of the intestate Brett, FJ held:

> I would hold it contrary to Public Policy for him (the deceased) to be able to legitimate an illegitimate child born during the continuance of his marriage under the ordinance by any other method than that provided in the legitimacy ordinance… to hold otherwise would reduce the distinction between customary law marriage and statutory marriage to a mere form of words.[4]

With respect to the 2nd appellant, the Court held that the material time in determining the validity of his acknowledgment is not the time of conception but the time of his birth. Thus the 2nd appellant being born at the time when the father was at liberty to marry and was acknowledged by his father at such time, legitimized him in law and therefore entitled him to share in the deceased's estate.

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[2] Ibid. P. 180.
[3] (1960) 5 FSC 84.
[4] Ibid. P. 88.

Brett FJ declined to rely on and distinguished the earlier case of *Alake v. Pratt*,[5] which approved the custom of legitimization of children born out of wedlock by acknowledgment of paternity and placed such legitimized children in the same position as children conceived in lawful wedlock in the inheritance of the estate of an intestate.

According to the learned Supreme Court justice, the principle in *Alake v. Pratt*,[6] was applicable only to the extent of children not born during the continuance of a statutory marriage.
Apart from the many strictures that have trailed the above dictum of Brett FJ.,[7] it is submitted that it does not and should not represent the current position of the law in Nigeria in the light of Section 42(2) of the constitution of the Federal Republic of Nigeria 1999 (as amended).
The revolutionary sub-section which was originally enacted as Section 39(2) of the 1979 constitution provides:
"No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth".
The above Section we respectfully submit was intended to obliterate or at least whittle down the effect and attendant problems of illegitimacy both in a social context and with respect to its legal ramifications. As succinctly pointed out by Nwogwugwu,[8] this provision was "the first attempt to address the consequences of illegitimacy in Nigeria…"

The rationale for the above constitutional provision as offered by the proffer of the text in the constitution drafting committee in 1978 is testamentary to this fact. It reads thus:

> There is no doubt that all of us have had no choice, nor were we given an option, as to who would be our parents before we were born. If we were given an option, I am sure that there will be none of us who would prefer to be born by wretched parents, to be born of a slave or even to be born by prostitutes. We would prefer to be born by people who are legally married. This enactment is saying that on no account should a person be discriminated against merely by reasons of circumstances of his birth.[9]

The mischief rule is a cardinal principle of interpretation in Nigeria.[10] A court in exercising its adjudicatory powers must look at the position of the law before a particular enactment was made and see the mischief

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5 (1955) 15 WACA 20.
6 *(Supra).*
7 See E.I. Nwogwugwu Family Law in Nigeria, 3rd ed. (HEBN Publishers Plc, 2014) p. 318. Where the learned author argued that "it is difficult to justify the distinction which Brett, F.J. made in respect of the status of the two appellants. Public policy is no more outraged at the time the first appellant was born there at the time the second appellant was conceived. If the prohibition of promiscuity is the guiding factor, the conduct of the appellants' parents was equally in morally and legally wrong at the time of birth in the first case as at that of conceiving the second appellant".
See also ItseSagay Nigerian Law of Succession, (Malthause Press Ltd, 2006) p. 8, M.C.Onokah, Family Law, (Spectrum Books Ltd, 2003) p. 368.
8 Nwogwugwu op. cit, p. 308.
9 Mr. J.O. Aghiemien, Proceedings of the constituent assembly (official report) Vol. III p. 2346. Columns 7664-7665, Federal Ministry of Information, Printing Division, Lagos.36 (1932) 11 NLR 47.Cited in E.I in Nwogwugwu, Family Law in Nigeria, 3rd ed. (HEBN Publishers Plc, 2014) p. 308.
10 Heydon's case (1584) 3 Col. Rep. 78, 76, ER 638..Salami JCA also held in *Opera v. Opadiran* (1994) NWLR (Pt. 344) P. 368 at P. 381 paras G – H that "The purpose for which a statute or provisions thereof has been made and its nature and the intention of the legislature in making it which is known as social policy or mischief rule can be taken into consideration by the court in arriving at a decision…"

which it was set to cure and give its judgment in such a manner that the mischief is suppressed and the social policy is advanced.
The Court of Appeal apparently lost sight of this when it decided the case of *Motoh v. Motoh*.[11]
In that case the respondent sued the original defendants claiming a declaration that he is the *okpala* and only male issue of late Jeremaih Anagor Motoh according to the custom of Umuanagavillage,Awka. The respondent further averred that the deceased married two wives, the defendant and his mother and that the defendant had six female children while his mother had him and his sister. He claimed that throughout the deceased lifetime he was recognized by the deceased as the *okpala,* the only son and heir. The defendant on her own part refuted the claim of the respondent and claimed that she was the only wife of the deceased who married her under the Marriage Act and that the deceased never recognized the respondent as his son or his *okpala.*

At conclusion of hearing, the trial court found in favour of the respondent and granted his claims.
Dissatisfied with the judgment, the appellants appealed to the court of appeal.
Overturning the decision of the trial judge, the court of Appeal *per* Aboki JCA put the litmus test thus:

> The central issue for determination is whether the plaintiff/respondent had proved that he was a legitimate child of late Jeremiah Anagor Motoh and therefore entitled to inherit his estate.[12]

The court went further to hold that:

> The plaintiff/respondent had claimed to be a son of the late Jeremiah AnagorMotoh, however being a biological father is different from being a father legally in the eyes of the law. All the witnesses, who testified on behalf of the plaintiff/respondent only gave evidence to the fact that the plaintiff/respondent's mother was allegedly married to late Jeremiah Anagor Motoh and gave birth to the plaintiff/respondent while late Jeremaih Anagor Motoh was alive.[13]

The court relying on the cases of *Alake v. Pratt* and the modifications made thereto in *Cole v. Akinyele*and *Osho v. Philips* in disinheriting the respondent held that there was no evidence that the late Jeremiah AnagorMotoh whom the respondent claimed to be his father, acknowledged his paternity either on record or by conduct. It further held that "the respondent is not a child of the late Jeremiah AnagorMotoh because he is a product of an unlawful, null and void marriage"[14]
With all due respect, the reasoning of the learned justices of the Court of appeal in the above decision couldn't have been more misconceived.
Firstly, the fact that a person is a product of an amorous relationship between his mother and a man married under statute should not guide the court in determining his right to succession. The court should not think that by disinheriting the child they are reinforcing public policy and morals. On the contrary, the courts are simply applauding the man's conduct on one hand and punishing the child on the other hand. Such illogicality cannot be christened public policy or justice by the courts.
Sagay succinctly captured this point when he said that:

> The blood tie and the deceased's responsibility for bringing them into the world cannot be eradicated...it would certainly be in accord with equity in

[11] (2011) 16 NWLR (Pt. 1274) p. 474.
[12] Ibid. p. 529, paras H.
[13] Ibid. p. 529, paras A – C.
[14] Ibid. p. 533, paras A – B.

> the broadest sense, not to subject a child to punishment and deprivation for the 'sin' and 'omissions' of his parents.[15]

Secondly, the learned justice of the Court of appeal who delivered the lead judgment asked the wrong question. The "central issue for determination" should not have been "whether the plaintiff/respondent had proved that he was a legitimate child of the intestate and therefore entitled to inherit his estate" but "whether the plaintiff/respondent had proved that he is a biological son of the intestate and therefore entitled to inherit his estate."

The court predicating the entitlement of the plaintiff/respondent to inherit the intestate's estate on legitimacy by a valid act of acknowledgement is wrong and overlooks the clear provisions of section 42(2) of the constitution and the intendment of the drafters.

The said sub-section may not tear or remove the toga or halo of illegitimacy that hovers around persons born out of wedlock in a social context[16] but is principally intended to remove every legal obstacle or deprivation that such children born out of wedlock may experience in life more especially in the sharing of their putative father's estate.

It is startling that Aboki JCA had "no difficulty" in relying on Niki Tobi's poetic exposition in *Mojekwu v. Mojekwu.,*[17] which was based on Section 42 of the constitution in holding that:

> The native law and custom of UmuanagaAwka which discriminates against female children of the same parents and favours the male child who inherits all the estate of their father to the exclusion of his female siblings to be repugnant to natural justice, equity and good conscience.

If the learned justice had such level of "justice" in him, one wonders why he then found it difficult to see the injustice in favouring one child born of the same father over another just for the mere fact that one was born out of wedlock. The Court probably forgot or chose to forget that in the case of *Mojekwu v. Mojekwu* it relied upon Tobi JCA (as he then was) also said that:

> Day after day, month after month and year after year, we hear of and read about customs which discriminate against the womenfolk in this country. They are regarded as inferior to the menfolk. Why should it be so? "All human beings-male and female-are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional...it is the monopoly of God to determine the sex of a baby and not the parents...I believe that God, the creator of human being, is also the final authority of who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing.[18]

If the logic and sentiments in the above dictum is to be relied upon it follows that it is the sole prerogative and arrogation of God to determine the status of birth of a child and not the child himself. It would therefore be discriminatory of the society or the courts to discriminate against such child based on a choice not made by him but others.

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15 Sagay, op. cit. p. 12.

16 "… the conclusion which can be confidently reached is that section 42(2) did not abolish the status of illegitimacy in Nigerian. It merely ameliorated that status by removing the disabilities and deprivations attached thereto". Nwogwugwu, *op cit*. p. 309.

17 (1997) 7 NWLR (Pt. 512) p. 283.

18 Ibid. p. 304 – 305.

In support of the above, Sagay argues that:

> It is definitely repugnant to natural justice, equity and good conscience and a gross breach of human rights, to condemn a human being to discrimination and deprivation because of the circumstances of his birth over which he has no control or say.[19]

Thus our argument is that if the question of inheritance of property arises in our courts, the courts should resist the temptation to follow sheepishly and slavishly the principle in *Cole v. Akinyele* and *Osho v. Philips*. These cases were pre-1979 cases and were decided based on the prevailing law, social norms and understanding at the time.

The law is that if the issue of right to inheritance of the estate of an intestate comes up for determination the question the court should ask itself is which of the parties to the case was fathered by the intestate. If the court finds that any party to the case was fathered by the intestate he should be entitled to share in the estate of his biological father, his "illegitimate" status notwithstanding.

Onokah has queried that:

> Taking into consideration the provisions of Section 39(2) of the 1979 constitution (now section.42 (2) 1999 constitution (as amended)...,one wonders how far the courts implement this federal law in terms of illegitimacy in intestate succession relating to the statutory marriages. Although it is appreciated that the courts are handicapped by the provisions of the Legitimacy Act which is in contradistinction to the rules of customary law marriage law, but the rationale for the above provision is that such children should not bear the brunt of the facts of their births which arose from the conduct of their respective parents.[20]

Curiously, the writer went ahead to suggest that:

> The discrimination against illegitimate children in intestate succession touching on statutory marriages calls for re-examination by the law-makers in Nigeria with a view to placing them on the same footing with children born outside customary law marriages.[21]

While the opinion expressed by the learned writer on the rationale behind the enactment of section 42(2) is unassailable, we find it hard to reconcile it with the second limb suggesting a "re-examination" of the existing law.

As she rightly pointed out earlier, the intendment of Section 42(2) is to place children born illegitimate on the same footing as children born legitimate in intestate succession. This is irrespective of the nature of the marriage contracted by their putative father that rendered them illegitimate.

It is quizzical that the author having made this fine point would call for the re-examination of the law when the emphasis should be on the Courts in Nigeria giving life to the letters of the law which has abundantly and comprehensively taken care of the "discrimination against illegitimate children in intestate succession."

Being a constitutional provision, the existence of an Act or principle of law that runs contrary to section 42(2) cannot provide a safe haven for or offer salvation to a Court that refuses to apply it.

[19] Sagay, op. cit. p. 16.
[20] Onokah, op. cit. p. 373-374.
[21] Ibid.

Happily, Nwogwugwu was more assertive and emphatic when he wrote that "...in the light of Section 42 (2) of the 1999 Constitution, non-legitimization by whatever means does not constitute a bar to participation in the distribution of the natural father's estate."[22]
The public policy consideration that has hitherto informed the court's recalcitrance[23] in accepting and applying the provisions of Section 42(2) of the constitution is unfounded.
Apart from the fact that public policy itself is a continuum; fluid, amorphous and fickle in nature[24] which is as observed by Burrough. J.;" is a very unruly horse and when one get astride it you never know where it will carry you",[25] it does not in law or in fact justify the approach of unduly favouring children born "legitimate" over children born "illegitimate" in the inheritance of the estate of their father.

To this end Sagay, in criticizing the decision in *Dacosta*.,[26]where the court's decision in disinheriting a child born outside wedlock was informed by public policy, writes:

> The social and public policy reasons advanced by the judge for this decision in this case are untenable. If a man who has voluntarily submitted himself, to be bound by social norms created by monogamy, has children outside his marriage, it is futile to think that by punishing the children of such unions, the man is being posthumously compelled to abide by the said social norms, and public policy. This, to say the least is absurd, and repugnant to natural justice, equity and good conscience. Apart from the above, such approach is extremely illogical.

However, the Court of appeal in *TEA Salubi v. Mrs. Benedicta Nwariakwu & ors.,*[27]appreciated the spirit in which Section 42(2) was enacted.
In that case, the intestate, chief TEA Salubi was married to Mrs. Angela Salubi under the Marriage Act in 1939. Two children were born of this marriage, namely the appellant, Dr. T.E.A. Salubi and the 1st respondent Mrs. BenedictaNwariakwu. At a later date, the deceased had two other children from two different women born out of wedlock.

Chief T.E.A. Salubi died in 1982 and subsequently his first son, Dr. T.E.A. Salubi, the appellant in this case, and the widow of the intestate were granted letters of administration over the estate. Due to old age and ill-health, the widow could not effectively partake in the administration of the estate and the appellant was largely the sole administrator of the estate. The first respondent who was the sister to the appellant (born of the same mother) was dissatisfied with the way the appellant was managing the estate and after all the efforts to call the appellant to order and resolve the dispute amicably at the family level failed, the 1st respondent instituted an action in court.

At the close of hearing the learned trial judge held that the first respondent had made out a case to warrant his setting aside the letters of administration earlier granted in respect of the estate among parties entitled

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22 Nwogwugwu, *op. cit* p. 319.
23 See.Ketunde Da Costa & ors v. Juliana Fasehun & ors. (Unreported) Suit No. M/150/80). High Court of Lagos, OladipoWilliams, J, 22nd May, 1981.Where the court's decision in disinheriting a child born outside wedlock was informed by public policy.
24 See Parke B's dictum on public policy in Egerton v. Browlow, 4 H.L.C. 1 at p. 123.
25 *Richardson v. Mellish* (1824) 2 Big.252 quoted by Lord Bramwell in *Mogul Steamship Co., McCrewgor,*Gow*and others*, 66 L.T. Rep. 6.
26 Ketunde Da Costa &ors v. Juliana Fasehun&ors.(Supra).
27 (1997) 5 NWLR (Pt. 505) 442

thereto. (i.e. the two children of statutory marriage). It held that the two other children being born out of wedlock were illegitimate and therefore not entitled to inherit the intestate's estate.
The appellant was dissatisfied with the decision and he appealed to the court of appeal.
The court of appeal in demurring with the above decision of the trial judge held, per Akintan JCA that:

> . ...one cannot shut his eyes to the specific provisions of the provision of section 39 (2) of the 1979 constitution (now 42(2) of 1999 constitution; as amended) which provides that " no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of circumstances of his birth." I have no doubt in holding that the principle that the two children born out of wedlock, in the instant case are not entitled to benefit out of the estate of their acknowledged father who died intestate would amount to subjecting them to disability or deprivation merely by reason of the circumstances of their being born out of wedlock which is exactly what Section 39(2) of the 1979 constitution was aimed at preventing.[28]

Concurring with the lead judgment, Ige J.C.A., commenting on the status of the two children born out of wedlock held:

> They cannot and should not be regarded under our law as illegitimate as held by the trial judge...The decision in *Cole v. Akinyele (1960) SCNLR 192; (1960) 5 FSC 84* is no longer the law[29]...I hold that Oba and Patience (the two children born outside wedlock) are equal beneficiaries of their father's property just as the appellant and the 1st respondent. They should be regarded as children for the purpose of the statutes or Law of Distribution applicable to their father's estate.[30]

The proscription of the rule in *Cole v. Akinyele* by the court of Appeal in the above case is gratifying[31], however it is further submitted that Section 42(2) of the constitution is not limited to entitling children born out of wedlock whose paternity has been acknowledged by their father to share in the estate of such father but extends to children whose paternity were not acknowledged by their putative father but have been established to have been fathered by the intestate.
It is my suggestion that where a Court is faced with a decision where public policy acts as the lamp with which her feet are guided, she must not forget those immortal words of Ogundare JSC in *Okonkwo v. Okagbue*[32], where he held that:

> Public policy is a variable thing fluctuating with the circumstances of the time. A conduct that might be acceptable a hundred years ago may be heresy these days and vice versa. Therefore, notice of public policy ought to reflect changes in the society as custom is not static. That a local custom is contrary to public policy and the repugnant to natural justice, equity and a good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and sensitivities of the people of this country and to consensus values in the

[28] Ibid. p. 470 – paras E – G.
[29] Emphasis mine.
[30] Ibid. p. 477 paras C-E.
[31] It is noteworthy that the above Court of appeal decision was affirmed by the Supreme Court on appeal. See.Salubiv.Nwariaku (2003) 7 NWLR Pt. 819 pg. 426.
[32] (1994) 9 NWLR Pt. 368 pg.301

> civilized international community which we share. We must not forget that we are a part of that community and isolate ourselves from its values. Full cognizance ought to be taken of the current social conditions, experiences and perceptions of the people. After all, custom is not static.[33]

CONCLUSION

The issue of illegitimacy and inheritance of property as discussed has generated a lot of controversy. Apart from its proprietary implications, the socio-cultural dimension to it has made it very topical.

We have tried to argue that in the light of the radical provision of Section. 42(2) of the 1999 Constitution(as amended) and in keeping with its letters and spirit, despite the polemics seemingly offered by public policy, that a child born outside wedlock, once proven to have been fathered by a man should be entitled to partake in the estate of his biological father irrespective of whether his paternity was acknowledged or not.

[33] Ibid p.341, paras.E-G.