
Nigeria

International Estate Planning Guide

Individual Tax and Private Client Committee

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I. Wills and Disability Planning Documents

There is a general apathy in Nigeria about making plans for disability or transferring wealth to future generations. However in recent times, there has been increased awareness of the need to establish estate plans in view of the uncertainties of life. Generally, the usual vehicles and/or constructs utilised in actualising estate plans are Wills and *Intervivos gifts* (sometimes called Living Trusts).

A. Will Formalities and Enforceability of Foreign Wills

It is important to mention that the applicable laws in the Nigerian Legal system are a combination of received English laws, local laws (legislative enactments), customary laws and judicial precedents. Consequently the jurisprudence of estate planning in Nigeria is construed in line with the above laws.

Some of the formalities of making a valid Will are provided in Section 9 of the Wills Act of 1837 (which is a statute of general application in Nigeria¹). The provisions of S.4 of the Wills Law of Lagos State Cap W2 2004² (hereinafter called Wills Law) provide thus:

No Will Shall Be Valid Unless:

- a. It shall be in writing;
- b. It is signed by the Testator or signed in his presence and by his direction, in such place of the Will so that it is apparent on the face of the Will that the Testator intended to give effect to the signature to the writing signed as his Will.
- c. The Testator makes or acknowledges the signature in the presence of at least 2 witnesses present at the same time.
- d. The witnesses attest and subscribe the Will in the presence of the Testator but no form of attestation or publication shall be required.
- e. No signature under this section or under any other provision of this law shall be operative to give effect to any disposition or direction which is underneath or follows, nor shall it give effect to any disposition or direction inserted after the signature shall have been made.

The following essential requirements appear from the above provision:

- i. A Will must be in writing or typed and not oral. Oral Wills (Nuncupative Wills) may be valid under customary law but are not covered by the Wills Law. The Nigerian courts have repeatedly held that the reduction into writing of an essentially customary law transaction does not alter its nature. Writing is no more than mere evidence of the transaction.³ Thus, it should not affect the nature of the disposition. Moreover, writing *per se* is not conclusive evidence that the English form is intended by the Testator. If a Will is written but does not comply with the requirements of the Wills Act, it would be treated as valid under customary law.
- ii. A Will must be signed at the foot or end of the document by the Testator or by another person (appointed by the Testator) in his presence and by his direction. The Testator must sign or acknowledge before the witnesses subscribe, or the Will will be void for flawed execution. Signature here will include any mark intended to represent the name of the Testator e.g. thumb print, a cross, an initial, etc.
- iii. The signature must be affixed in the presence of two or more witnesses present

¹ This was received by virtue of the various local reception laws. Being an Act enacted before 1900, it is applicable in states that are yet to enact their Wills Law.

² Unless otherwise indicated, all references in this paper shall be made to this law.

³ Rotibi V.Savage (1984) 17 NLR 77, Nwabuoku V. Otth (1961) 1 ALL NLR 487.

at the same time or signed in the absence of witnesses but acknowledged by the Testator in the presence of two or more witnesses.

- iv. The witnesses must attest and subscribe to the Will in the presence of the Testator. To attest is to see the Testator signing, while to subscribe is to sign the Will as proof of attestation.

In addition to the above, other conditions which must be satisfied for a Will to be valid are:

- f. The will must be voluntarily made and executed by the Testator. This means that the Will must have been freely made without any form of influence whatsoever by any person on the Testator that affects the Testator's mind in the making of the will. Persuasion is allowed in law but should not amount to pressure; pressure of whatever character if so exerted as to overpower the volition of the Testator without convincing his judgment will amount to undue influence, which will invalidate the Will.
- g. The Will must be made by a Testator with testamentary capacity for it to be valid. Testamentary capacity means the capacity and ability to make a valid Will and it involves two elements:
 - i. *Age*: Section 3 of the Wills Law provides that the minimum age at which a person can make a will is 18 years. Certain persons are however exempted from this age requirement, i.e. soldiers in actual military service and mariners or seaman at sea who can prepare valid Wills though under the age of 18 years.
 - ii. *Sound Disposing Mind*: The Testator must possess the mental capacity or sound disposing mind to make a Will. This simply means that the Testator must not be suffering from any disease of the mind or of the body capable of affecting the mind of the Testator in the making of the will. Where it is established that the Testator was not of sound mind at the time of making the Will, the Will will be invalidated. There are three criteria for ascertaining whether a Testator had the requisite disposing mind for making a Will:
 - (a) The Testator must understand that he is giving his property to one or more objects or persons of his regard;
 - (b) The Testator must understand and recollect the exact extent of his property.
 - (c) The Testator must also understand the extent of those he intends to include or exclude from his Will.
- h. In order to make a valid Will, the Testator must have the intention to make a will and must intend that his wishes should take effect on his death. The Testator must know of and approve of the contents of his Will. If the contents of the Will are not the wishes of the Testator but of another person then it is invalid.
- i. By virtue of section 8 of the Wills Law, a Will must not be witnessed by a beneficiary of the Will or his spouse unless the gift to the beneficiary is a charge or direction for payment of debt. In consequence, where a person or his spouse is a beneficiary under a Will, such a person or the spouse must not witness the Will. If that person or spouse witnesses the Will, the gift to him fails. Nonetheless, the Will remains valid.

Where a Will has been read and probate obtained in a foreign country, the grant shall be resealed⁴ to make it effective within Nigeria. The resealing is made with respect to the properties found within Nigeria. There may be a need to reseal in the different states in Nigeria where the deceased had property.

By virtue of Order 55 Rule 69 of the High Court of Lagos State Civil Procedure Rules 2004, the

⁴ Section 2, Probate (resealing) Act.

Probate Registry will require that an application for resealing be made by the person to whom the grant was made or by any person authorised in writing to apply on his behalf. The relevant taxes are paid in the different states where the deceased had left landed property.

B. Will Substitute (Revocable Trusts or Entities)

A revocable trust may be a substitute for a Will because it has a number of benefits, including but not limited to the fact that it does not require probate and begins to run immediately upon execution and transfer of the assets. However, it is not common for people to create revocable trusts as substitutes for Wills in Nigeria, probably due to the associated cost of transferring ownership to a trustee or the settlor's fear of losing control of his assets. For example, to transfer title in land requires obtaining Governor's consent pursuant to Section 22 of the Land Use Act 1978. Obtaining Governor's Consent may cost as much as 30 percent of the market value of the Land.

The use of entities is also not common but is known to a few. Here, the intention of the individual is to allow assets to pass from one generation to another, by vesting title in the property in a corporate legal entity (company name) which in law has perpetual succession. In view of the perpetual succession accorded corporate entities, all that is required when an existing shareholder dies, is to amend the records of the company with the Corporate Affairs Commission (Companies Registry as it is known in the UK) by filing new forms CAC 2 (Particulars of Shareholding) while the assets continually remain with the entity thereby obviating the need for a Will.

C. Powers of Attorney, Directives, and Similar Disability Document

In Nigeria, it is not common to donate power to an attorney or give directives as it relates to disability.

II. Estate Administration

The administration of an estate is generally the means of distributing the assets (estate) of a deceased among his family, friends and objects of his regard. This can be either where he died leaving a Will (testate) or without leaving a Will (intestate). Upon death the power of the deceased over his estate devolves on other persons, called personal representatives. Where he appoints executors in a valid Will, the executors are his personal representatives. Where he made no Will, does not appoint executors, or the Will turns out to be invalid, certain persons on application to the court are appointed as administrators of the deceased estate.

A. Overview of Administration Procedures

There are various means by which a deceased's estate can be administered, including under the Wills Law/Act, Customary law, and Islamic Law. The laws that govern the practice and procedure for the administration of estate are a combination of received English laws (Under the English Common Law); and State laws (enacted by each state's legislative assembly) applicable within the state. The Administration of Estate Law of Lagos State is one such example. Lagos State and most western states incorporated the provisions of the Administration of Estate Law of Western Nigeria 1959.

Where certain persons have applied for a grant of letters of administration in respect of an estate and are unable to establish their claims to the grant or fail to give any required security, the court may grant letters of administration to the Administrator-General of the state. In instances where the Administrator-General is appointed, the rules provide that where the administration of the estate is not completed within 18 months after the grant of letters of administration, the Administrator-General must file an interim statement of account in court. The interested parties are entitled to examine the Administrator-General's statement.

When the estate of a deceased person is at risk of dissipation and wastage, etc., as a result of dispute between executors or between executors and beneficiaries, the court is empowered to appoint an administrator *pendente lite*, to manage the estate pending the determination of the dispute in court. Such an appointee (administrator *pendente lite*) does not need to apply for letters of administration since such an appointment was by an order of court.

Lastly, the court has inherent discretionary powers in matters relating to the administration of estates,

particularly in instances where the deceased died intestate, or matters relating to the revocation of letters of administration.

Order 55 of the Lagos State High Court civil procedure rules governs Grants of Probate or Administrations in general:

In outline the steps for the application of letters of Probate are:

- The executor applies to the Probate Registry of the High Court for the reading of the Will.
- The executor submits an application to prove the Will and obtain probate.
- The executor pays for and obtains the probate court for a nominal fee.
- The Probate form is then completed. This involves taking the form to the different institutions where the deceased had assets (Banks, stockbrokers, Pension Fund Administrators etc).
- Submission of the probate form, with a list of all the assets that comprise the deceased's estate for assessment of probate duty.
- Payment of assessed duties is made by a Bank draft. This is usually 10 per cent of the value of the real and personal property.
- The Executor and witnesses of the Testator are contacted and invited to appear in court to prove the Will by signing, this is called the 'Marking of the Will.'
- A draft of the Minute and Order of the grant are made by the court clerks and passed to the Probate Judge for approval.
- Upon approval, the Order and Minute are signed by the Probate Judge and Probate is granted to the executor.

Where a person dies intestate, the courts may, on application by certain people entitled to inherit the deceased's estate, grant 'Letters of Administration.' Usually forms are issued to the applicants to be returned upon completion to the probate registry accompanied by:

- Inventory of deceased assets.
- Affidavit of next-of-kin (relationship).
- Bond. This is to ensure that that when the Letters of Administration is granted, the grantees make proper inventory, distribute the estate and pay all debts.
- Bank Certificate
- Particulars of the landed property of the deceased.
- Schedule of debt and funeral expenses
- Justification for sureties. This may not be required for a creditor, a person beneficially entitled to the whole estate, or the attorney of a person beneficially entitled to the whole estate, among others.

Where an executor or administrator of an estate demonstrates a clear lack of interest or commitment resulting in poor administration of the estate, the grant may be revoked on application to court. A grant can be revoked if it was obtained by falsehood, i.e. where the grantee does not stand in relation to the deceased as he asserted in his application for grant of letters of administration. The court's

power to revoke a grant of probate depends on the court's inherent jurisdiction. The court may also revoke a grant of administration.⁵

B. Intestate Succession and Forced Heirship

When a decedent does not leave a Will, his estate is subject to rules of distribution whether they coincide with his wishes or not. There are two types of rules of distribution. These rules of distribution are applicable depending on whether the deceased was subject to customary law or statutory law during his lifetime. Where the deceased was subject to customary law, his estate will be distributed according to his native law and custom or Islamic law if he is a Muslim. On the other hand, where subject to statutory law, his estate will be distributed according to the provisions of any local enactment relating to administration of estate, and where none exist, the common law intestacy rules will apply.

There are generally three systems of law governing intestate succession in Nigeria. These are Common Law, Laws of various state (statutory) and customary Laws. Customary law in this context includes Muslim law.⁶ The factor that determines which system is to apply in every case is the type of marriage contracted by the deceased. This rule is mostly valid in respect of movable property. Thus if a person contracts a Christian (monogamous) marriage outside Nigeria, the Common Law of England governs the distribution of his estate. If he contracts a statutory (Act) marriage in Nigeria, and then dies domiciled in Lagos or in any of the states comprising the old western region, then the administration of estate laws will govern.⁷ If he contracts a statutory marriage, but dies domiciled in any of the states comprising the former northern or eastern regions, then the common law will also govern the distribution of his estate.⁸ Finally, if the deceased was an indigenous Nigerian and no issue or spouse survives him, his estate will be distributed in accordance with the relevant customary law, regardless of the type of marriage. If the deceased was a Muslim, then Islamic law would govern.

The distribution of an immovable property of intestate person is governed by the Lex Situs i.e. the law of the place where land is situated. There could be further refinements. For example, if the person is subject to customary law or Islamic law, then his personal law will apply, irrespective of the Lex situs. The 1959 Law does not apply to situations where a Nigerian who is subject to customary law contracts a monogamous marriage outside Nigeria. The reasonable solution will be to apply the provisions of the administration of estate law rather than English Law.

In determining the law applicable to the distribution of the estate of a deceased (intestate) in Nigeria, the following rules are important:

- Immovable property is governed by the lex situs, including the conflict of law rules of the lex situs.
- Movable property is governed by the law of domicile of the deceased at the time of his death.
- If the immovable property is based in Lagos, Ogun, Oyo, Ondo or Bendel state, the administration of estate law applies, when customary law does not apply.
- If the property involved is movable and the deceased died domiciled in any of the five states listed above, then the administration of estate law applies irrespective of the location of the property.
- If the immovable property is based in any of the northern or eastern states, the rules in *Cole v. Cole* will apply.⁹ *Cole v. Cole* provides that 'when a person who contracts a Christian marriage outside Nigeria, subsequently dies intestate, domiciled in Nigeria, his estate will be distributed in accordance with English Common law,' according to which realty will go to the heir at

⁵ S.66 (a) Probate and Administration Act, 1898

⁶ Zaidan v. Zaidan (1974) 4 U I L R 283

⁷ Laws of western Nigeria 1959 Cap 1

⁸ Administrator-General V. Egbuna & Ors. 18 NLR 1

⁹ (1898) 1 NLR 15

law.

- If the person died domiciled in any of the northern or eastern states, then in respect of movable property, the law of the state in which he died domiciled will apply, irrespective of the location of the property.
- It is possible for the immovable property of a deceased who died intestate to be distributed in accordance with one law, and his movable property by another law.
- Where the deceased was subject to customary law, customary law will apply to the distribution of his estate, if he was married under customary law at the time of his death or if he was not married at the time and left no issue of a statutory marriage.

There is strong argument that a Testator who has laboured to acquire assets during his life should have unrestricted and unfettered discretion in the way and manner such assets are distributed upon his demise. Forced heirship on the other hand does not recognize total freedom of testation and its proponents contend that it is perfectly proper for Testators to be required to make adequate provision for their dependents.

In Nigeria, there are three (3) main forms of forced heirship or limitation to the general right of a Testator to dispose of his assets as he deems fit in the various Wills Laws:

Under customary law. The limitation placed on the right to dispose assets is couched in various ways by the different Wills Laws. A good example is section 3(1) of the Wills Law of Western Region 1959¹⁰ which states,

“Subject to any customary Law relating thereto, it shall be unlawful for any person to devise, bequeath or dispose of by his Will, executed in the manner hereinafter required, all real estate which he shall be entitled to either at law or in equity.”

By the above provision, the freedom of the Testator to dispose his property is fettered to accommodate customary laws, and the courts have upheld such customary restrictions in several cases.¹¹ Thus the Testator (under Bini customary laws) cannot devise his Igi-Ogbe (property where the Testator lived and died). There also similar restriction in the Wills Laws of Lagos, Kaduna, Plateau, Kwara and Jigawa States.

Limitation under Islam. Islam also places a restriction on the quantum of the Testator's estate that can be disposed by Will. The Testator cannot give more than a third of his estate to persons outside his family,¹² and the Testator cannot give preferential treatment to or disinherit any of the children.¹³

Reasonable provision for dependents. The Wills Laws of some states (Lagos, Oyo and Abia) have provisions within their laws that permit named persons¹⁴ who were being maintained either wholly or partly by the deceased immediately before the death of the deceased to apply to court for reasonable provision to be made for them under the estate of the deceased, even contrary to the desires of the Testator as expressed in the Will. These limitations to the Testator's rights infringe on certain rights guaranteed by the Constitution of the Federal Republic of Nigeria, which recognises the right of the individual to acquire and own property in any part of the country (with corresponding and integral rights to alienate or otherwise dispose of such property). The limitation equally questions the freedom of expression that a Testator exercises in making a Will.

¹⁰ Applicable in all states in the former Western Region. However there are some states with Wills Laws that accord absolute rights of testation.

¹¹ Oke v. Oke (1974)3 SC 1, Idehen v Idehen (1991)6 NWLR (Pt 198) 382.

¹² Adesubukan v. Yinusa (1971) All NLR

¹³ Supra

¹⁴ Wife, wives, Husband and child or children; and in addition in Abia and Oyo, parent, brothers or sisters of the deceased.

C. Marital Property

Property acquired by either spouse during the course of a marriage is considered marital property. Under customary law, only men have the right to own land. Sharia law does not allow women access to real property. Under customary law, a widow cannot inherit marital property. However a couple married under the Marriage Act can own property in their individual names or jointly.

D. Tenancies, Survivorship Accounts, and Payable on Death Accounts

1. Tenancies

Whether or not jointly held property (i.e. property held by more than one person) needs to go through the probate process depends on the type of ownership.

There are two kinds of survivorship. The first and more common one in Nigeria is known as Joint Tenancy. This is where two or more people jointly own property. In the event of any of the owners pre-deceasing the other owner(s), the deceased owner's share of the property passes to the surviving beneficiaries of such a property to the exclusion of the estate of the deceased joint owner. The other kind of survivorship is known as Tenancy-in-common. Here, in contrast to joint tenancy, the deceased owner's share of property forms a part of his estate, to be inherited according to the terms of his or her Will (if there is one) or according to such Law that governed the deceased's affairs during his life.

Whether a devise or a bequest to two or more beneficiaries under a Will will be regulated by the rules of Joint Tenancy or Tenancy-in-common will depend on the interpretation of the wording of the Will. The rules regulating Joint Tenancies and Tenancies-in-common are common law rules which are not applicable to customary law modes of inheritance.

Where no specific words of severance are used in devolving a property, which indicate separate partitions or interest of the same property devolving to two or more beneficiaries, or to two or more people, the law assumes that a joint tenancy has been created with the result that the estate of a deceased joint owner cannot assume the place of the deceased in the enjoyment of such a property. A Joint Tenancy is therefore implied where there is a unity of title, unity of interest, unity of time, and unity of possession.

On the other hand, the presence of any of the following words in a Will creates a Tenancy-in-common: "in equal shares"; "share and share alike"; "to be distributed between"; "to be distributed among them in joint and equal proportion"; "equally"; "among"; and "respectively".

In the case of *Chinweze v. Mazi* (1989) 1 SC (part 11) 33 at 46, for example, the Supreme Court held that by operation of Law, Joint Tenancy leads to the doctrine of survivorship by which if one joint tenant dies without having obtained a separate share of the property for him or herself, during his or her life time, his or her interest will not pass to his or her estate but such interest will accrue to the other surviving joint tenants. The Supreme Court also held that on the facts in this case, the legal assignment it considered did not contain words of severance and therefore, the half brothers to the 2nd Defendant's sister could not take any benefit in the contested property due to the applicability of the rules of joint tenancy to the disputed property.

2. Survivorship Accounts and Payable on Death Accounts

Whether a joint account will pass to the surviving owner will depend on the signature mandate on the account. Where the signature mandate allows either of the joint owners to sign to retrieve money from the account, it would not matter that one of them has died intestate. However, where the signature mandate requires both signatories to give instructions on the account, then either a letter of probate or letter of administration must be obtained depending on whether there is Will or the joint owner died intestate.

There are no payable on death accounts in Nigeria.

III. Trusts, Foundations, and Other Planning Structures

A. Common Technique

As stated earlier, there is little awareness about using trusts for family estate planning purposes. In the few instances that exist, the most common technique has been to transfer assets to a Trust company, which is more often than not a subsidiary of a Bank (although there are a few that are not). Offshore trusts may also be established in some instances to support investment arrangements in jurisdictions where certain benefits can be obtained—mainly tax and protection from regulatory oversight.

The use of Foundations is mainly for charitable purposes and not for estate planning.

B. Fiduciary Duties

There are generally fiduciary duties on trustees because their role involves being entrusted with the property of other person(s) as part of dealing with those persons' affairs. The essence of a fiduciary relationship is one of loyalty and includes:

- To act in the best interest of the beneficiaries at all times;
- To refrain from making any personal profits for themselves that are not authorised by the terms of their engagement;
- To carry out the express terms of the trust instrument;
- When investing trust property, to act as a prudent person of business would act and to generate the best possible financial return for the trust; and
- Not to be in a conflict of interest position and to administer the Trust in the best interest of the beneficiaries.

The terms of the deed constituting a trust may narrow or expand these duties but in most instances they cannot be eliminated completely.

There are various Laws and corporate Governance codes that impose personal liability on Directors and officers of a Company. An example is Section 290 of the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2004 (CAMA).

C. Treatment of Foreign Trusts and Foundations

A properly executed Trust will state the Laws that should govern its administration. However, where a foreign trust involves the transfer of landed property that is domiciled in Nigeria, conflict of law issues may arise. However because equity (a trust being an aspect of equity) *acts in personam*, the general rule in conflict of Laws that no court will entertain a determination of title to, or for the right to possession of, land outside its jurisdiction or for the recovery of damages or trespass to foreign land may not apply. The implication of this is that a Nigerian court in its equitable jurisdiction can hear an action against a person in respect of land situated outside its jurisdiction if the action arises out of a contract or equity between the parties.

There is a dearth of judicial authority in this obvious grey area of the law. As such, the above views are personal and there has not been any cause to the author's knowledge to test this aspect of the law in a Nigerian court.

IV. Taxation

A. Domicile and Residency

For the purposes of taxation, a person is regarded as a resident of Nigeria if he/she spends 183 or

more days in Nigeria within a 12-month period. Nigerian residents are required to pay income tax on their global income except where there is double taxation treaty.¹⁵ A rebate may be deducted for any tax paid to (and not recoverable from) the government of any other country on income from a source outside Nigeria, provided such income is included in Nigerian taxable income. Taxation at 10 percent is imposed on all capital gains, excluding capital gains on stocks and shares.

B. Gift, Estate, and Inheritance Taxes

Although there are no regulations that impose gift, wealth, estate, and/or inheritance taxes in Nigeria, the grant of administration is usually subject to the payment of appropriate estate duties imposed by the probate court where the application is made after assessment of all the deceased's assets has been disclosed. The rate is usually at a rate of 10 percent.

Real Estate Conveyance Tax: Land is vested in state government. Governor's consent is required for transfer of any interest in land situated in urban areas (S22 of Land Use Act). Consent fees vary and may be as high as 30 percent of the market value of the interest being conveyed.

Capital transfer tax was abolished in 1996. However, there are some taxes or rates applicable to real estate transactions such as Real Property Tax, which is more popularly known as tenement rates. In Lagos State, The Land Use Charge Law, which is intended to be a single property charge, replaces all other State and Local Government taxes on real property, including taxes like tenement rates, ground rents and neighbourhood improvement charges.

Stamp Duties: Stamp duty is payable on written agreements and other documents to either the Federal or State government, depending on the parties to the transaction.

C. Taxes on Income and Capital

Section 16 of the Personal Income Tax Act, Laws of the Federation of Nigeria provides that the income of a Trustee from a settlement, trust or estate of a deceased person made, created or administered in Nigeria shall be ascertained in accordance with the second Schedule of the Act.

Employment income is generally taxable unless exempt. Business profit earned by an individual from a trade or profession and other investment incomes are also taxable.

Capital Gains Tax (CGT) is generally levied at a rate of 10 percent. CGT on shares and stocks was abolished by the Finance Act of 1998. Accordingly, when a trustee disposes of stocks or Shares, the Trustee is not liable to pay taxes.

Certain charitable and educational institutions of a public character are excluded from Capital Gains Tax.¹⁶

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¹⁵ The following countries have a double taxation treaty with Nigeria: Belgium, Canada, Czech Republic, France, Netherlands, Pakistan, Romania, Slovakia United Kingdom

¹⁶ Section 26 of the Personal Income Tax Act.

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She currently heads the Corporate Trust Department of Stanbic IBTC Trustees Limited advising syndicates of Lenders either in the Company's capacity as Facility and/or Collateral (Security) Agents. She is also actively involved in providing Estate Planning advice to High Net worth Individuals and staff members of corporate organisations.

Ese is a member of the Nigerian Bar Association and the International Bar Association with membership of the Private Client Committee, Investment Funds Committee among others. She is an associate of the Institute of Chartered Secretaries and Administrators (UK) and is undergoing a program at the University of London leading to the award of an LLM (Masters in Law). She has attended relevant trainings on trusteeship and Agency.

Ese is married to Anthony, who is also a lawyer and they are blessed with a daughter. They live in Lagos Nigeria.