SINGAPORE COURTS' NEW POWERS[1] OF WILLS RECTIFICATION

1. Rectification of Wills

(1) Where the contents of a Will seems to be wrong, and the testator has died and so is in no position to put it right, the Court has the power under Section 28, Wills Act to alter the words in the Will. Section 28[2] states:-

> Rectification of will
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> 28.— (1) A court may order that a will be rectified so as to carry out the testator's intentions, if the court is satisfied that, as a consequence of either or both of the following, the will is so expressed that the will fails to carry out the testator's intentions:
>
> (a) a clerical error;
>
> (b) a failure to understand the testator's instructions.
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> (2) Except with the permission of a court, an application for an order under subsection (1) must be made no later than 6 months after the date on which a grant authorizing the administration of the testator's estate is first made.
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> (3) Where the personal representatives of the testator distribute, after the end of the period of 6 months referred to in subsection (2)[3], any part of the testator's estate –
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> (a) this section does not render the personal representatives liable for making that distribution on the ground that they ought to have taken into account the possibility that a court may permit the making of an application for an order under subsection (1) after the end of that period; but
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> (b) this subsection does not affect any power to recover, by reason of the making of an order under subsection (1), any part of the testator's estate that is so distributed.

[1] This came into force on 1 December 2016, by virtue of S. 28, Wills Act, pursuant to Statutes (Miscellaneous Amendments) Act 2016 (Commencement) (No. 3) Notification 2016 (S.608/2016). It is however to be noted that Section 28 appears to confer the Singapore Courts retrospective powers to rectify wills.

[2] Section 28, Wills Act was inserted by virtue of Section 50 of the Statutes (Miscellaneous Amendments) Act 2016. Section 28, WA is substantially *in pari materia* with rectification in equity under s 20 of the UK Administration of Justice Act 1982, with some subtle differences, chief of which was that the UK version conferred the powers of the Court to rectify wills made for persons who died after the commencement of the UK Act, but the Singapore Courts have powers to rectify wills for persons who died before the commencement of the Act (which was 1 December 2016, and also seemingly where the Court has already granted probate of the will and even when the estate has already been distributed.

[3] **By reason of Section 28(3) of the Wills Act, prudent executors of wills (and administrators who have been granted LA with the will annexed) should not distribute the estate within 6 months from the date of the grant of representation being issued unless they are very certain that there is no possibility of a Section 28(1) will rectification application being brought against them for the rectification of the will in question. The immunity from liability only applies if they distribute the estate more than 6 months after obtaining the sealed grant of representation.**

(4) The following grants are to be disregarded[4] when considering, for the purposes of this section, when a grant authorizing the administration of the testator's estate is first made:

(a) a grant limited to settled land or to trust property;

(b) any other grant that does not permit the distribution of the testator's estate;

(c) a grant limited to a part only of the testator's estate, unless a grant limited to the remainder of the testator's estate has previously been made or is made at the same time.

(5) For the purposes of this section, where a grant consists of any probate, or letters of administration with the will annexed, sealed under section 47(1)[5] of the Probate and Administration Act (Cap. 251), the grant is deemed to be made on the date of sealing of the probate or letters of administration with the will annexed.

(6) The Family Justice Rules Committee constituted under section 46(1) of the Family Justice Act 2014 (Act 27 of 2014) may make Family Justice Rules –

(a) to regulate and prescribe the procedure and practice to be followed in any application for an order under subsection (1); and

(b) to provide for any matter relating to any such procedure or practice.

(7) In this section –

"court" means the High Court or a Family Court;

"grant" means any of the following:

(a) any probate granted by the High Court or a Family Court, or granted before 1 January 2015 by a District Court;

(b) any letters of administration with the will annexed granted by the High Court or a Family Court, or granted before 1 January 2015 by a District Court;

(c) any probate, or letters of administration with the will annexed, sealed under section 47(1) of the Probate and Administration Act;

"letters of administration with the will annexed" and "probate" have the same meanings as in section 2 of the Probate and Administration Act.

(2) In the UK Supreme Court decision of *Marley v Rawlings* [2014] UKSC 2, it was stated that there was no limit to the extent of the courts' power to rectify wills. In that case, rectification amounted to 'transposing the whole text of the wife's will into [the husband's] will ... the greater the extent of the correction sought, the steeper the task for a claimant who is seeking rectification'.

[4] In other words, for the grants which are listed at Section 28(4), there is no limit of 6 months within which the application to rectify the will in question has to be brought.

[5] Section 47(1) PAA refers to resealing of grants of representation of a Commonwealth or Hong Kong court.

2. **Applications for rectification**

(1) An application for rectification must be made within 6 months of a grant of representation (S. 28(2), WA) unless the court gives leave for an extension of time. The procedure and requirements for a will rectification application is set out at Part 17A of the Family Justice Rules.

(2) Part 17A stipulates:-

Definitions

295A. In this Part, unless the context otherwise requires -

"interested party", in relation to an application for an order under section 28(1) of the Wills Act (Cap. 352) that a will be rectified so as to carry out the testator's intentions, means —

(a) a person –

(i) to whom any devise, legacy, estate, interest, gift or appointment is given or made under the will; and

(ii) whose devise, legacy, estate, interest, gift or appointment may be prejudiced by the order;

(b) an executor named in the will; or

(c) a personal representative of the testator;

"probate proceedings" means any civil proceedings under the Probate and Administration Act (Cap. 251);

"will" has the same meaning as in section 2 of the Wills Act.

Rectification of will

295B.—(1) An application for an order under section 28(1) of the Wills Act (Cap. 352), that a will be rectified so as to carry out the testator's intentions, must be made -

(a) if no probate proceedings have been commenced in relation to the will, by originating summons; or

(b) if probate proceedings have been commenced in relation to the will, by summons in those proceedings.

(2) The application must be supported by an affidavit that -

(a) sets out the grounds of the application;

(b) contains evidence of —

(i) the testator's intentions;

(ii) where it is alleged that the will fails to carry out the testator's intentions as a consequence of a clerical error, the nature of the alleged clerical error; and

(iii) where it is alleged that the will fails to carry out the testator's intentions as a consequence of a failure to understand the testator's instructions, the respects in which the testator's instructions were allegedly not understood; and

(c) contains the written consent of each interested party who consents to the application.

(3) Unless the Court otherwise directs, the application must be served on every interested party who has not consented to the application.

(4) To avoid doubt, where the applicant requires the permission of a court under section 28(2) of the Wills Act in order to make the application, the application cannot be made before that permission is obtained.

Endorsement of memorandum on probate, etc.

295C.—(1) This rule applies where an application is made for an order under section 28(1) of the Wills Act (Cap. 352) that a will be rectified so as to carry out the testator's intentions.

(2) Paragraphs (3)(a) and (4)(b) apply only in cases where the Registry has issued —

(a) a printed grant of probate of the will; or

(b) a printed grant of letters of administration with the will annexed.

(3) The personal representatives of the testator must -

(a) produce in Court, at the hearing of the application, the probate or letters of administration under which the testator's estate is administered; and

(b) if the Court makes an order under section 28(1) of the Wills Act that the will be rectified - file a Request for a memorandum of the order to be endorsed on, or permanently annexed to, the probate or letters of administration.

(4) If the Court makes an order under section 28(1) of the Wills Act that the will be rectified, or an order dismissing the application -

(a) a memorandum of the order must be endorsed on, or permanently annexed to, the probate or letters of administration; and

(b) the probate or letters of administration must remain in the custody of the Court until sub-paragraph (a) is complied with.

(5) The memorandum of the order must set out –

(a) the title of the proceedings in which the application is made; and

(b) the operative part of the order in full.

(3) The usual civil standard of proof, namely, on the balance of probabilities applies to applications under Section 28 (Part 17A FJR). However, because the court is being asked to approve a departure from the testator's wishes as they appear from a properly executed legal instrument, the court will only order rectification if it is provided with convincing evidence as to the testator's true intention and as to the relevant clerical or (as the case may be) the correct relevant instructions of the testator and the failure to understand them[6].

(4) For the reasons mentioned at Footnote 3 (*supra*), solicitors should advise executors and administrators (with will annexed)[7] not to distribute any part of the estate of the deceased testator until at least 6 months has elapsed from the date that the grant of representation was issued by the Family Justice Courts, so that they can claim the protection of the statutory immunity conferred by S. 28(4) of the Wills Act.

Examples of Rectification (from English cases)

Marley v Rawlings [2014]

Mr and Mrs. Rawlings instructed their solicitor to draft for them mirror wills in which each left his or her entire estate to the surviving spouse, but in the event that the other failed to survive, the entire estate would pass to their friend, Terry Marley, who was not related to them but who the couple had treated as if he was their son. The Wills made no provision for the Rawlings' two natural sons. The Wills were drafted correctly, but when it came to execute them, the Wills were mixed up by the solicitor[8] with the result that Mr Rawlings signed the will prepared for his wife and Mrs. Rawlings signed the will prepared for her husband. Both wills were witnessed by the solicitor and his secretary.

The mistake was not noticed on Mrs. Rawlings' death in 2003 but came to light only on Mr Rawlings' death in 2006. At the time of his death, Mr Rawlings was a joint tenant with Mr Marley of the house in which they both lived, so that the tenancy passed through the doctrine of survivorship. In addition, there was some £70,000 in Mr Rawlings' estate. Terry and Michael Rawlings, the two natural sons, challenged the validity of the will, as they stood to inherit the £70,000 if Mr Rawlings had died intestate. Mr Marley sought rectification of the will so that it should record what Mr Rawlings had actually intended, and that probate should be granted of the will so rectified. The brothers were successful both at first instance and in the Court of Appeal. However, the Supreme Court ordered rectification of the Will to make it accord with Mr Rawlings' intentions. The

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[6] Williams, Mortimer and Sunnucks – Executors, Administrators and Probate – 20th Edition, para 40.23

[7] An analogous provision is found in Section 4(3) of the Inheritance (Family Provision) Act ["IFPA"], viz:

> *"4(3) The provisions of this Act shall not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiration of the said period of 6 months on the ground that they ought to have taken into account the possibility that the court might exercise its power to extend that period, but this subsection shall be without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under this Act."*

Accordingly, even if the deceased died intestate, if there is a possibility of a IFPA claim against the estate, administrators should also be advised not to make a distribution until after the 6 months' statutory period has expired, so that they are protected by the statutory immunity conferred by S. 4(3) of the IFPA.

[8] *Marley v Rawlings* is the authority holding that the term "clerical error" in S. 28(1) does not mean that it must be an error of a clerk or secretary and can include any mistake that arises in connection with office work of a routine nature, other than a failure to understand the testator's instructions, which is covered by s 28(1)(b).

rectification was by rectifying the "Will" (which bore Mrs. Rawlings' name) which had been in fact signed by Mr Rawlings by substituting Mrs. Rawlings' name for Mr Rawlings' name wherever they appeared in the Will.

Clarke v Brothwood and Others (2006)

The Will as drafted gave a "1/20" share of the residuary estate to the beneficiary, when this would result in the testator dying partially intestate. It was actually intended to be 20 per cent and the solicitor's clerk had made a clerical mistake and substituted "1/20" for "20 per cent" which would then result in the estate being fully distributed under the Will.