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Institute of Legal Education

Probate & Succession Planning

Dying Testate v Dying Intestate

Goh Kok Yeow

COMPARATIVE TABLE OF ADVANTAGES OF DYING TESTATE VS DYING INTESTATE (NON-MUSLIMS)

1: Right to choose one's beneficiaries and determine their legacies.

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Dying with a valid will	Dying Intestate
Testator has a free hand (subject only to leaving reasonable provisions for dependants). [Inheritance (Family Provision) Act]	Succession to estate is determined by the provisions of Intestate Succession Act; Estate may be inherited by persons who are not deserving or who will get a larger share than those who deserve or need more, or even by the State (bona vacantia). At the same time, people who the intestate may have assumed would be beneficiaries –e.g., step-children – will not be entitled to claim a share of the estate.

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2: Ability to choose the Executor and Trustee of one's Will and set the terms of appointment.

Dying with a valid will	Dying Intestate
The Testator can choose the Executor(s) and Trustee(s) of the Will and set the scope of their powers. The Executor need not be a next-of-kin or even be a beneficiary. It may be a professional or a trust company. The choice of Executor in a valid will is always given effect to by the Court.	Only the next-of-kin who qualify under s 18(3) of the Probate and Administration Act can be the administrators. There could well be disputes amongst the next-of-kin as to who should be appointed the administrator. A bankrupt is very unlikely to be given leave to be appointed an administrator.
So – even though Section 400(1) of the IRDA disqualifies a bankrupt from being appointed or acting as a personal representative, except with the leave of Court, the Court is more likely to allow a bankrupt named as executor to take up the appointment (as it was the testator's choice)	(Save for the limited exception for trustees of land settlement found at S. 18(2)

Note – Choice of Executor

It is important to advise the testator that they should choose an executor who will or is likely to accept the appointment (and also have a substitute executor in the event that the executor who is appointed refuses to be the executor, i.e., he renounces the appointment or dies before the testator or is unable through disability to apply for probate).

If the executor is unable or unwilling to apply for probate, grant of letters of administration (with will annexed) pursuant to Section 13 of the PAA has to be applied for by the persons who are eligible for such grant shown at S 13(2), PAA. In such a case, the difficulties and hassles of obtaining a grant of LA (with will annexed) would be very similar to a case where there was no will, albeit that after the GLA (with will annex) has been obtained, the estate can be distributed pursuant to the will.

3: Minimum number of executors or personal representatives to administer an estate with a beneficiary who is a minor

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Dying with a valid will	Intestacy
Only one executor is required, and substitute executor(s) can be appointed. Upt to 4 executors can be appointed. Executors prima facie can act jointly and severally. *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] SGCA 5, [2000] 1 SLR(R) 159	At least 2 administrators must be Appointed (S. 6, PAA). This could lead to substantial additional problems and inconvenience for the surviving spouse (who has priority to apply for LA) as the spouse often has difficulty finding someone willing to be appointed as co-administrator Besides, if there are minority interests, then, regardless however small the value of the estate, sureties are needed (or an application for dispensation of sureties has to be filed and an order of court obtained). This adds to the cost for the LA proceedings. Administrators must act jointly in the administration of an intestate's estate.

4: Vesting of deceased's estate

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Dying with a valid will	Dying Intestate
The testator's assets vest in the executor(s) upon death, and this (in principle) enables the executor to handle the deceased's affairs after death even before he has obtained the grant of probate, subject to the need for him to produce the grant of probate, when required by the other party.	Does not vest in the administrators until after letters of administration have been obtained. Will vest in the Public Trustee in Singapore until a Grant is obtained by the Administrator. The Estate will be in a state of limbo until a Grant of LA is obtained by the Administrator.

(*Teo Gim Tiong v Krisnasamy Pushpavathi* [2014] 4 SLR 15)

5: Appointment of Guardians for infant children

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Dying with a valid will	Dying Intestate
A Testator who has infant children can appoint testamentary guardians for the children. The Testator has free choice to appoint a testamentary guardian, and that guardian appointed under the will of the deceased parent shall act jointly with the surviving parent of the infant so long as the other parent remains alive, unless that parent objects to his so acting (S. 7(3), Guardianship of Infants Act). If the surviving parent objects, the testamentary guardian can apply to court for orders to be made under S7(4).	Where a person has died intestate, leaving children and the other parent of the children surviving him, the surviving parent is the sole guardian, regardless of how the deceased parent may have thought of the ability and suitability of the surviving parent to be the sole guardian. If both parents have died without a will, there may be disputes between the next-of-kin of both parents to be appointed guardians (and thereby control the finances of the estates of the deceased parents.

Refer to ss. 6 and 7 of the Guardianship of Infants Act (Cap 122)

6. Intestacy: Need to prove deceased's religion, custom, personal law and ages and share entitlement of the beneficiaries, etc.

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Dying with a valid will	Dying Intestate
Generally speaking, no such requirement for such additional information to be provided. However, if the will was executed outside Singapore, the Court may ask for an affidavit of foreign law to confirm the formal validity of the will (per Section 5 of the Wills Act) and if the will was a homemade will and/or it was not signed or witnessed properly, the Court may require an Affidavit of Due Execution of the Will to be filed by witnesses to the will.	A great deal more information has to be obtained during instruction taking for LA applications, as the applicant's entitlement to apply for grant, the deceased's religion, custom, personal law and ages and share entitlements of the beneficiaries have to be ascertained and confirmed. These additional steps will cause delay in obtaining and extracting grant of letters of administration, and this is exacerbated if the deceased had a foreign domicile, as the Court will require an Affidavit of Foreign Law by a foreign lawyer.

7: Shorter time and cheaper to obtain probate vs LA.

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Dying with a valid will	Dying Intestate
The grant of probate can be obtained faster and at lower expense for legal costs and court filing fees if there is a valid will – fewer documents to be filed	Even in the most straightforward of cases (and even if sureties and administration bonds are not required), it is slower and more costly to apply for a grant of LA as opposed to grant of probate. More documents have to be filed for a LA application than for a probate application.

8 Power to carry on the deceased's affairs and calling in of the deceased's assets

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Dying with a valid will	Dying Intestate
Executors have the power from the time the Deceased dies, to carry on the deceased's affairs and call in the assets (subject to the validations of their actions by extraction of probate of the will, and any restrictions contained in the will).	The intending administrators have no such power until they obtain the grant of LA. Administrators cannot give good discharge for any payments that they collect until and unless a grant of LA has been obtained.

9: Chain of executorship

Dying with a valid will	Dying Intestate
If, after obtaining the grant of probate, the executor dies without having completed the administration, the executor of the executor's will (if there is one) steps into the deceased executor's shoes and continues wit the administration of the testator's estate. See Section 25 of the Civil Law Act.	There is no equivalent in the administration of intestate estates. If the administrator dies without completing the administration, the beneficiaries will have to apply for a *grant de bonis non,* which essentially is a fresh application to court.

10: Administration Bond / Sureties to the Admin Bond

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Dying with a valid will	Dying Intestate
Where there is a will and the executors prove the will, S 29 PAA does not apply. Therefore, there is no need to provide sureties or the administration bond. There are very substantial costs savings and time savings in such a case, as there is no need to apply for dispensation of sureties (which would incur oath fees to be paid for the affidavit to support such application), no need to file an Administration Bond, no need for the executors to have to look for 2 people who will be prepared to be surties.	All applications for LAs to the Family Division of the High Court (HCF) require the administrator to execute an administration bond and to provide 2 sureties (unless otherwise ordered by the Court or an order for dispensation of sureties is granted). For LA applications to th Family Courts, if the circumstances of the Estate falls within certain classes as set out in the Family Courts (para 68 of the FJCPD), Admin Bond and 2 sureties also needed, to guarantee the Administrators' proper performance of the administration. The amount to be secured is the gross value of the estate.

10: Administration Bond / Sureties to the Admin Bond (cont'd)

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Dying with a valid will	Dying Intestate
	It can cost hardship and embarrassment to the Administrator to have to ask around for people to volunteer to be sureties. Some people may even want to charge a fee to be sureties, which will have to be paid out of the estate. Application for dispensation of sureties will add to the costs of the matter. Time, cost and delay involved in extracting grant.

11: Preservation and protection of family wealth

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Dying with a valid will	Dying Intestate
A testator can stipulate that part or the whole of the family wealth is to be preserved subject to the rule against perpetuities and accumulations, for a period of time. This would ensure that family wealth is not squandered by heirs.	Without a will, the beneficiaries are entitled absolutely to receive their full entitlement under the ISA once all the estate has been collected in and debts paid. The administrator has no power to delay the distribution (and the administrator would be in breach of fiduciary duty if he does so).

12: Saving of Stamp Duty

Dying with a valid will	Dying Intestate
There is no stamp duty payable for the transfer by assent of a devised property to the named beneficiary. This could result in very substantial savings in stamp duty. E.g: *"I give my house at 1, XXX Road, Singapore XXXXXX, to my son, XXXX absolutely"* will attract **no** stamp duty whatsoever, regardless of the value of the property (or how many properties the devisee already owns).	The transfer of an intestate deceased person's property by way of intestate succession laws could result in the beneficiaries having to execute a subsequent Deed of Family Arrangement in order to re-distribute the estate according to deceased's wishes. This will result in very high ad valorem stamp duty (plus ABSD too) if transfer of immovable property is involved.

12: Saving of Stamp Duty (cont'd)

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Dying with a valid will	Dying Intestate
	For instance, if the Deceased had 3 houses and 3 children. Assuming that, had he come around to making a will that each child is to get one house in his own name, the failure to make a will will mean that stamp duty is not payable if each house is conveyed to all 3 children as co-owners, but if each child wanted to have one house in his sole name, ad valorem stamp duty (and perhaps ABSD as well) is payable on 2/3rds of the value of the house.

13: Right of commencement of legal proceedings

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Dying with a valid will	Dying Intestate
Executors have the right to commence legal proceedings in their capacity as the named executors of the deceased testator's will, even though they may not yet have been issued the grant of probate. However, in order to obtain judgment and execute the judgment or order of court, the executor must have extracted the grant of probate. *Lee Han Tiong and others v Tay Yok Swee* [1996] 2 SLR(R) 833	No one has the right to commence any proceedings. The persons who apply for grant of LA also cannot commence any proceedings *qua* administrators of the deceased's estate until after they have extracted the grant of LA.

14. Remuneration of the personal representative

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Dying with a valid will	Dying Intestate
The Testator can set and fix the remuneration of the Executor (although in the absence of an express stipulation in the Will, S. 66 of the PAA will also apply).	The personal representative can apply to the Court for commission under Section 66 of the Probate and Administration Act. The rate of commission may be as high as 5% of the value of the assets collected.

WITH ALL THE ADVANTAGES, WHY THEN DO SOME PEOPLE CHOOSE NOT TO MAKE A WILL?

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Some clients do not want to make wills because they cannot make up their minds how their estates should be distributed and they are happy for the ISA to apply to their estate. In light of the advantages of testacy mentioned above, such clients should still be strongly encouraged to make a will so that there is an executor who will carry out their wish that the distribution of the estate is to follow the ISA. In this way, they can enjoy the best of both worlds!

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