



Singapore  
Institute of Legal Education

# Probate & Succession Planning

## **Introduction to Wills and Probate**

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# WILLS

So what is a Will?

- A Will is a declaration in writing, made in accordance with the formalities required by Statute, of the intention of the person making it with regard to matters which he/she wishes to take effect upon or after his/her death.

*[Section 23 Forms & Precedents (4th Edition), 495]*

# Key characters in a Will

- **Testator** – the person making the Will
- **Executor(s)** – the person(s) named in the Will as responsible for dealing with the estate upon the Testator's death
- **Beneficiary** – the person(s) named in a Will to receive property from the Testator's estate upon the Testator's death.

# Who can make a Will?

- **‘Testator’** – the person making the Will
  - Any individual who is at least 21 years old
    - s 4 of the Wills Act (“**WA**”)
    - Exceptions in s 27 WA: Soldiers, mariner or seaman at sea
  - Of sound mind (i.e. have testamentary capacity)
    - **Chee Mu Lin Muriel v Chee Ka Lin Caroline** [2010] 4 SLR 373
    - **ULV v ULW** [2019] 3 SLR 1270 (HCF)

# Requirements for a valid Will

- A Will is only valid when it complies with both formal and substantive requirements of making a Will:
  - Rules as to formal validity - s 5 WA provides for situations where a Will shall be treated as properly executed by the testator
  - A Will must be in writing (s 6 WA)
  - Executed in the presence of 2 or more witnesses at the same time and those witnesses shall subscribe the Will in the presence of the testator (s 6(2) WA)
  - Note the effect of section 10 Wills Act – why beneficiaries or wife/husband of a beneficiary should not be witnesses to the Will

# When does a Will take effect?

- Every Will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of a testator, unless a contrary intention shall appear by the Will (s 19 WA) i.e upon the death of a testator
  - Known as the ‘ambulatory’ nature of a Will
  - Can be changed as often as the testator wants during his lifetime, provided he has testamentary capacity to do so

# Typical clauses in a Will

We will consider the following usual clauses:

## The Start

- Commencement
- Revocation
- Appointment of executor(s) & trustee(s)
- Appointment of guardian(s)

## The Main Body

- Specific gift(s)
- Residuary gift(s)

## The End of the Will

- Testimonium
- Attestation

# THE START - typical clauses in a Will

- **Commencement of a Will**

E.g. *“This is the last will and testament of me (name) (NRIC No.) of (address).”*

- **Revocation clause** (refer to s 13 WA and s 15 WA )

E.g. *“ I revoke all former wills, codicils and other testamentary dispositions made by me.”*

- What is a codicil?
- What occurs when there is no revocation clause in a will? Wills previously made may be admitted to proof and the present will would have to be construed with the earlier will, so far as consistent, as forming the will.



# Typical clauses in a Will

- **Appointment of executor & trustee**

- What do executors and trustees do?
- Who can be appointed as executor and trustee? Anyone who is an adult including beneficiaries of the will. While any number of persons can be named in a will, probate can only be granted to no more than 4 persons (s 6 Probate and Administration Act (“**PAA**”)).
- Substitutional appointment of executor and trustee is advisable especially if there is only one named executor/trustee as there is a risk that he might pre-decease the testator or choose to renounce his office.
  - E.g. *“I appoint my grandfather Tan Ah Kow of 1 Chancery Lane, Singapore 200200 to be the sole executor and trustee of this my Will but if my said grandfather shall die in my lifetime or shall refuse or be unable to act as such executor and trustee then I appoint my niece Louise Lim of 200 Lotus Avenue, Singapore 100100 to be the executor and trustee of this my Will.”*

# Typical clauses in a Will

- **Appointment of guardians, if applicable**
  - What if your client has a child under 21 years old? A testator can appoint testamentary guardians under the will (who need not be biologically related to the child – c.f. natural guardian). Refer to s 7 of the Guardianship of Infants Act.
  - E.g. *“I appoint my friend Peter Lee to be the guardian of my minor children, Sylvia Lim and Matthew Lim in the event of my death, but if he predeceases me, then I hereby appoint my cousin, Nicole Chee, to be the substitute guardian thereof.”*

# THE MAIN BODY -Typical clauses in a Will

Main part of will dealing with different types of gifts – Specific, Non-specific, Residue

- **Specific gift clauses.** A specific gift is a gift of a particular item(s) or any asset including land and other types of immovable property. Must be described accurately.

E.g. “I give \$100,000.00 free of interest to my friend Andrew Chia provided he survives me”.

E.g. “I give my property known as 12 Maple Hill, #05-01, Singapore to my son, Robert Tan.”

# Typical clauses in a Will

- **Non-specific gift clauses**

- E.g. “I give all my personal possessions to Lim Peck Tong.”

In the above example there is no indication of any specific items to be gifted.

# Typical clauses in a Will

Having distinguished a specific gift from a non-specific gift, you need to be aware of the difference between a gift of residue (a residuary gift) and a gift of something other than residue (a non-residuary gift).

*E.g. Martin Fernandez gives S\$200,000.00 free of interest to each of his 4 children. He gives all his watches to his nephew Alan Chan. Everything else he leaves to his wife. The gift of money and watches are (specific) non-residuary gifts and the gift of everything else is a gift of residue.*

# Typical clauses in a Will

- **Residuary gift clauses** – “catch all”
  - All the property of the testator that has not been specifically provided for in the Will.
  - The residuary estate is usually used to pay debts, funeral and testamentary expenses, estate taxes and legacies.

# Typical clauses in a Will

Residuary clause: immediate gift of residuary estate to a class of beneficiaries

E.g. 1 *“Subject to the payment of my just debts, funeral and testamentary expenses and estate duty if any, I give, devise and bequeath my movable and immovable property not hereby disposed of, to my children as are living at my death and if more than one in equal shares”*

# Typical clauses in a Will

Residuary clause – to trustees on trust for sale, to be held for a beneficiary with provision for survivorship/gift-over

*E.g. 2 “I give the residue of my estate out of which shall be paid my debts, funeral and testamentary expenses and estate duties if any, to my trustees on trust for sale with power to postpone sale without liability for loss and such estate and the property which currently represents it is referred to in this will as “my Residuary Trust Fund”. My trustees shall hold my Residuary Trust Fund for Wilson Boh but if Wilson Boh shall predecease me then to Wilson Boh’s children in equal shares.”*

In the above example a trust is needed because minor interests (being Wilson’s children as the alternate beneficiaries/gift over beneficiaries) may arise if the primary beneficiary (Wilson) dies before the testator.



# THE END - typical clauses in a Will

- **Testimonium clause**

- Placed at the end of the Will

E.g. *“In witness whereof I have hereunto set my hand this 20<sup>th</sup> day of July 2020.”*

- **Attestation s 6 WA**

**General attestation clause:**

- E.g. *“Signed by the abovenamed Tan Ah Moi as her last will and testament in the presence of us both present at the same time who at her request and in the presence of each other have hereunto subscribed our names as witnesses:-”*

- **Where translation of the Will is required:**

E.g. *“Signed by the above named [name of testator] in our presence and by us in his, the testator being unable to understand English but understanding Mandarin the will was translated into Mandarin by [name of translator] who is fully conversant with Mandarin and English before execution as stated above when the testator appeared thoroughly to understand and have knowledge of the will.*

(NOTE **section 6(2) WA** – signatures at the “foot or end of the will”)

## Note: referring to persons in Wills

- **Naming the testator**

- If the testator holds assets in other names e.g. *Lee Li Chua - also known as Karen L.L. Chua* – then in the commencement of the will, the other name(s) ought to be included. This is so when the Grant of Probate is issued on the Will proved, it would bear all the names of the deceased and the assets held in the other name(s) can be dealt with by the executors/trustees.

- **Details of beneficiaries & witnesses**

- The full names/IC numbers of beneficiaries and their respective addresses should be set out in the Will
- Witnesses should also include sufficient details so that it is possible to locate them in the future when necessary. The Court may require an affidavit of due execution from a witness if it has queries on the execution of the Will (Rule 215 FJR)

# Note: Properties that cannot be disposed of in a Will/Gifts that fail

- **Monies in the CPF accounts**

- Monies in CPF accounts can only be dealt with by way of a CPF nomination.
- s 25 of the Central Provident Fund Act 1953

- **Proceeds from insurance policies**

- S131 - 133 of the Insurance Act 1966
- Section 150(2) IA read with the Insurance (General Provisions) Regulations 2003

# Note: Properties that cannot be disposed of in a Will/gifts that fail

- **Property held in joint tenancy?**

- In joint tenancy ownership of property, the law of survivorship will apply. However, the ultimate *survivor* can dispose of jointly held assets in a will (*Lau Siew Kim v Yeo Guan Chye* [2008] 2 SLR(R) 0108)

E.g. “*If I outlive my husband, I give the property known as [address] to my son Teck Leong*”.

- A will cannot sever a joint tenancy, which can only be severed by way of a notice of severance and serving a copy on the other joint tenant. Refer to s 35 and 66A of the CLPA; s 53(5) of the Land Titles Act.

- **Trust properties**

- Assets placed in an inter vivos trust are not part of the deceased's estate

- **Properties that do not exist/accounts with insufficient monies at date of death**

- A gift fails if the gifted property does not exist at the testator's death. This is the principle of **ademption**. If there is insufficient money to pay cash gifts then the legacies are reduced and this is known as **abatement** and each beneficiary takes *pari passu*.

## Note: Beneficiaries

- **What happens when gifts are to be given to a testator's named child ("A") under testator's Will but A dies before the testator?**
- **Generally**, a gift by Will **lapses** if a beneficiary dies before the testator. If there are no gift over beneficiaries then the gift falls into the residuary estate for distribution under the residuary clause.
- **HOWEVER**, note the effect of **s 26 Wills Act**:
  - Applies where the child/children is/are specifically named e.g. "*I give my property at XXX to my son, John Tan*". John's share passes to John's estate for distribution if John dies before his father (see *Re Will of Loke Soh Lui, dec'd* [1997] 3 SLR(R) 956)
  - If A leaves issue as at the date of death, any gift from A's father to A will not lapse, but pursuant to s 26 WA will go to A's estate for distribution (unless a contrary intention is stated in the Will)
  - If a parent wishes for the failed gift to pass to someone else other than to the named deceased child's estate, an express clause in the will must indicate this contrary intention

## Note: Beneficiaries

- S 26 WA does **not** apply to class gifts
- E.g. gift to class of children “*I give my property at XXX, free of encumbrances, to all my surviving children in equal shares as at the date of my death*”
  - Gift automatically lapses vis-à-vis the deceased child; gift will be redistributed to the rest of the surviving children in equal shares
  - If one wishes for the gift to pass to the deceased child’s issue, must include an express clause in the Will indicating so

# Note: Profile of Beneficiaries

- Considerations and consequences of gifting certain types of immovable property where beneficiary is not a Singaporean or owns HDB property
- Residential Property Act (“**RPA**”)
  - Refer to types of property under s 3 RPA
  - Approval of the Land Dealings Approval Unit (see 25(5) RPA)
  - Proceeds of sale instead of in-specie inheritance s 3(4) RPA
- Housing and Development Act (“**HDA**”) (See s 59 of HDA)

# Other Points

- **Avoidance of partial intestacy**

- Partial intestacy can arise where a Will does not name executors or where all executors have predeceased the testator and the Will does not name any substitute executor. In such cases a grant of **letters of administration with will annexed** (instead of a grant of probate) will have to be applied for. See section 13 Probate & Administration Act on who should apply for letters of administration with will annexed
- A partial intestacy can also arise where the Will does not dispose of some part of the testator's estate which is capable of passing under a Will or did not provide for a residuary clause to deal with assets not specifically disposed of. The beneficiaries of such undisposed assets are those persons who take upon the intestacy of the testator. See s 10 Intestate Succession Act (“**ISA**”)



# Other Points

- **Failure to provide for the welfare of deceased's dependants**
- Inheritance (Family Provision) Act (“**I(FP)A**”) allows for certain dependants to apply to alter the distribution of the deceased's estate for the maintenance of a dependant not provided for under a will
- The I(FP)A does not apply to parents (see section 3 of I(FP)A) or illegitimate children of the deceased (see *Low Guang Hong David Ors v Suryono Wino Goei* [2012] 3 SLR 185)

# Taking instructions in Will-drafting

*“...there ought to be no room for even the slightest doubt (or the slightest possibility of a mistake) on the part of a solicitor in both understanding the testator’s intention and expressing that intention in the will to be drawn up.”*

*Low Ah Cheow v Ng Hock Guan [2009] SGCA 25*

# Taking Instructions in Will-drafting

## Questions to ask yourself as a lawyer

- Can I act for the client? Refer to rule 25 of the Legal Profession (Professional Conduct) Rules 2015.
  - A solicitor/law practice must not act for the client in the drafting of a will where the solicitor, his partner, director, consultant or employee or their immediate family members will be a beneficiary.
  - *The Law Society of Singapore v Lee Suet Fern* [2020] SGDT 1
- What does the client want to do?
- Can what he is asking for be done?
- Does the will accurately reflect his intentions?
- When must the will be prepared?

# Taking attendance notes

*“In cases where the construction of the terms of a will is contested, it may be necessary to compare the testimony of the solicitor who drafted the will (“the drafting solicitor”) with his attendance notes since those notes are (or at least should be) a contemporaneous record of the testator’s instructions. A failure on the drafting solicitor’s part to keep proper attendance notes and/or records may have adverse consequences. This omission could persuade the court to doubt the veracity of the drafting solicitor’s testimony if a dispute arises as to the purport of the terms of the will; the court may even draw adverse inferences against the drafting solicitor”*

*Low Ah Cheow and others v Ng Hock Guan [2009] SGCA 25*

# Taking attendance notes

*What should go in your attendance note for Wills preparation and witnessing? Non-exhaustive examples of facts and details:*

- How long have you known the testator?
- Who introduced you to the testator?
- On what date did you receive instructions from the testator?
- Did you receive instructions via telephone / email?
- If instructions were taken at a meeting – include contemporaneous notes of the meeting, the reasons given by testator for their intentions / any significant changes from previous Wills, the advice given to the testator, where the meeting took place and who else was present at the meeting
- Did the testator exhibit any signs of confusion or loss of memory?
- How were the provisions of the will explained to the testator?
- Can the testator read English? If not, in what language / dialect was the will interpreted and read out to the testator?

# NEXT : Comparing some differences between intestate and testate estates

Who is in charge and who gets what?

As you have seen, with a Will, a testator can choose who he wants to put in charge of his estate (i.e. he gets to choose his personal representatives - executors and trustees) and enjoys the right to also choose his beneficiaries and their shares, subject to leaving reasonable provision for certain dependants.

When a testator dies, his estate vests in executors and they handle the deceased's affairs subject to the production of the grant of probate.

# Comparing some differences in intestate and testate estates

In an intestacy situation i.e. where someone has died without a Will, the estate vests in the Public Trustee (s 37 PAA) until a grant of letters of administration has been obtained by personal representatives - called administrators.

The entitlement to the deceased's estate is determined by statute – Intestate Succession Act (“**ISA**”) - and the question of who can be an administrator of an intestate's estate is determined by the priority of entitlement to the estate as set out in the ISA (see: section 7 of the ISA).

# Some Succession Issues

- **What happens when a beneficiary dies before the vesting of his interest in an estate ?**
  - Refer to Section 26 WA, *Re Loke Soh Lui* on the implication of referring to “children” without naming the children, creating a class gift. What about intestate situations?
- **What happens when there are concurrent deaths where it is not possible to determine who has died first?**
  - Refer to Section 30 Civil Law Act on the presumption of survivorship (“the younger shall be deemed to have survived the elder”)
- **Inheritance rights of illegitimate and adopted children**
  - Sections 5 – 10 of the Legitimacy Act
  - When given up for adoption (See Section 7 of the Adoption of Children Act)
- **Bankruptcies in relation to succession and administration**
  - Section 400 of the Insolvency, Restructuring and Dissolution Act 2018



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