

## WILL & PROBATE

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# DOES THE ABSENCE OF A RESIDUARY CLAUSE IN A WILL RESULT IN PARTIAL INTESTACY OVER ANY PART OF A DECEASED'S ESTATE

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Dated 13<sup>th</sup> September 2022

### **INTRODUCTION**

The Federal Court in **Kalwant Singh A/L Ujagar Singh & Anor v Jaswant Kaur A/P Ujagar Singh A/P Ujagar Singh & Ors [2022] 3 MLJ 184** ("**Kalwant Singh case**") revolved around the issue of whether the absence of a residuary clause in a will results in partial intestacy over any part of a deceased's estate, where the testator by his will creates a trust over the whole of his estate, devises and bequeaths the same to his trustee whilst specifically excluding his heirs at law as beneficiaries of his estate.

This article discusses the facts, issues and judgment of the case. This article will also elaborate on the principles of law relied by the Federal Court in arriving its decision. In this article, parties will be referred to as they were, in the High Court.

### **BRIEF FACTS**

The 1st – 4th Plaintiffs and the 1st – 2nd Defendants are the lawful children to Ujagar Singh (father) ("**Ujagar**") and Nihal Kaur (mother) ("**Nihal**"). Nihal executed her last will on 05.10.2001 and passed away on 24.03.2013 whereas Ujagar executed his last will on 31.03.2007 and passed away on 04.12.2014.

Upon the death of Nihal and Ujagar, the 1st Defendant was appointed as the executor for both Nihal and Ujagar's estate. The Plaintiffs subsequently found out that the share portion of one property which was in Nihal's name had been transferred to the Defendants in equal share in 2015 ("**the said Property**"). Therefore, disputes arose between the siblings in respect of the said Property. The Plaintiffs then filed an action in the High Court for certain reliefs, which amongst others include a declaration that the 1st Defendant as the executor for Ujagar's estate shall distribute residuary of Ujagar's estate (i.e. the said Property) to all the beneficiaries of Ujagar's estate within 14 days from the Court Order date.

### **HIGH COURT'S FINDINGS**

The High Court Judge found that the said Property fell within the residuary estate of Ujagar as the said Property was never included in Ujagar's Will. The learned High Court Judge allowed the Plaintiff's action in favour of the 4th plaintiff only by referring to Nihal's will which states as follows:-

*"I give to my husband, Ujagar ... absolutely my undivided share in the shop lot held under ... In the event my husband does not survive me, I give to my fourth son, Harjeet Singh... a life interest in my undivided share in the shop lot..."*

### **COURT OF APPEAL'S FINDINGS**

Aggrieved with the High Court's decision, the Defendants appealed to the Court of Appeal. The Court of Appeal found that Ujagar's Will did not state that he wished to give effect to Nihal's intention to give the said Property to the 4th Plaintiff. The Court of Appeal viewed that the learned High Court Judge had construed Ujagar's will by using Nihal's will. The Court of Appeal having read Ujagar's Will, held that it was his intention to limit his estate only to those specifically listed in his will and the said Property was obviously not provided for in the will. Therefore, the said Property forms his residuary estate. As such it shall be passed to all the heirs at law of Ujagar as intestate property, in accordance with the Distribution Act 1958. As a result, the Court of Appeal allowed the appeal in part and the decision of the High Court was set aside.

The Defendants, aggrieved by the Court of Appeal's decision, appealed to the Federal Court.

### **FEDERAL COURT'S DECISION**

The Federal Court in reaching its decision, explained the following principles of law below:-

#### ***Construing a Will***

The Federal Court relied on and applies the principles of law in **Re Murray Estate 2007 BCSC 1035** where it was held that the court will not alter or add to the words of the will unless it is perfectly clear that the will does not express the intention of the testator. The Federal Court further referred to **Re Chin Sem Lin's Settlement; Yong Tet Foong & Anor v Chin Thin Lee & Ors [1971] 2 MLJ 152** where it was held that the duty of the Court in construing a will is to ascertain if possible what the testator meant, without any pre-conceived ideas as to his meaning and to give effect as far as possible to his intention as declared in the will.

#### ***Presumption against Intestacy***

The Federal Court held that if the will is capable of two interpretations, the court will prefer the interpretation which results in the disposal of the whole estate over and above the interpretation which results in an intestacy. As such, where the wordings of the will are not clear and ambiguous, the Court would apply certain principles that could assist in avoiding a case of partial intestacy as held in **Tay Seck Loong @ Tay Seck Long & Ors v The Chor Chen & Ors [2005] 7 MLJ 612**.

The Federal Court after referring to the case of **Hsu Yik Chai v Hsu Yaw Tang & Anor [1982] 2 MLJ 227** and **Tan Sri Dr. M Mahadevan v Dr. Jeyalaksami Ratnavale & Ors [2017] 6 CLJ 4** further held that if a will does not provide for the distribution of a particular property and there are no words in the will that could be interpreted as a residuary clause, a court would not be able to

assist in avoiding a case of partial intestacy. The Court is prohibited from inferring an intention which is not present in a will.

### **The relevant provision of the Wills Act 1959**

In dealing with the appeal, the Federal Court also found that **section 18 of the Wills Act 1959** is pertinent and relevant as it provides that *'Every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will'*.

### **Exclusion Clause**

Where the intention to exclude certain beneficiaries is expressed in a will, the absence of a residuary clause will not entitle those beneficiaries to obtain those benefits under the will. Instead the bequest will be shared among those who the testator had intended to benefit. The Federal Court referred to the cases of **Re Sharpe [1985] 18 DLR (4th) 421 and Re Wynn (Decd) [1983] 3 All ER 311.**

### **The Present Appeal**

In arriving its decision, the Federal Court noted the following clauses in Ujagar's Will which provides that:-

"3. I appoint my son Kalwant Singh... to be the executor of and trustee of this my Malaysian will and estate and **devise and bequeath the whole of my Malaysian estate both real and personal unto my trustee upon the following trusts...**

4. I declare that I have **intentionally not made provision under this my will for my daughters and other sons** for reason that I have already made adequate alternative financial provision for them."

As Nihal predeceased Ujagar, the Court was of the view that at the point when Ujagar passed away, he already had beneficial interest in the said Property which was registered in Nihal's name. As such at that point in time, the said property formed part of Ujagar's estate (going by the provision of section 18 of the Wills Act 1959). Therefore, with particular reference to clause 3 of Ujagar's will where it states that the whole estate was to be devised and bequeathed to his trustee, i.e. the 1st Defendant, the Federal Court held that the said Property should be dealt with by way of a testamentary disposition to the 1st Defendant.

Further, the Federal Court also found that the intent of Ujagar here is unmistakable as he had in clear, unambiguous and appropriate language in clause 4 of his will excluded his daughters and other sons for reasons that he had made other financial arrangements for them.

That being the case, the Federal Court set aside the order of the Court of Appeal and ordered that the said Property will be given to the 1st Defendant as trustee and executor of the Will to be distributed according to the will.

### **KEY TAKEAWAYS**

This decision would serve as a guidance and reinforcement of the legal position that the Court will ascertain and give effect as far as possible and as far as practicable the intention of a testator as declared in his will when interpreting and construing a will. In addition, it is important to note that the court will take into consideration exclusion clauses in a will when determining the distribution of an estate. Further, it is not always the situation that the absence of a residuary

clause in a will would result in a partial intestacy over a deceased's estate. The Court is obligated to look into the intention of the testator as expressed in the will and would prefer an interpretation which disposes of the whole estate over and above an interpretation which results in intestacy (i.e. presumption against intestacy). This is in line with the principle in **Tay Seck Loong @ Tay Seck Long & Ors v The Chor Chen & Ors [2005] 7 MLJ 612** where it was held that "...there is a strong presumption that where one made a Will, one did not intend to die intestate."

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