Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit

HIGH COURT (JOHOR BAHRU) — SUIT NOS 23NCVC-159 OF 2011 AND 22NCVC-377 OF 2011
VERNON ONG J
31 DECEMBER 2012

Family Law — Marriage — Common law marriage — Whether parties displayed common intention to have marital union — Whether parties' long period of cohabitation and arrangement of financial affairs suggested marital relationship — Whether couple's daughter legitimate and treated as such by father's family members — Whether laches and acquiescence barred family members from subsequently challenging child's legitimacy

Succession — Probate — Validity of will — Photocopy of will — Whether will duly executed in accordance with law — Whether presumption will had been revoked due to possible destruction of original copy rebutted — Whether testator's conduct after making of will and circumstances of case did not show intention to revoke will — Whether probate may be granted to copy of will — Probate and Administration Act 1959 s 26

The plaintiffs in the consolidated actions herein claimed they were the lawful court-appointed administrators of the estate of their deceased brother ('the deceased') and sought various reliefs in their suits against the defendants. In the first suit (Suit 159), the plaintiffs denied that the first defendant ('WCL') and the second defendant ('Isabelle') were respectively the lawful wife and daughter of the deceased. The plaintiffs claimed WCL was merely someone the deceased had lived with for many years without undergoing any Chinese customary or other official or ceremonial form of marriage. Isabelle, the plaintiffs claimed, was not born of the deceased's union with WCL and neither was she legally adopted by them but merely 'taken' as an infant from a village and brought up as their daughter. The plaintiffs claimed WCL and Isabelle had no beneficial rights or interests under the deceased's estate and that the deceased had clearly made known to the plaintiffs that he had never made any will. The plaintiffs, inter alia, sought a declaration that they were the rightful administrators of the deceased's estate; that the defendants were not the deceased's beneficiaries or next-of-kin and that an order be made revoking and setting aside the grant of letters of administration to the deceased's estate that WCL had obtained from another branch of the High Court. In their defence and counterclaim, the defendants maintained not only that WCL was the deceased's lawful wife and Isabelle their lawful and legitimate child, but that the deceased had named

A WCL as the sole executrix and beneficiary of his estate under a will, the original copy of which could not be found. WCL was, however, able to produce a photocopy of the will and, in support of her case, called as witnesses a lawyer ('DW1') and his then legal clerk ('DW2'). DW1 testified that he prepared the will and that the deceased later executed the will in his and DW2's presence. B DW1's official receipt issued to the deceased for preparation of the will and certain other supportive documents were tendered in evidence. In their counterclaim the defendants sought an order that the copy of the will be proved and, in consequence, the grants of letters of administration obtained both by WCL and the plaintiffs to the deceased's estate be nullified. Meanwhile, in Suit C 377, the plaintiffs' claim against the defendant therein was for the return to them as lawful administrators certain monies the defendant had allegedly misappropriated from the estate. The determination of both suits turned on question whether WCL and Isabelle were respectively the deceased's lawful wife and issue whether the deceased had left a valid will. D

Held, dismissing the claims in both suits and allowing the first and second defendants' counterclaim:

E (1) As the court found that WCL and Isabelle were respectively the lawful wife and lawful child of the deceased, it followed that the plaintiffs' locus as administrators of the deceased's estate pursuant to the grant of letters of administration granted to them was no longer tenable in law and in fact. As such, their claims in both the suits failed (see para 50).

F (2) The court had no hesitation in finding WCL was married to the deceased as there was clearly a common intention on the part of both of them to form a marital union which lasted for 29 years and ended with his demise despite the fact the deceased's family members refused to acknowledge her as his wife (see para 31).

G (3) Even if there was no tea ceremony at the deceased's family home as contended by the plaintiffs, there was nothing to preclude the court from holding there was a common law marriage between the deceased and WCL given the fact they had cohabited for a considerable length of time accompanied by the repute and presumption of marriage (see para 31). H

(4) The fact the plaintiffs did not recognise the relationship between the deceased and WCL was of no consequence to the validity of their marriage. Their denial did not erase or negate all the events between 1974 and 2009 which marked the deceased and WCL coming together as I husband and wife in 1980; their cohabitation and holding themselves out as husband and wife; their starting a family with the birth of Isabelle; the deceased opening and maintaining joint accounts with WCL and buying properties in their joint names and his taking out of insurance policies naming WCL and Isabelle as beneficiaries (see para 31).

(5) As to whether Isabelle was the lawful child of the deceased, the plaintiffs had waited until she was 23 years of age before mounting a challenge on her legitimacy. During this time the deceased had taken Isabelle to visit his parents and family and, in fact, both plaintiffs admitted that they accepted Isabelle as the deceased's daughter and treated her as their niece. The plaintiffs were guilty of laches and by their acts and admission had acquiesced to Isabelle as the daughter of the deceased over the years (see para 33).

(6) The fact that Isabelle was the lawful daughter of the deceased and WCL was evident from the particulars in her birth certificate and identity card and those in the deceased's earlier passport. In any case, the plaintiffs failed to adduce any evidence to assert that Isabelle was not the deceased's lawful child. As such, there was nothing for her to disprove. It would be unjust and against equity and good conscience to declare Isabelle an illegitimate child of the deceased (see para 38).

(7) The deceased had died testate leaving behind a valid will. The requirements of s 5(2) of the Wills Act 1959 had been satisfied as there was evidence to show the deceased had signed the will in the presence of DW1 and DW2. The court found their evidence to be clear, concise and credible. In the photocopy of the will WCL was appointed its executrix and the will set out the deceased's intention to give all his real and personal property to WCL. In the light of that evidence the plaintiffs' assertion that the deceased told them that he had never made a will was implausible (see paras 42 & 51).

(8) There was no evidence to suggest the deceased had wanted to destroy or revoke the will or to not benefit WCL. Accordingly, the presumption of revocation had been rebutted by the conduct of the deceased and by inference from the circumstances of the case. Probate may be granted to the copy of the will as it had been sufficiently established on balance of probabilities (s 26 of the Probate and Administration Act 1959) (see para 48).

[Bahasa Malaysia summary

Plaintif-plaintif dalam tindakan-tindakan yang disatukan telah mendakwa mereka adalah pentadbir-pentadbir yang dilantik oleh mahkamah secara sah untuk harta pusaka abang mereka yang telah meninggal dunia ('si mati') dan memohon pelbagai relief dalam guaman-guaman mereka terhadap defendan-defendan. Dalam guaman pertama ('Guaman 159'), plaintif-plaintif menafikan bahawa defendan pertama ('WCL') dan defendan kedua ('Isabelle') masing-masing adalah isteri dan anak perempuan sah si mati. Plaintif-plaintif mendakwa WCL hanya seseorang yang si mati telah tinggal bersama untuk beberapa tahun tanpa melalui mana-mana adat Cina atau bentuk rasmi atau upacara perkahwinan lain. Isabelle, plaintif-plaintif mendakwa, tidak lahir

daripada hubungan si mati dengan WCL dan dia juga tidak diambil sebagai anak angkat secara sah oleh mereka tetapi hanya 'diambil' sewaktu bayi daripada sebuah kampung dan dibesarkan sebagai anak perempuan mereka. Plaintif-plaintif mendakwa WCL dan Isabelle tiada hak benefisiari atau kepentingan di bawah harta pusaka si mati dan bahawa si mati jelas telah memberitahu plaintif-plaintif bahawa dia tidak pernah membuat apa-apa wasiat. Plaintif-plaintif, antara lain, memohon satu deklarasi bahawa mereka adalah pentadbir-pentadbir sah ke atas harta pusaka si mati; bahawa defendan-defendan bukan benefisiari-benefisiari atau waris kadim si mati dan bahawa satu perintah telah dibuat membatalkan dan mengetepikan pemberian surat pentadbiran kepada harta pusaka si mati yang telah diperoleh oleh WCL daripada cawangan Mahkamah Tinggi yang lain. Dalam pembelaan dan tuntutan balas mereka, defendan-defendan menegaskan bukan sahaja WCL isteri sah si mati dan Isabelle anak mereka yang sah, tetapi bahawa si mati telah menamakan WCL sebagai telah satu-satunya wasi dan benefisiari kepada harta pusakanya di bawah satu wasiat, salinan asalnya yang tidak dapat ditemui. WCL, bagaimanapun, dapat mengemukakan salinan wasiat itu dan, sebagai menyokong kesnya, dipanggil sebagai saksi-saksi peguam ('DW1') dan bekas kerani undang-undangnya ('DW2'). DW1 telah memberi keterangan bahawa dia telah menyediakan wasiat itu dan bahawa si mati kemudian telah menyempurnakan wasiat itu dengan kehadirannya dan DW2. Resit rasmi DW1 yang dikeluarkan kepada si mati untuk persediaan wasiat itu dan beberapa dokumen sokongan telah ditender sebagai keterangan. Dalam tuntutan balas mereka defendan-defendan memohon perintah agar salinan wasiat itu dibuktikan dan, berikutan itu, pemberian surat-surat pentadbiran diperoleh oleh kedua-dua WCL dan plaintif-plaintif ke atas harta pusaka si mati adalah terbatal. Sementara itu, dalam Guaman 377, tuntutan plaintif-plaintif terhadap defendan adalah untuk mendapat balik daripada mereka sebagai pentadbir-pentadbir sah wang yang defendan dikatakan telah dilesapkan daripada harta pusaka itu. Penentuan kedua-dua guaman itu bertujuan mempersoalkan sama ada WCL dan Isabelle masing-masing adalah isteri sah si mati dan isu sama ada si mati telah meninggalkan wasiat yang sah.

Diputuskan, menolak tuntutan-tuntutan dalam kedua-dua guaman dan membenarkan tuntutan balas defendan pertama dan kedua:

(1) Oleh kerana mahkamah mendapati bahawa WCL dan Isabelle masing-masing adalah isteri dan anak sah kepada si mati, adalah diikuti bahawa locus plaintif-plaintif sebagai pentadbir-pentadbir harta pusaka si mati menurut pemberian surat-surat pentadbiran yang diberikan kepada mereka tidak lagi dapat dipertahankan dari segi undang-undang dan fakta. Oleh demikian, tuntutan-tuntutan mereka dalam kedua-dua guaman gagal (lihat perenggan 50).

(2) Mahkamah tidak teragak-agak untuk mendapati WCL telah pun berkahwin kepada si mati kerana jelas terdapat niat bersama di kedua-dua

pihak untuk membentuk hubungan perkahwinan yang bertahan selama 29 tahun dan berakhir dengan kematiannya meskipun hakikatnya ahli keluarga si mati enggan menganggapnya sebagai isterinya (lihat perenggan 31).

(3) Walaupun tiada upacara minum teh di rumah keluarga si mati sebagaimana dihujahkan oleh plaintif-plaintif, tiada apa-apa untuk menghalang mahkamah daripada memutuskan terdapat perkahwinan *common law* antara si mati dan WCL berdasarkan fakta mereka telah bersekedudukan untuk tempoh masa yang lama disertai reputasi dan andaian perkahwinan (lihat perenggan 31).

(4) Hakikat yang plaintif-plaintif tidak mengakui hubungan antara si mati dan WCL tidak memberi kesan kepada kesahan perkahwinan mereka. Penafian mereka tidak melenyapkan atau menidakkan semua kejadian antara tahun 1974 dan 2009 yang menandakan si mati dan WCL hidup bersama sebagai suami dan isteri pada tahun 1980; mereka memulakan keluarga dengan kelahiran Isabelle; si mati membuka dan mengendalikan akaun-akaun bersama dengan WCL dan membeli hartanah-hartanah atas nama mereka bersama dan dia mengambil polisi insurans dengan menamakan WCL dan Isabelle sebagai benefisiari-benefisiari (lihat perenggan 31).

(5) Berhubung sama ada Isabelle adalah anak sah si mati, plaintif-plaintif telah menunggu sehingga dia berumur 23 tahun sebelum menghadapi cabaran tentang kesahannya sebagai anak mereka. Pada masa ini si mati telah membawa Isabelle melawat ibu bapa dan keluarganya, bahkan, kedua-dua plaintif mengakui yang mereka menerima Isabelle sebagai anak perempuan si mati dan menganggapnya sebagai anak saudara mereka. Plaintif-plaintif bersalah kerana *laches* dan melalui tindakan dan pengakuan mereka telah bersetuju yang Isabelle adalah anak perempuan si mati selama tempoh tersebut (lihat perenggan 33).

(6) Hakikat bahawa Isabelle adalah anak perempuan sah si mati dan WCL adalah jelas daripada butir-butir dalam sijil kelahirannya dan kad pengenalannya dan dalam paspot si mati sebelum ini. Dalam apa keadaan, plaintif-plaintif telah gagal untuk mengemukakan apa-apa keterangan untuk menegaskan bahawa Isabelle bukan anak si mati yang sah. Oleh itu, tiada apa-apa untuk dibuktikan sebaliknya. Adalah tidak adil dan bertentangan ekuiti dan nurani baik untuk menganggap Isabelle anak tak sah taraf si mati (lihat perenggan 38).

(7) Si mati telah meninggal dunia meninggalkan satu wasiat yang sah. Keperluan s 5(2) Akta Wasiat 1959 telah dipatuhi kerana terdapat keterangan untuk menunjukkan si mati telah menandatangani wasiat itu dengan kehadiran DW1 dan DW2. Mahkamah mendapati keterangan mereka adalah jelas, tepat dan boleh dipercayai. Dalam salinan wasiat itu

WCL telah dilantik sebagai wasinya dan wasiat itu menyatakan niat si mati untuk memberikan semua hartanah sebenar dan peribadinya kepada WCL. Berdasarkan keterangan tersebut hujah plaintif-plaintif bahawa si mati telah memberitahu mereka yang dia tidak pernah membuat wasiat tidak dapat dipercayai (lihat perenggan 42–51).

(8) Tiada keterangan untuk mencadangkan si mati ingin memusnahkan atau membatalkan wasiat itu atau untuk tidak diberikan kepada WCL. Sewajarnya, andaian pembatalan telah dipatahkan melalui perilaku si mati dan melalui inferens berdasarkan keadaan kes. Probet boleh diberikan kepada salinan wasiat itu kerana ia adalah cukup untuk dibuktikan atas imbangan kebarangkalian (s 26 Akta Probet dan Pentadbiran 1959) (lihat perenggan 48).]

Notes

For a case on common law marriage, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4225.

For cases on validity of will, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2574–2584.

Cases referred to

Abrath v North Eastern Rly Co (1883) 11 QBD 440, CA (refd)

Carolis De Silva v Tim Kim (1902) 9 SSLR App 8 (refd)

Ching Kwong Kuen v Soh Siew Yoke; Soh Siew Yoke v Ching Kwong Kuen [1982] 2 MLJ 139 (refd)

Chua Mui Nee v Palaniappan [1967] 1 MLJ 270, FC (refd)

Dorothy Yee Yeng Nam v Lee Fah Kooi [1956] 1 MLJ 257 (refd)

Eastern Enterprise Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)

Estate of Chong Swee Lin; Kam Soh Keh, Re v Chan Kok Leong & Ors [1997] 4 MLJ 464, HC (refd)

Hyde v Hyde and Woodmansee [1861–73] All ER Rep 175 (refd)

In the estate of Yeow Kian Kee (deceased); Er Gek Cheng v Ho Yeng Seng [1949] 1 MLJ 171 (refd)

Isaac Penhas v Tan Soo Eng [1953] 1 MLJ 73, PC (refd)

Karam Singh v PP [1967] 2 MLJ 25, FC (refd)

Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221, PC (refd)

Lee Gee Chong deceased, Re; Tay Geok Yap & Ors v Tan Lian Cheow [1965] 1 MLJ 102, FC (refd)

Lee Siew Kow Deceased Yeow Siew Neo (W), Re v Gan Eng Neo [1952] MLJ 184, CA (refd)

Nagapushani v Nesaratnam & Anor [1970] 2 MLJ 8 (refd)

Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25, SC (refd)

Paramesuari v Ayadurai [1959] 1 MLJ 195 (refd)

Ramasamy v PP [1938] 1 MLJ 137 (refd)

Reg v Willans (1858) 3 Ky 16 (refd)

Rex v Govindasamy [1933] 2 MLJ 97 (refd)
Sawinder Kaur d/o Fauja Sindo Singh v Charnjit Singh s/o Thakar Singh [1996] MLJU 304; [1998] 1 CLJ Supp 402, HC (distd)
Selvaduray v Chinniah [1939] 1 MLJ 253, CA (refd)
Soh Siew Yoke v Ching Kwong Kuen [1982] 2 MLJ 139 (refd)

Legislation referred to

Adoption Act 1952
Christian Marriage Ordinance 1956
Civil Law Act 1956 ss 3(1), 27
Civil Law Enactment 1937
Civil Marriage Ordinance 1952
Distribution Act 1958
Evidence Act 1950 ss 101(1), 102, 103
Law Reform (Marriage and Divorce) Act 1976
Limitation Act 1953 s 32
Probate and Administration Act 1959 ss 5, 5(2), 26
Wills Act 1959 s 5, 5(2)

WH Kan (LK Chow with him) (Josephine LK Chow & Co) for the plaintiff.
Yeo Chun Ming, John (CM Teo & Associates) in Suit No 23NCVC-159 of 2011 for the defendant.
Tho Kam Chew (KC Tho & Partners) in Suit No 22NCVC-377 of 2011 for the defendant.

Vernon Ong J:

[1] The plaintiffs in both actions are siblings of Wong Ah Hah @ Wong Wai Hum ('the deceased'). Their actions against the defendants are for various declarations and other relief relating to the estate of the deceased.

BACKGROUND TO THE PLAINTIFFS' ACTIONS

[2] On 19 September 2009, the deceased passed away of a massive heart attack, leaving a substantial legacy. The first and second plaintiffs in both suits are the elder sisters of the deceased.

SUIT 159

The plaintiffs' case

[3] In suit 159 Mdm Wong Choi Lin ('WCL') the first defendant is the wife of the deceased. The second defendant Isabelle Wong Hao Hyee ('IW') is their

daughter. The plaintiffs' case is predicated on the following grounds:

(a) the deceased had clearly indicated to the plaintiffs and their other sibling, Wong Sow Yin that he had not drawn up any testamentary will his passing;

(b) the deceased, although was never married in his lifetime, had a companion, ie, WSL, who claimed to be his 'lawful wife';

(c) the deceased had on or around year 1989, together with WCL 'taken' an infant girl, IW from a village in Layang-Layang, Johor and had registered IW as the daughter of the deceased and WCL;

(d) the deceased and WCL had never adopted IW according to the proper adoption procedures in law as in the Adoption Act 1952;

(e) as a result of the above, the plaintiffs together with another of their siblings, Wong Sow Yin had also filed an action via Originating Summons No 24M-166 of 2010 in the Johor Bahru High Court against IW, WCL, the deceased's estate and the National Registration Department ('NRD') in order to seek for a declaration in relation to the status of IW as to whether she is the 'daughter' of the deceased ('the OS suit') (the OS suit was subsequently withdrawn by the plaintiffs); and

(f) the plaintiffs' intention and objectives in applying for the limited grant of letters of administration is to protect and preserve the deceased's estate until the court decides on the true/rightful beneficiaries to the deceased's estate.

[4] Accordingly, it is the plaintiffs' contention that:

(a) there was no will created by the deceased in his lifetime and/or if there was any will that was created in the deceased's lifetime, that will was not properly executed and invalid in law for failing to comply with the requirements of s 5 of the Wills Act 1959 on the attestation of the will;

(b) in the event that the deceased had actually made a valid will in favour of WCL in 1990, the deceased had destroyed the will with the intention not to benefit WCL as the sole beneficiary;

(c) the deceased and WCL were never married, whether in accordance with the civil process of registration of marriage or Chinese customary marriage as recognised in law;

(d) IW is not the natural born child of the deceased and WCL;

(e) IW not being the natural born child is also not adopted by the deceased and WCL according to the proper procedure as stipulated in the Adoption Act 1952;

(f) WCL is not the legal wife of the deceased and IW is not the legitimate

child of the deceased and both are not beneficiaries entitled to benefit under the Distribution Act 1958; and

(g) the grant of letters of administration obtained by WCL in the Johor Bahru High Court is invalid and should be set aside.

[5] The plaintiffs are therefore seeking the following reliefs:

(a) that the grant of letters of administration obtained by WCL at the Johor Bahru High Court in Petition No 31–143 of 2010 be revoked and set aside;

(b) a declaration that the defendants are not beneficiaries or next of kin of the deceased;

(c) a declaration that the plaintiffs are the lawful administrators of the deceased's estate;

(d) that the defendants return all land titles and monies taken from the deceased's bank accounts to the plaintiffs acting as administrators to the deceased's estate;

(e) that the defendants be held accountable, responsible and liable for whatever losses or damages suffered by the deceased's estate as a result of the administration and distribution previously carried out by WCL without the plaintiffs' knowledge; and

(f) an injunction against the defendants from meddling with the estate of the deceased.

The defendants' defence and counterclaim

[6] Apart from their stand that WCL was the lawful wife and IW the natural born child of the deceased and WCL, it is also contended that the deceased died testate leaving a will dated 6 December 1990. WCL is the sole executrix and beneficiary under the will. By way of counterclaim, the defendants are seeking an order that the will be proved, that the grant of letters of administration (*ad colligenda bona*) dated 30 November 2010 and issued on 19 April 2011 at the Kuala Lumpur High Court vide Petition No S31–125 of 2010 to the plaintiffs is deemed superseded and cancelled and the grant of letters of administration dated 14 January 2011 and issued on 25 February 2011 to the first defendant at the Johor Bahru High Court vide Petition No 31–143 of 2010 be cancelled, and other consequential orders.

SUIT 377

The plaintiffs' case

[7] The plaintiffs are suing in their capacity as administrators of the

deceased's estate pursuant to a grant of letters of administration (*ad colligenda bona*) dated 30 November 2010 and issued on 19 April 2011 at the Kuala Lumpur High Court vide Petition No S31–125 of 2010. The defendant is one Mdm Ngan Lin @ Wong Ngan Lin ('NL') the younger sister of WCL. It is contended that WNL practised fraud and or deception on the deceased's estate on 23 September 2009 by fraudulently selling the deceased's shares and or causing the remisier of the deceased's central depository system ('CDS') account in OSK Investment Bank Bhd ('OSK') to sell off all of the deceased's shares in his account in OSK and transfer the proceeds of the share sales totalling RM1,196,138.16 to the deceased and WNL's joint account in Citibank Bhd. The joint account was subsequently terminated and the share proceeds were transferred out from the joint account to WNL's personal account in Citibank. WNL took out a third party notice against Wong Wai Hei ('WWH'). WWH is the younger brother of the deceased. The plaintiffs are seeking the following relief:

(a) that the share proceeds of RM1,196,138.16 be returned to the plaintiffs acting as administrators of the deceased's estate; and

(b) interest and costs.

Ngan Lin's defence

[8] The plaintiffs have no locus standi to bring this action as the rightful and lawful administrators/executrixes of the deceased's estate are WCL and IW. The shares in the deceased's CDS account were held by the deceased on trust for and as a nominee of WWH as the shares were bought and paid for by WWH. WWH sold the shares via SMS to one Choo Oi Shin of OSK using the deceased's handphone. WWH instructed the said OS Choo to deposit the sales proceeds into the joint Citibank account of the deceased and NL. NL paid WWH the sale proceeds. The plaintiffs act for WWH as one of the seven beneficiaries and therefore a party to the proceedings and have full knowledge of WWH's acts. WWH had in his statutory declaration dated 19 August 2011 and 18 October 2011 and in his affidavit affirmed on 8 November 2011 admitted that he instructed the sale and received the sale proceeds.

[9] Pursuant to an order of this court, Suit 159 was consolidated with Suit 377 and ordered to be tried together.

OVERVIEW OF THE EVIDENCE

[10] Altogether nine witnesses testified for the plaintiffs and six witnesses for the defendants. They are as follows:

PW1	Wong Fong Yin (the first plaintiff)
PW2	Wong Sow Yin
PW3	Noradslin binti Mohd Norzuki
PW4	Yeoh Beng Sang
PW5	Wong Wai Sek
PW6	Wong Wai Hip
PW7	Choo Oi Chin
PW8	Liew Yet Yong
PW9	Wong Pong Weng (the second plaintiff)
DW1	Chun Yoon Fook, Advocate & Solicitor
DW2	Wong Sit Foong
DW3	Ahmad Hash Bin Yahaya
DW4	Wong Choi Lin
DW5	Isabelle Wong Hao Hyee
DW6	Ngan Lin @ Wong Ngan Lin

Proof of any particular fact — burden of proo

[11] In law the burden of proof as to any particular fact lies on the party who wishes to make the court believe in its existence (s 103 of the Evidence Act 1950; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25 at p 28 (FC)). There is no burden on the opposing party to disprove it (*Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236).

[12] In this instance, WCL and IW contends that the deceased left a valid will. It is therefore their duty to produce the necessary evidence in proof of their assertion. Thus, it is incumbent upon WCL and IW to produce the necessary witness to prove their allegation. Accordingly, at the outset of the trial the court called upon WCL and IW to prove the will which was purportedly executed by the deceased. This they did by calling Mr Chun Yoon Fook ('DW1') an advocate and solicitor and his legal clerk Ms Wong Sit Fong ('DW2').

[13] Mr Chun testified that he prepared the will (exh D1) based on the instructions of the deceased. On 6 December 1990, the deceased executed the will at his office in the presence of both Mr Chun and his legal clerk Ms SF Wong. Both he and Ms SF Wong duly attested to that fact by signing on the will as witnesses. Mr Chun also confirmed that the official receipt (exh D3) dated 6 December 1990 was issued by him to the deceased in connection with the preparation of the deceased's will. At the plaintiffs' counsel request, Mr Chun subsequently produced the original register book showing that in 1990 a file (corresponding to the reference number in the official receipt) had been opened for the preparation of the will. Mr Chun and Ms SF Wong also made statutory declarations dated 20 October 2011 and 2 February 2012

respectively to that effect (exhs D2 and D4). Under cross-examination, Mr Chun said that he conversed with the deceased in Cantonese; that he had explained the contents of the will to the deceased before the deceased executed the will. Except for some minor inconsistencies, Ms SF Wong's evidence corroborated Mr Chun's testimony in material particulars.

[14] The evidence of both Mdm Wong Fong Yin (the first plaintiff) and Mdm Wong Pong Weng (the second plaintiff) relate to the following. They said that WCL was only known as the partner/companion of the deceased as they were never married. IW was taken by the deceased and WCL as an 'adopted child' when she was still an infant and raised as their own. WCL was not one to have lived with the deceased as a 'common law wife'. None of the family members have known her to be the 'wife' of the deceased. The deceased and WCL never held any Chinese tea ceremony held at the family home. They were not aware that the deceased had taken a wife. The deceased did not bring WCL to their mother's 80th birthday celebrations. The deceased did not bring WCL back to visit the family in Bentong or on trips to Goh Tong Jaya. As for IW, the first plaintiff said that 'all of us are fully aware of her status as a child brought into the family as a baby, whose birth was falsely reported by the deceased brother to be his own child with WCL. She has been brought up in life to be his own child but she was not lawfully adopted and is not a natural child of the deceased'. 'My deceased brother died without leaving a will that can be proven. For this reason, it is only possible to have the Estate distributed according to law and to the rightful beneficiaries in law as well'. As to the will, the first plaintiff said that the deceased told her personally that he did not have any will prepared sometime in 2009. She saw the deceased as a simple minded Chinese businessman from the traditional era. Making a will was not of importance to him. In answer to the question whether it is even possible that the deceased could have made the will in 1990, she said that she 'would think that this was a forged will, if that was so. And the person we would accuse of doing such a despicable act would also be my brother, Wong Wai Hei'. She further added that if a will did exist, then 'my deceased brother has since decided to either destroy it or not recognise it any more as he had indicated to me in his years prior to his death that he was thinking of doing up a will as he realised that many of his friends had indeed passed on without making a will. He would not have said that to me if this will was still around'. The deceased was not married but living with WCL in Johor Bahru. She produced a JPN search showing that no marriage was ever registered between the deceased and WCL; and the deceased's income tax return for 2008 showing that the deceased had declared his marital status as 'Bujang' (bachelor). Mdm Wong also denied that there was any wedding dinner in 1980; and that none of their family members attended the so-called wedding dinner. There was no tea ceremony at their home to commemorate the wedding of the deceased and WCL. As for Suit 377, she said that the deceased's shares in the CDS account were sold via SMS instructions from his mobile number to the remisier after his death. The

proceeds of the share sale were banked into the joint account of the deceased and NL in Citibank. NL had then taken the monies out.

[15] The other siblings namely Wong Sow Yin ('PW3'), Wong Wai Sek ('PW5') and Wong Wai Hip ('PW6') also testified that as far as they were concerned the deceased was not married. They said that WCL did not accompany the deceased to any of the family functions. They were also doubted the fact that IW is the natural born child of the deceased.

[16] Mr Theng Wai Heng ('PW10') was called as an expert witness. He professed to be familiar with on Chinese customary marriage rites. He said that under Chinese customs, funeral and marriages are related. According to Chinese customary practice, the basic requirement is for there to be a tea ceremony held at both sides of the families where the bride and the groom would have to serve tea to the seniors, elders for both sides of the families. This act signifies acceptance of every family member towards the bride and groom. The bride and groom must also pray to the ancestors of both families. By itself, a wedding dinner is insufficient because the Chinese customary practice requires the performance of a tea ceremony and prayers to the ancestors of the families.

[17] WCL ('DW4') also took the stand. She said that she was the lawful wife of the deceased. They first met in Bentong in 1970 when she was only 14 years of age and the deceased was 22 years of age; and that they have been together for over 40 years until his death in 2009. In 1972 they moved to Johor Bahru. The deceased worked as an electrician in Singapore. In 1974, the deceased started work in Johor Bahru as an air-conditioner installer whilst she worked as a factory worker. She produced photographs of the deceased and her taken in Singapore in 1974, in Genting Highlands in 1976, in Bentong waterfall in 1977, and in Bentong in 1978. In 1977, the deceased rented a shop house to carry out his business and that she assisted him. They resided in the basement floor of the shop house. She produced photographs of the entrance of the rented shop house in 1978–1979. After being together for ten years, they decided to get married. They returned to Bentong in 1980. On 22 December 1980 they underwent a simple tea ceremony at her mother's house. Her mother gave them each a red packet where they served her tea. The deceased presented her with a wedding ring. After spending the rest of the day with family and relatives, they had a wedding dinner at a local restaurant. She produced photographs of the wedding ring and of the wedding dinner. The deceased family members did not attend the wedding dinner; the deceased's father had objected to the wedding because both the deceased and she had the same family surname 'Wong'. After their wedding, they went on a honeymoon to Kota Kinabalu, Sabah; photographs of them taken at Kota Kinabalu were produced. Subsequently, they moved into their own shop house and they resided at the

basement floor. Over the years, as the business flourished they accumulated substantial savings, took up insurance policies and bought various properties in joint names. She produced copies of fixed deposit receipts, savings passbooks, safe deposit box agreement, issue documents of title, and agreements for sale of property, insurance proposal forms, insurance policies and other documents. On 2 December 1989, IW was born and raised by them. She produced photographs of IW as a baby, her full moon ceremony, her teenage years. WCL did not attend any of the family functions of the deceased as his family did not like her; as the deceased did not want to upset them, he requested her not to attend those functions. She produced the birth certificate (exh D114). She settled the hospital bills, funeral expenses and attended to the funeral arrangements for the deceased. The deceased was cremated and his remains interred in an urn at the Nirvana columbarium. She also conducted prayer sessions for the deceased on the 7th day, 35th day, 49th day and 100th day. None of the deceased family members attended any of the prayer sessions. She produced a copy of the will taken from Mr Chun's office file. She believed that the original copy of the will may have been destroyed by WWH after the deceased's demise. As she could not locate the will, she then proceeded to obtain the grant of letters of administration from the Johor Bahru High Court. After the plaintiffs challenged her marital status and the status of IW, she look further and found a copy of the official receipt for the will. Eventually, she managed to locate Mr Chun and procured a copy of the deceased's will.

[18] IW testified that she is the lawful daughter of the deceased and WCL She referred to her birth certificate, her passport showing both the deceased and herself and her identity card sharing the same residential address as the deceased. She remembers growing up with her father the deceased her mother WCL; she enjoyed the yearly birthday celebrations and holidays together with them. She produced photographs taken of her full moon celebration, and photographs taken of her and her parents over the years. She also produced documents showing that the deceased had bought numerous insurance policies and maintained investments and bank accounts with her.

[19] NL testified that her sister WCL and the deceased had spent a lifetime since 1970 until his demise in 2009. They were married in Bentong in 1980 through customary marriage and had a child IW in 1989. NL was present and witnessed the customary marriage, NL started working for the deceased as a clerk in 1985 until his demise. During the time WWH worked for the deceased, all his investments were made in the deceased's name including the purchase of shares in the stock market and property purchases. NL said that the deceased told her that he had made a will giving his entire estate to his wife WCL. NL also handled the deceased's personal banking matters. To handle WWH's investments, the deceased opened bank accounts jointly in his name and my name. If WWH wanted to make any investments, he would tell the

deceased who will then instruct his share broker to make the buy through the deceased's share account with OSK. Thereafter, the deceased would ask her to handle the payment. That is when she will ask WWH to deposit monies into the joint account whereupon she would issue a cheque for payment to OSK. After the deceased's death, WWH informed her that he had used the deceased's handphone to sms Ms Choo of OSK to dispose of the shares and to pay the sale proceeds into the joint account at Citibank. Subsequently, NL paid out the sale proceeds to WWH. NL also produced statutory declarations affirmed by WWH on 19 August 2011 and 18 October 2011 and an affidavit affirmed by WWH on 8 November 2011 confirming the transactions.

FINDINGS OF THE COURT

[20] The principal question in this case relates to whether WCL and IW are the lawful beneficiaries of the estate of the deceased. This question is predicated upon (a) whether WCL was married to the deceased and whether IW is the lawful issue of the deceased; and (b) whether the will was executed by the deceased, and if so, whether it is a valid will under the Wills Act 1959.

Civil proceedings — burden and standard of proof

[21] It is trite that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (a) the burden of establishing a case; and (b) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiffs is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiffs who must establish their case. If they fail to do so, it will not do for the plaintiffs to say that the defendants have not established their defence (*Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA); s 102 of the Evidence Act 1950). On the effect of the burden of proof not being discharged, Terrell Ag CJ in *Selvaduray v Chinniah*, adopting the position stated by the Court of Appeal in *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 said:

> In such a case as the present the position has been clearly stated in the judgment of Brett MR in *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at p 452:
>
> > But then it is contended (I think fallaciously), that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this. It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie

> evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiffs evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

Applying the principles laid down by the Court of Appeal in the above case, it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie that any preponderance in the plaintiffs favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the court that the plaintiff has not established his case and the learned judge has so found.

WHETHER WCL WAS MARRIED TO THE DECEASED AND WHETHER IW IS THE LAWFUL ISSUE OF THE DECEASED?

[22] The fact that the marriage between the deceased and WCL is not registered is not in dispute. The question to be determined is whether there was a customary marriage which was solemnised on 22 December 1980 and if so, whether the customary marriage is valid.

Customary marriages and common law marriages

[23] The current law regulating non-Muslim marriages is the Law Reform (Marriage and Divorce) Act 1976 ('LRA 1976'). It came into force on 1 March 1982. Under the LRA 1976, marriages solemnised prior to 1 March 1982 are recognised. These included marriages solemnised in accordance with the provision of statutes such as the Christian Marriage Ordinance 1956 and the Civil Marriage Ordinance 1952, Chinese customary marriages, Hindu marriages and common law marriages.

[24] Customary marriages have been accepted for a long time. As Sir Peter Benson Maxwell in *Reg v Willans* (1858) 3 Ky 16 said at p 32:

> But where the law of the place is inapplicable to the parties by reason of peculiarities of religious opinions and usages, then from a sort of moral necessity the validity of the marriage depends upon whether it was performed according to the rites of their religion.

This view was adopted in the Civil Law Enactment 1937 and later entrenched in ss 3(1) and 27 of the Civil Law Act 1956. The fact that that Chinese custom were common throughout Peninsular Malaysia was reflected in *Dorothy Yee Yeng Nam v Lee Fah Kooi* [1956] 1 MLJ 257, where Thomson CJ opined at p 263 that:

> The courts in effect have given judicial recognition to certain customs prevalent and thought to be prevalent among persons of Chinese race irrespective of their domicile or religion. They have thus set up what might be called a sort of common law as affecting persons of Chinese race and it would seem that the case is the same in those portions of the Federation which were not formerly part of the Straits Settlements or, perhaps more accurately, which were part of the former Federated Malay States.

[25] According to *Re Lee Siew Kow Deceased Yeow Siew Neo (W) v Gan Eng Neo* [1952] MLJ 184, the ingredients of a valid Chinese customary marriage were a marriage based on mutual consent. The requirements of ceremony, a contract, and repute of marriage were only evidentiary and not essential for the validity of the marriage. In this connection, it is also pertinent to note the Federal Court's decision in *Re Lee Gee Chong deceased; Tay Geok Yap & Ors v Tan Lian Cheow* [1965] 1 MLJ 102 that to prove a Chinese secondary marriage it is only necessary to prove a common intention to form a permanent union as husband and secondary wife and the formation of a union by the man taking the woman as his secondary wife and the woman taking the man as her husband. In law, the requirements of marriage with regards to the first wife and secondary wife are also the same; in *In the estate of Yeow Kian Kee (deceased); Er Gek Cheng v Ho Yeng Seng* [1949] 1 MLJ 171, Murray-Aynsley CJ said at p 172:

> The legal requirements for marriage with a t'sai and a t'sip are, I think, the same. This means that the law of this Colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage.

Murray-Aynsley CJ also touched on the question of whether there was a need to comply strictly with the Chinese customary rites at p 173:

> … I think in these cases the observances of rites and ceremonies is merely *evidence of intention*. As with us, the use of Hindu marriage ceremonies is not a matter of legal requirement, it is merely evidence.

> In the case of Chinese marriages, in most cases, the ceremonies regarded as essential at the time of the *Six Widows Case* (12 SSLR 120) have disappeared and there remains a simple form of consensual marriage, quite in conformity with the requirements of the Canon Law. (Emphasis added.)

[26] In *Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors* [1997] 4 MLJ 464 the petitioner, claiming to be the lawful husband of the deceased, filed a petition for letters of administration to the deceased's estate. The petition was opposed by the respondents on the grounds that the petitioner was never the lawful husband of the deceased. They contended that they should be made administrators since they were the lawful children of the deceased. The petitioner stated that he and the deceased got married by way of a Chinese customary marriage ceremony which involved hosting a dinner for a few of their friends. The petitioner also produced a marriage certificate which he had purchased from a Chinese book store which was filled up and signed by the petitioner and the deceased as husband and wife, the signing being witnessed by two of the friends present at the dinner. It was also asserted that they had resided together in a flat after they were married. On the evidence the High Court judge found that there was a material contradiction between the evidence given by the only surviving witness who signed the marriage certificate and that by the petitioner. Moreover, based on the surrounding circumstances, the signature purported to be that of the deceased on the marriage certificate could not have been that of the deceased. Further, contrary to the petitioner's claim that he had cohabited with the deceased, there was evidence to show that he was merely a tenant residing in one of the rooms in the flat. In dismissing the petition, the High Court held that the law merely required a Chinese customary marriage to be a consensual marriage with an agreement to form a relationship that came within the English definition of marriage. The specific requirements needed to fulfil certain vital elements of Chinese marriage rites were only ceremonies to evidence the intention of the parties to tie the marital knot. Such intention however, could be implied and expressed in other forms.

[27] In *Ching Kwong Suen v Soh Siew Yoke*; *Soh Siew Yoke v Ching Kwong Kuen* [1982] 2 MLJ 139 Ching (the appellant) and Soh (the respondent) appealed against a magistrate's order ordering Ching to pay Soh $1,500 per month maintenance to Soh and $1,000 per month for her daughter. The question for determination was whether there was a valid marriage. The High Court held that Ching and Soh had gone through a ceremony of marriage, that they had lived openly as husband and wife and that there was a valid marriage between Ching and Soh. The court's finding was predicated on the following grounds:

(a) when Soh first met Ching in 1957, she was 19 years old. Soh came from a humble background; whereas Ching came from a rich and respectable background;

(b) in 1958 they began to live together at Soh's place;

(c) in 1959, a simple marriage ceremony was arranged and Ching gave Soh's mother $1,000 towards the expenses for the wedding. Both Ching and Soh served tea to Soh's mother who then gave them each a red packet. The ceremony was attended by 20–30 people; and

(d) they lived together as husband and wife for 19 years; and Soh bore Ching three children.

[28] As an aside, the view expressed in *Reg v Willans* , is equally applicable to Hindus as well (*Rex v Govindasamy* [1933] 2 MLJ 97; *Ramasamy v Public Prosecutor* [1938] 1 MLJ 137; *Paramesuari v Ayadurai* [1959] 1 MLJ 195; *Nagapushani v Nesaratnam & Anor* [1970] 2 MLJ 8).

[29] Common law marriages was described as the voluntary union between a man and a woman for life to the exclusion of all others (see *Hyde v Hyde and Woodmansee* [1861–73] All ER Rep 175). In Malaysia, common law marriages refer to two persons cohabiting for a considerable length of time accompanied by the repute and presumption of marriage, although the initial marriage ceremony was not complete and might have been defective (*Carolis De Silva v Tim Kim* (1902) 9 SSLR App 8; applied in *Isaac Penhas v Tan Soo Eng* [1953] 1 MLJ 73 (PC); *Chua Mui Nee v Palaniappan* [1967] 1 MLJ 270 (FC)).

[30] The question of whether the deceased and WCL were lawfully married by custom is a question of fact — to consider whether there is any evidence of intention on the part of the deceased and WCL to enter into a marriage; which intention could be implied or expressed in other forms. The salient facts as presented in the evidence at the trial are as follows:

(a) the deceased and WCL have been living together in Johor Bahru since 1972;

(b) on 22 December 1980, at a tea ceremony at WCL's mother's house, they served WCL's mother tea and were each given a red packet; family members and relatives were present; the deceased gave WCL a wedding ring;

(c) there was a wedding dinner at a local restaurant attended by family, relatives and friends;

(d) both the deceased and WCL went for their honeymoon at Kota Kinabalu, Sabah in early 1981 and on a holiday in Hong Kong in 1985;

(e) they lived together as husband and wife at their shop house for the next 29 years until the deceased's demise in 2009;

(f) they maintained joint fixed deposit accounts in both names, joint savings

A accounts in both names, maintained a joint safe deposit box in both names, purchased numerous properties in both names;

(g) on 2 December 1989, IW was born to their family. There was a full moon ceremony to celebrate the birth of IW;

B

(h) on 6 December 1990, the deceased make a will naming WCL as the sole beneficiary and executrix of the will;

(i) in 1990, the deceased took up insurance policy nominating WCL as the beneficiary; and

C

(j) in numerous insurance proposal forms (77–81A; 82–86A; 87–91A; 92–96A; 97–107A; 108–112A; 113–117A; 118–127A; 128–132A; 133– 136A), the deceased procured insurance policies declaring his status as 'married' and nominating IW as his nominee with the relationship D stated as 'daughter'.

[31] On the basis of the abovementioned facts, the court has no hesitation in finding that there was clearly a common intention on the part of the deceased and WCL to form a marital union. Their union lasted for 29 years despite the E fact that the deceased's family members did not give their blessing and refused to acknowledge WCL as the deceased's wife. The fact that the plaintiffs did not recognise the marriage is of no consequence to the validity of the marriage. Their denial does not erase or negate all the events that occurred between 1974–2009; which events marked the deceased and WCL coming together as F husband and wife in 1980, their cohabiting in the basement floor of their shop house and holding themselves out as husband and wife, the start of their family with the birth of IW in 1989, the full moon ceremony and the photographs of the deceased holding baby IW in his arms in 1989, and other photographs of them together in 1990–1991, 1996 and 1999–2000. The fact of the deceased G opening and maintaining joint accounts with WCL and purchasing properties in joint names with WCL fortifies the court's finding that there was an intention to enter into a marriage back in 1980; as those events occurring after their marriage are consistent with the actions of a husband and wife as partners H for life. The fact that the deceased took out insurance policies naming WCL and IW as beneficiaries are also consistent with the actions of a husband and father. The marital union of the deceased and WCL only ended with the demise of the deceased on 19 September 2009. Even if there was no tea ceremony at the deceased's family home as contended by the plaintiffs, there is I nothing to preclude the court from holding that there was a common law marriage between the deceased and WCL; given the fact that they had cohabited for a considerable length of time accompanied by repute and the presumption of marriage. In consequence of the above findings, the court holds that WCL was married to the deceased.

[32] It is necessary to comment on the evidence of Mr Theng who was called by the plaintiffs as an expert on Chinese customary marriages. Mr Theng did not tender any curriculum vitae; neither did he show that he had any qualifications or any expertise on Chinese customary marriages. In fact, he is working as a 'senior service consultant' in a bereavement care and services company; in practice he conducts funeral services. His knowledge of Chinese customary marriage rites is based on his own personal knowledge. The court is not satisfied that Mr Theng is skilled in his field of expertise by special study and by years of experience. He did not come across as a credible and independent expert witness. Consequently, Mr Theng's opinion is of no assistance to the court and is accordingly discounted.

[33] As to the question of IW as the lawful child of the deceased, the plaintiffs waited until IW reached the age of 23 years before mounting a challenge on her legitimacy. During this time, the deceased had taken IW home to visit his parents and family in Bentong. In fact, both the plaintiffs admitted that they have accepted IW as the daughter of the deceased and treated IW as their niece. In all the circumstances, the plaintiffs are guilty of laches. Further, they have by their act and own admission acquiesced to IW as the daughter of the deceased over the years. In the premises, the court ought to refuse the reliefs sought by the plaintiffs on the grounds of laches and acquiescence.

Doctrine of laches

[34] The doctrine of laches is founded in equity. It may be pleaded in defence to a claim even if the action is brought within the period of limitation. This equitable relief is preserved under s 32 of the Limitation Act 1953 which provides that:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the grounds of acquiescence, laches or otherwise.

[35] The doctrine of laches may be successfully raised in defence if it can be shown that by the plaintiff's delay or neglect in prosecuting its claim the plaintiff has acquiesced in the defendant's conduct or has caused the defendant to alter his position to his detriment. In applying the doctrine of laches, the court will consider the conduct of the plaintiff to determine whether he had acquiesced in the state of event of which he complains. The court will also consider the position of the defendant to ascertain whether the plaintiff's position had in any manner affected or prejudiced the defendant. In this connection, the following circumstances must always be considered, viz, (a) the length of the delay, and (b) the nature of the acts done during the interval.

[36] The doctrine of laches has been succinctly defined by the judicial committee of the Privy Council in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at pp 239–240 as follows:

> The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.

[37] Acquiescence has been defined in *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25 (SC) by Mohamed Azmi SCJ in the following manner:

> The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of has right of what he did not know at the time, and in that sense acquiescence is an element in laches. The term is however properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed; a person so standing by cannot afterwards be heard to complain of the act (see *De Bussche v Alt*). In that sense the doctrine of acquiescence may be defined as acquiescence under such circumstances that assent may reasonably be inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable.

[38] The fact that IW is the lawful daughter of the deceased and WCL is evident from IW's birth certificate (85 and 85A of bundle B). This fact is corroborated by the earlier passport of the deceased with IW attached therein and with IW's identity card with the similar address with the deceased and WCL. At any rate, the plaintiffs did not make out a prima facie case on their claim against IW. They failed to introduce any evidence to support their assertion that IW is not the lawful child of the deceased. As such, there is nothing for IW to disprove. In all the circumstances, it would be against the principles of justice, equity and good conscience to declare IW's status as an illegitimate child of the deceased.

WHETHER THE WILL WAS EXECUTED BY THE DECEASED, AND IF SO, WHETHER IT IS A VALID WILL UNDER THE WILLS ACT 1959

[39] The validity of a will is governed by s 5 of the Wills Act 1959 which provides as follows:

> Mode of execution
>
> 5(1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
>
> (2) *Every will shall be signed* at the foot or end thereof *by the testator* or by some other person in his presence and by his direction; *such signature shall be madeoracknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time …* (Emphasis added.)

[40] In other words, a will is valid if:

(a) if the testator's signature to the will is made in the presence of two or more witnesses present at the sometime; or

(b) if the signature is acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time.

[41] It is to be noted that the words 'such signature shall be made or acknowledged by the testator as the signature to his will' are disjunctive because of the word 'or'. The situation in para, (a) is quite straightforward — it refers to the situation where the testotor signs on the will in the presence of two witnesses. The situation described in para, (b) is different. It refers to a situation where the testator's signature is already on the document and which signature has been acknowledged by the testator to be his in the presence of two or more witnesses.

[42] In the present case, the requirements of sub-s (2) has been satisfied as the deceased signed the will in the presence of Mr Chun and Ms SF Wong. WCL give her account of the circumstances leading to the discovery of the will. Her testimony is corroborated by Mr Chun a senior advocate and solicitor. Mr Chun said that the deceased used to service the air conditioners at his office. He confirmed that some time in 1990, the deceased instructed him to prepare his will. On 6 December 1990, the deceased executed the will at his office in the presence of himself and Ms SF Wong, his then legal clerk. He issued the official receipt in connection with the preparation of the will. He also produced the original ring binder file from which the copy of the will was recently recovered; and at the request of the plaintiff's counsel, he also produced the original register book showing that a file had been opened back in 1990 for the preparation of the will. Both Mr Chun and Ms SF Wong also affirmed

statutory declarations to that effect. On the whole, the court found both Mr Chun and Ms SF Wong's evidence to be clear, concise and credible.

[43] The photocopy of the will dated 6 December 1990 bears the signature of the deceased as the testator and the signatures of Mr Chun and Ms SF Wong as witnesses. WCL was appointed as the executrix of the will. It also sets out the deceased's intention to give all his real and personal property to WCL. In the light of the evidence aforesaid, the plaintiffs' assertion that the deceased told them that he never made a will is implausible.

[44] Learned counsel for the plaintiffs submitted that there was no evidence led or given that Ms SF Wong had obtained confirmation and acknowledgement from the deceased that he had signed or the signature was his. This is fatal in accordance to sub-s (2) as two witnesses must be present at the same time and that the deceased must acknowledge that the signature on the will is that of the deceased (*Sawinder Kaur d/o Fauja Sindo Singh v Charnjit Singh s/o Thakar Singh* [1996] MLJU 304; [1998] 1 CLJ Supp 402).

[45] In *Sawinder Kaur Fauja Singh*, the second wife of the deceased applied for a declaration that the will of her deceased husband is null and void. Her claim was premised solely on the affidavit and oral testimony of one Major Singh. On the day in question, Major Singh was approached by the deceased who told him that he wanted to give his son his property in India. The deceased then asked Major Singh to sign on a piece of paper; which paper already bore two signatures. Major Singh duly signed on that piece of paper. There was no evidence that Major Singh enquired of the deceased whose signatures they might be. Since there was no acknowledgement or signature by the testator to his will, in the presence of two or more witnesses present at the same time, the High Court allowed the claim of the second wife and pronounced against with will of the deceased.

[46] *Sawinder Kaur Fauja Singh,* is however, distinguishable on the facts and is of no aid to the plaintiffs. In that case, there were already two signatures on the document before Major Singh signed on it. There was a failure on the part of Major Singh to enquire of the deceased whether any one of the signatures on the document belonged to the deceased; put another way, there was no acknowledgement or signature by the deceased. The issue before the court in that case was whether the signature by the deceased qua testator was acknowledged by the deceased since there were already two signatures on the document.

Whether the will may be proved?

[47] The whereabouts of the original will is a matter of speculation and

conjecture. The plaintiffs contend that the deceased did not make any will; and that if he did, he destroyed the original copy as he no longer wished to benefit WCL. On the other hand, according to WCL the original copy of the will was kept in the office safe. It was missing after the office safe was broken into after the deceased's demise. It was destroyed by WWH. There is however, no evidence to support either the plaintiffs' assertion that the deceased destroyed the will. There is also no evidence to show that the will was destroyed by WWH.

[48] If the original copy of the will has been lost, a presumption may arise that the deceased has intentionally destroyed the will, ie, revoked the will. However, this presumption of revocation can be rebutted by showing that the original copy of the will has merely been misplaced or unintentionally destroyed. At any rate, a photocopy of the will was being kept by Mr Chun. There is no evidence to show that the deceased had informed or instructed Mr Chun that he intended to revoke the will. In the absence of any intention to revoke the will, the presumption of revocation by the misplacement or destruction can be rebutted. The court also takes cognisance of the fact that up until his demise, there was nothing in the conduct or actions of the deceased to suggest that he wanted to revoke the will. If anything, the evidence shows that the relationship between the deceased, WCL and IW was normal. The deceased was carrying on his business, assisted by WWH and NL. His matrimonial and home life appeared to be normal. The deceased, WCL and IW were all living together as a family. All the joint savings and fixed deposit accounts with WCL, properties held under joint names with WCL and insurance policies were maintained during the deceased's lifetime. In short, there is nothing to suggest that the deceased wanted to destroy the will or to not benefit WCL. In all the circumstances, the court holds the presumption of revocation has been rebutted by the conduct of the deceased and by inference from the circumstances of the case.

[49] By reason of the foregoing, the court also holds that probate may be granted of a copy of the will as they have been sufficiently established on the balance of probabilities (s 26 of the Probate and Administration Act 1959).

CONCLUSION

[50] By reason of the foregoing, it is evident that the plaintiffs' claim is wholly unsubstantiated. Further, given the finding that WCL was the lawful wife and IW the lawful child of the deceased, it must follow that the plaintiff's locus as the administrators of the deceased's estate pursuant to a grant of letters of administration (*ad colligenda bona*) dated 30 November 2010 and issued on 19 April 2011 at the Kuala Lumpur High Court vide Petition No S31–125 of 2010 is no longer tenable in law and in fact. As such, their claim against NL

must also fail. Therefore, the plaintiffs' claim in Suit 159 is dismissed with costs. The plaintiffs' claim in Suit 377 is also dismissed with costs.

[51] In the light of all the circumstances, and in particular the finding that the deceased died testate leaving behind a valid will, the counterclaim of WCL and IW is allowed in prayers (i)–(vi) and (xi) in the amended statement of claim and amended counterclaim.

[52] After hearing of counsel for the parties, the court awarded fixed costs of RMXXXXX in favour of the defendants in Suit 159 and RMXXXXX in favour of the defendant in Suit 377.

Claims in both suits dismissed and first and second defendants' counterclaim allowed.

Reported by Ashok Kumar