The Social Sciences 11 (Special Issue 6): 7206-7209, 2016
ISSN: 1818-5800

Sudden Death in the Line of Duty: The Extension of Privileged Wills in Malaysia

[1]Faridah Hussain and [2]Mohd Hisham Mohd Kamal
[1]Faculty of Law, Universiti Teknologi MARA, UiTM, 40450 Shah Alam, Selangor, Malaysia
[2]Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia (IIUM)
Jalan Gombak, Selangor, Malaysia

Abstract: The objective of this study is to explore the applicability of privileged wills to certain media people in the forefront of war, police force in peacekeeping operations and members of volunteer relief organizations giving medical and humanitarian service under the Wills Act 1959 (Act 346). For this purpose, this study employs a qualitative research methodology and uses the doctrinal and comparative approach. The question to be considered is whether the law on privileged wills in Malaysia is still important and whether all groups entitled to make privileged wills are covered by the Wills Act 1959 (Act 346). This study contends that privileged wills are to be preserved in Malaysia.

Key words: Privileged wills, extension, sudden deat, employs, preserved

INTRODUCTION

The opportunity to dispose of property to the poor and needy or beneficiaries is important to generate and sustain the economic development. Disposing property during a life time may be made by an individual through a making of gift, waqf and hibah. On the other hand, making a will or wasiyyah in Islam is a method of disposing property after death. Whilst the institution of waqf is seen as a model for poverty alleviation (Kadouf and Sulaiman, 2015) making a will or wasiyyah is also one of the methods of disposing properties to the needy in order to move the society against poverty. The importance of making a will under the civil law is seen as an individual's freedom to exercise his testamentary desire. According to Katheleen R. Guzman the testamentary freedom and testamentary intent are twinned.

She writes that wills law is also understandably concerned with maximizing the efficient use of judicial resources by which courts to decide which pose many contested estate matters. On comparison basis between civil law and Islamic law, under the Islamic law, the making of wasiyyah is derived from The Holy Qur'an (Al-Baqarah Verses 180-182). As such, the concept of individual's freedom to exercise testamentary desire is recognised under the Islamic law. However, a Muslim cannot by a testamentary disposition reduce or enlarge the shares of those who by law are entitled to inherit. Coulson comments that Sunni jurisprudence sees the essence of succession law to lie in protecting the interests of the legal heirs. According to him, the purpose of bequests in providing for cases of particular hardship in fulfilling a charitable purpose or in performing what the testator conceived to be a personal duty left outstanding during his life time (MPH Rubin J. observes in Mohamed Ismail Bin Ibrahim and Another v Mohammad Taha Bin Ibrahim.

With regards to a will, according to Sladen (2001) a will is a declaration of a man's mind as to the proper disposition of his property after death. This declaration is established by evidence either oral or written. As to the right to make a will, it is generally accepted throughout the civilized world that men and women have the right to dispose of their property when they die. Weisbord (2012) recognizes that a person who owns property during his life time has the power to direct its disposition after his death. It is important to note that a will has no legal effect until the death of the testator. It is noted that there is a universal phenomenon that may be found in the making of wills in a state of war, where words written or spoken may constitute a soldier's or mariner's privileged will. Tobias (1948) explains that privileged wills was first introduced under the Roman law which permitted soldiers and sailors to make oral or informal wills. Even though the formalities in making a will is seen as a legal protection against fraud, however, in the state of actual military service, soldiers may dispose of their property without complying with formalities.

Corresponding Author: Faridah Hussain, Faculty of Law, Universiti Teknologi MARA (UiTM), 40450 Shah Alam, Selangor, Malaysia

REVIEW OF CASES

With regards to the right of making privileged wills, the first and foremost requirement prescribed by the statute is that soldier or army must be in "actual military service". If we scrutinise the cases, it is evident that soldier who has been ordered to hold himself in readiness for service overseas can make a valid soldier's will. What constitute "actual military service" is when the country is at war. As such a soldier may dispose of their property without complying with formalities provided they are "in actual military service".

On the issue of "in actual military service", P.J. Maguire states that the meaning of the words "in actual military service" or their equivalent in expeditione has been considered in a number of English cases. He mentions that in more modern times the construction of the words "actual military service" was considered very fully by sir Francis Jeune in the case of In the goods of hiscock (1900-03) Al ER Rep 63. In the case In the goods of hiscock (1900-03) All ER Rep 63, the soldier had gone into barracks with a view to his despatch overseas to serve in the South African War. F.H. Sir P. Jeune held that two tests to be applied to the construction of the words in expeditione. Firstly, it must be assumed in the first place, that a state of war to exist. Assuming such a state of war to exist, the question arises when or how soon does the soldier become in actual military service. He says that if the soldier remained in barracks he could not be so considered. One test that might be looked at is: Had he received orders to go. Was his battalion or regiment under orders for foreign service. He says that this test would be too wide because the word "actual" has to be taken into account. Secondly, he mentions the other test, namely had the soldier done something. Had he taken some step at the time when he made his will to bring himself within the words "in actual military service". In this case, the court held that having gone into barracks with a view to being drafted to the front he brought himself within the meaning of "in actual military service" (In the Goods of Hiscock (1900-03) All ER 63.

P. Maguire mentions that if the order for mobilisation has been received by a soldier, although he may have done nothing under it, yet that order so alters his position as practically to place him in expeditione (In the Goods of John C. Ryan, Deceased 1945 IR 174). He also refers to the case of Gattward v Knee 2 Curt 386 where sir Francis Jeune held that mobilisation may be faily taken as a commencement of that which in Roman Law was expressed by the words in expeditione. He says that the extension of the test was approved by lord merrivale in the Re Booth, Booth v Booth (1926) ER Rep 594. As such in the case of In the Goods of John C. Ryan, Deceased IR 174, P. Maguire admits the will to probate as the deceased in that case by going into barracks there to await orders to move to meet an anticipation invasion had done something which brought him within the words of soldier "in actual military service".

In the case of Re Wingham (deceased): Andrew v Wingham 2 All ER 908, the Court of Appeal held that at the time when the testator made his will he was in "actual military service" and therefore the document should be admitted to probate as a valid will. Applying the two test namely was the testator "on actual military service"; "was such service active" the Court of Appeal held that the deceased was so engaged in military service and was directly concerned with operations in a war. In this case, the Court of Appeal justification was that the testator's status as a man enrolled in the royal air force at a time when his country was at war and left his home to proceed to some area in order to take part in active warfar is considered as "in actual military service".

CONTENTS

Tsen (1994) writes that the Roman law introduced privileged wills to dispense red tape with regard to the wills of soldiers in expedition, that is when they were on active service. He mentions that Julius Caesar has been recognised for introducing this practice which gave soldiers and seamen special privilege to make a will without formalities. Despite the fact that privileged wills is an ancient legal creation, the Law Society Gazette of the United Kingdom has commented that it is still relevant in contemporary modern circumstance.

The gazette cites as example a situation where australian force was sent to Malaya at the request of the government of Malaya after the declaration of emergency, and this was very much a universal practice (The Law Society Gazette (2nd July, 1986). Writers mention that this exceptional practice is a privilege given to military service personnel who are always ready to serve the country at the first sign of conflict that often arises without prior warning. It cannot be denied that they would thus have little or no time to make arrangement regarding their personal affairs including the making of wills before responding to the call of duty (Gerry *et al*., 2003). Summers (1978) explains that the underlying reason for the preservation of privileged wills are the imminent dangers, diseases, disasters and sudden death which are constantly faced by soldiers and sailors. Hence, as John Proffatt acknowledges, this privilege is granted by

almost all governments to this class of persons. Further support on the practice of preserving privileged wills is given by the law reform commission of the New South Wales in Report 47.

The Commission examines that in the past, members of the military forces generally had a relatively low level of education which was not sufficient to provide them with the necessary knowledge on making a formal will. The Commission adds that the justification for the retention of privileged wills is due to the lack of legal consultation and professional advice in relation to the making of wills. The Malaysian Wills Act 1959 originated from the english wills act 1837 where provisions of the english act were first adopted in Malaya by the wills ordinance (Ordinance No. 38 of 1959) which eventually became the Wills Act 1959. Privileged will is provided for under Section 26 (1) of the Wills act 1959 but this act is not applicable to the police force in peacekeeping operations, firemen and members of volunteer relief organizations giving medical and humanitarian services during war. This is obvious as the words in Section 26 only refer to members of armed forces being in actual military service and mariners or seamen including members of the naval forces (Akmal *et al*., 2013).

In West Malaysia, according to section 26 of the Wills Act 1959 a member of the armed forces of Malaysia being in actual military service and a mariner or seaman (including a member of the naval forces of Malaysia) being at sea may dispose of his property or of the guardianship, custody and tuition of a child or may exercise a power of appointment exercisable by will by a privileged will. In United Kingdom, Section 11 of the English Wills Act 1837 mirrors the provisions of law proclaim that a privilege testator is any soldier being in actual military service or any mariner or seaman being at sea is privileged in making privileged wills whereas in India, a privilege testator is any soldier being employed in an expedition or engaged in actual warfare or an airman so employed or engaged or any mariner being at sea. He may if he has completed the age of eighteen years to make a privileged will (Section 65 and 66 of the Indian Succession Act 1925). In British Columbia, Section 38(1) of the British Columbia Wills, Estate and Succession Act, 2014 provides provision of law for making privileged wills. It is to be noted that a privilege testator is a member of the Canadian forces while placed on active service under the national defence Act (Canada) or a member of the naval, land or air force of any member of the british commonwealth of nations or any ally of canada while on active service.

In Brunei, a privilege testator is a member of the royal brunei armed forces being in actual military service and a mariner or seaman, being at sea. He may dispose of his property by will by a privileged wills as evident in Section 26 of the law of brunei Chapter 193 Wills. The formality in making a will does not applicable to privileged wills in brunei. This is clearly provided for under Section 26 (4) of the Law of Brunei Chapter 193 Wills. In Bangladesh, a privileged testator is any soldier being employed in an expedition or engaged in actual warfare or an airman so employed or engaged or any mariner being at sea. He may dispose of his property by a will made in manner provided in Section 66 of the Bangladesh Succession Act 1925. Such wills are called privileged wills.

Meanwhile, according to Section 3 of the wills Act 7 of 1953 in South Africa, a soldier is a privilege testator. Soldier's will provided that any person while on active service with any of the land, air or naval forces of the Union or any other country allied to or associated with the union in any war, may make a will without complying with the formalities prescribed by section two or with any formalities whatsoever, except that it shall be made in writing. Such a will is called a soldier's will. As such civil law only recognizes the right to make a privileged will as the legal right of soldiers, airmen and sailors. This right is not applicable to other professions.

CONCLUSION

To date there is no decided case in Malaysia which addresses the issue of privileged will. Despite Malaysia not being in a state of war, the imminent risk faced by security forces of deadly danger is significant towards the study on the importance of privileged wills in Malaysia. An example may be seen in the incident of invasion in Lahad Datu, Sabah on 9th February until 1st March 2013. This incident involved the death of security members and gives rise to the question on the relevance of privileged wills in the occurrence of such attack. The legal framework for privileged wills and the vulnerability of sudden death of members of the police force in peacekeeping operations, certain media people in the forefront of war, firemen and members of volunteer relief organisations giving medical and humanitarian service have not been attended to by the legislators in order to qualify the class of persons to be entitled to make privileged wills. In a crisis situation, it is suggested that they should be given entitlement to make privileged wills and that the Parliament should amend Section 26 of the Wills Act 1959 so as to include them (Akmal *et al*., 2013).

Besides, this study also holds that privileged wills in Malaysia is still important. It would thus be practicable to extend the privilege to certain media people in the forefront of war, police force in peacekeeping operations, firemen and members of volunteer relief organisations who giving medical and humanitarian services as they are

also serve the country and subjected to the same situation of imminent danger, the diseases, disasters and sudden death in the line of duty.

ACKNOWLEDGEMENTS

This research is part of the first author's Ph.D study registered with Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia, (IIUM) and partly sponsored by Universiti Teknologi MARA (UiTM), 40450 Shah Alam, Selangor Darul Ehsan, Malaysia.

REFERENCES

Akmal, H.H., W.M.S. Noraini, A.H., Nora and M.H.M. Kamal, 2013. The Law of Wills and Intestacy in Malaysia. Mashi Publication Sdn. Bhd., Selangor, Malaysia.

Gerry, W.B., L.S. Katharine and J.A. Owens, 2003. Introduction to military wills. Texas Tech University School of Law, Lubbock, Texas. http://www.professorbeyer.com/Archive/new_site/Articles/Military_Wills.html.

Kadouf, n and S. Sulaiman, 2015. The institution of Waqf as a model for poverty alleviation: Lessons from Malaysia. Proceedings of the International Conference on Waqf 2015, May 10-11, 2015, Universiti Sultan Zainal Abidin, Kuala Terengganu, Malaysia, pp: 1900-1903.

Sladen, M., 2001. Wills Act 1837: Is it obsolescent?. TACT, Hamden, Connecticut, USA. http://www.tact.uk.net/review-index/wills-act-1837-is-it-obsolescent/.

Summers, W.L., 1918. Wills of soldiers and seaman. Minn. L. Rev., 261: 261-273.

Tobias, W., 1948. The formalities of testamentary execution by service personnel. Iowa L. Rev., 48: 48-90.

Tsen, T.J.L., 1994. A place for the privileged will. Sing. L. Rev., 15: 171-171.

Weisbord, R.K., 2012. Wills for everyone: Helping individuals opt out of intestacy. BCL. Rev., 53: 877-882.