

**“WHEN I DIE I BEQUEATH YOU ...”: FORMALITIES AS THE LEGAL PROTECTION
AGAINST FORGERY AND FRAUD IN WILLS IN MALAYSIA**

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ABSTRACT

In Malaysia, Muslims and non-Muslims alike, have the discretion to make their wills. In the modern era, where sophisticated technology are ubiquitous and criminal minds are abound, the drawback in making a will is that it might unfortunately fall into the hands of some unscrupulous crooks or the enemy of the maker/testator, leading to forgery, fraud or coercion. Such illegalities highlight the need for some specific rules or formalities in the will making process that should be in place, as a means of preventing and avoiding such crimes and also as a means of ensuring the validity of the will. This paper examines the importance of making a will and the formalities to be complied in making a valid will. Employing a qualitative research methodology and from the doctrinal and comparative approach to the legal systems, this paper analyses the legal requirements for the will for Muslims through the primary sources such as the Muslim Wills (Selangor) Enactment 1999 and for non-Muslims via the Wills Act 1959 and the Rules of Courts 2012 for both the Syariah and the civil systems. Other secondary sources used in this research include decided cases, books, articles in law journals and Internet sources. The paper contends that legal formalities for a will serve a rather useful function in protecting not only the testators' intention but also the validity of the will as courts' decisions in refusing or granting probate will be dependent on the validity of the will.

Keywords: *Will, Fraud, Forgery, Formality, Muslim, Non-Muslim.*

Introduction

In Malaysia, statute is the sole basis of the law of wills. Section 3 of the Wills Act, 1959 (Act 346) provides that every person of sound mind may dispose of all his property by will. Section 2 of the Act defines a ‘will’ as a declaration intended to have legal effect of the intentions of the testator, with respect to his property or other matters, which he desires to be carried out into effect after his death. However, the Wills Act 1959 is only applicable to the non-Muslims in Malaysia. Meanwhile, the Muslim Wills (Selangor) Enactment 1999 provides that a will can be made by a Muslim in Malaysia either by oral or in written form. This paper discusses on the issue of formalities in making a will in Malaysia. This issue of formalities in making a will in Malaysia needs to be addressed in order to avoid fraud and other host of crimes.

What is a will?

According to John Proffatt, a will is the declaration of a man’s mind as to the proper disposition of his property after death. Evidence such as oral or written may establish such declaration. (John Proffatt, 1989). A will is ambulatory and has no legal effect until the death of its maker (Verner F. Chaffin (1976-1977)).

Reid Kress Weisbord points out that the person who owns property during life has the power to direct its disposition at death. He argues that testamentary freedom is a “sacred privilege” and an important incident of property ownership. He stresses the testamentary freedom is the guiding principle of inheritance law. As intestacy can contribute to the growing problem of economic inequality, he suggests that testamentary process should be simplified and channeled to lay testators to ensure universal access to the will-making process (Reid Kress Weisbord, 2012).

The importance of formalities under the civil law

Under the English law, the notion of formalities and privileged wills are intertwined. Verner F. Chaffin explains that the law of wills is based entirely on statute and legislation sets forth in details, the manner in which wills are to be made, revoked and republished. The reason being so is that, a will is ambulatory in nature and has no legal effect until the death of the testator. He examines that the requirement of formalities is also to prevent fraud. (Verner F. Chaffin, 1976-1977). John Ritchie supports the idea that formalities as laid down by the statutes of wills are aimed to prevent forgery, perjury, fraud, coercion, mistake, hasty and impulsive action, as well as faulty memory. (John Ritchie, 1963).

The problem of providing evidence as to the intention of the dead man, who is not able to give direct evidence of his own intention is one of the difficult areas of the law of evidence (Simon N. L. Palk, 1973-1976). He observes further that to avoid fraud for fear that the will may fall into enemy hands some codes are employed. However, he questions the strict compliance of formalities because it

is not uncommon that courts in common law jurisdiction have decided on several issues such as whether the signature of the testator is in the right place, whether the will has been duly witnessed and whether the relevant persons were all present at the required time and so on (Simon N.L. Palk, 1973-1976).

The Importance of Formalities in Islam

In contrast, in Islam, wasiyyah is applicable to all Muslims universally and highly encouraged as said by the Prophet (peace be upon him): (Mohd Zamro Muda, 2008). “The worst are those who do not have time to make a will”. (Hadith by Ibnu Majah). The position in Islam is distinctively different from the requirements of a valid will under the English law. Rajesh Kumar Singh in the “Textbook on Muslim Law” explains that there are no specific formalities required in the making of a wasiyyah. This is because a Muslim may make a will either in oral or written form. In the case of a sick person, a will, which is made by signs, is considered valid. Nonetheless, if a will is made in verbal form, the burden of proof is very heavy that a will must be proved with utmost precision including the circumstances of time and place (Rajesh Kumar Singh, 2011).

The concept of will or wasiyyah in Islam, according to Mustafa Hj. Daud as cited by Manihah binti Deris, refers to the giving of properties to whom the giver likes, after his death, where the receivers are not considered as the heirs of the giver. (Manihah Deris, 2004). Musa Othman Angulu also explains that apart from the limitation that a wasiyyah cannot be made in favour of the heirs unless it is confirmed and approved by the other heirs, another principal restraint to Muslim will is that portion, which a testator can lawfully bequeath, is only one third of his properties. (Musa Othman Angulu, 2011).

The Legal Requirements under the civil law

The formalities prescribed for the execution of a will constitute a limit on the power to dispose of property on death (J. G. Miller, 1987). For a will to be valid, the Wills Act 1959 requires it to be made in writing. Apart from that the testator must sign the will in the presence of two witnesses. The witnesses cannot be the beneficiaries of the said will. Besides, the condition precedent towards a valid will is that the testator must have a testamentary capacity i.e he must be of sound mind, memory and understanding and has reached the age of majority (Paul Latimer, 2012).

In the case of *Re Hornby (1946)*; *In the Estates of Roberts [1934]*; *Re Stalman (1931)*; *In the will of William Spence (1969)*, the question as to the validity of the will depends on whether the signature of the testator is in the right place, rather than to draw the intention of the testator.

In the case of *Re Groffman (1969)*; *In the Goods of Gunston (1882)* the courts have to decide the question whether the will has been duly witnessed. In addition, the issue as to whether the relevant persons were all present at the required times was determined by the courts. For examples, in the case

of *Re Colling (1972)*; *Re Hancock (1971)*; *Brown v. Skirrow [1902]*. It seems to suggest that formalities in making a will is an influential consideration.

As a general principle, wills which failed to comply with formalities, will not be admitted to probate. However, the Supreme Court of South Australia has tried to help out testators who has committed errors and irregularities in making their wills. In the case of *Re Eaglestone (1950)*, the court held that signature on the back of will held good. Furthermore, *Robertson [1972]* the court held that the signature in the middle of will and the provisions above the signature could be admitted to probate.

Fraudulent wills

The leading case of fraud in wills is *Kennell v. Abbott (1797)*. In this case relying on the civil law authorities, the Court of Chancery held that the will of the testatrix was void because the marriage between the testatrix and her husband was void due to the husband having another wife still living, unknown to her.

Fraud in relation to wills could occur in various forms. At the beginning of making a will, a fraud could happen when the maker of instruments is deceived as the nature or contents of the instruments which she is signing. Besides, if there is an inducement which causes some injury or injustice from the instruments, either to the maker or to another, it is called fraud in the effect (Ralph W Gifford, 1920). Therefore, a statute of wills is enacted as a matter of policy. Apart from to ease the testator's intention, it is also to prevent the occurrence of fraud or mistake. Besides, the formalities are important to give the court a clear evidence as to the intention of the testator of what was present in his mind when he made the will (Harry E. Kohm, 1898).

The Legal Requirments under the Syariah System

The provision of section 3 of the Muslim Wills (Selangor) Enactment 1999 allows a will to be made either by oral or in written form by Muslims in Malaysia. Mohd Zamro Muda (2008) summarises conditions precedent to a valid will in Islam as follows. Firstly, there must be a testator (musi). A testator must be a mukallaf which means that the person has reached the age of puberty, free and willing, as well as the owner of the property. Secondly, there must be will recipients (musa lahu), and they must be known individuals (except for charity), exist at the time of the death of the testator, have the rights to own wealth and are non-beneficiaries under the faraid system. Another requisite of a Muslim will is that there must be willed property (musa bihi). Here, will properties can be either fixed or chattels or have valuable benefit in the estimation of syarak. The last prerequisite is sighah, which comprises of two elements, namely ijab and qabul. Sighah may take place whether in the condition of sarih or kinayah, verbally or in writing or by gesture. However, in Islam, qabul or

acceptance can only be made after the testator's death. Acceptance made prior to the testator's death is not considered (Mohd Zamro Muda. (2008).

Under the Muslim Wills (Selangor) Enactment 1999, the formalities, which exist in the Wills Act 1959, do not exist in the Enactment. However, the Enactments provide for samples of Islamic Wills for the purpose of convenience. In contrast to the will based on the common law, the Islamic system on will-making is more flexible than the former.

Conclusion

Codes have been employed to avoid fraud for fear the will may fall into enemy hands (Simon N.L. Palk, 1973-1976). Knowledge of the existence of the valid will make the executors liable to file an application for probate. Such a rule is based on the principle that the testator may appoint any suitable person to be the executors if he deems fit. The Wills Act 1959 provides that the testator may dispose his assets to any person even if the person is non-beneficiaries. If the executors fail to follow the instruction of the testator, the executor would be liable for breach of legal duties. In such a case, the beneficiaries may apply to the court for the removal of the executor from his position.

The law provides that in the testator-executor relationship, a duty of the executor to the beneficiaries also attaches when the Court sealed the will. In Malaysia, Order 71 rule 5 of the Rules of Court 2012 provides the procedure in applying for probate for Muslim and non-Muslim. To sum up, it can be said that whether or not the probate may be admitted by the courts may depend on the validity of the will. The executor and the testator should be aware of their duties in this modern era. Hence, it is timely that the testator seeks professional legal advice in making a will during his life time. Significantly, as has been discussed above, legal formalities for a will, be they in the civil or the Islamic systems, serve a rather useful function in protecting not only the testators' intention but also the validity of the will. The above-mentioned cases have indicated that the decision of the courts in refusing or granting probate will be dependent on the validity of the will.

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