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Date and Time: Friday, 5 April, 2019 5:50:00 PM MYT

Job Number: 86373631

Document (1)

1. [Gan Cheng Khuan v Gan Kah Yang & Ors \[2018\] MLJU 1363](#)

Client/Matter: -None-

Search Terms: Gan Cheng Khuan

Search Type: Natural Language

Narrowed by:

Content Type
MY Cases

Narrowed by
-None-

Gan Cheng Khuan v Gan Kah Yang & Ors [2018] MLJU 1363

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

UMI KALTHUM , SURAYA OTHMAN AND STEPHEN CHUNG JJCA

CIVIL APPEAL NO W-02(NCVC)(A)-363-02 OF 2018

14 September 2018

*Justin Voon Tiam Yu (Chia Wen Chow with him) (Chia Wen Chow & Assoc) for the appellant.
Kevin Sathiaseelan (Leng Wie Mun and Farhanna Roslan with him) (Kevin & Co) for the respondents.*

Stephen Chung J:

JUDGMENT OF THE COURT
The Appeal

[1]The Appellant had filed an ex-parte Originating Summons (OS) which was subsequently amended. The Interveners applied for leave and were granted leave to intervene in the OS. The Interveners have filed an affidavit in opposition to the OS which excluded them as beneficiaries under the estate of **Gan Cheng** Keong (deceased).

[2]In the OS the Appellant applied for the following declaratory orders that:

- (a) pursuant to [subsection 6\(1\)\(i\)](#) of the Distribution Act 1958 (the Act), only the brothers and sisters of **Gan Cheng** Keong (deceased) living at the time of his death was entitled to his estate;
- (b) pursuant to the interpretation in [subsection 6\(1\)\(i\)](#) of the Act, henceforth the brothers and sisters who were living at the time of the death of the deceased who are entitled to equal shares of the deceased's estate namely, (i) **Gan Cheng** Hoe; (ii) **Gan** Soo Hong; (iii) **Gan** Soo Lian [deceased]; (iv) **Gan** Chang Joo; (v) Soo Lee Veerasamy; (vi) Soo May Malakuoti; and (vii) **Gan Cheng Khuan**;
- (c) pursuant to the interpretation in [subsection 6\(1\)\(i\)](#) of the Act, the issues of the eldest brother of the deceased namely **Gan Cheng** Yee, who died on 27.1.1979, who predeceased the deceased are not entitled to the deceased's estate;
- (d) pursuant to [subsection 7\(2\)](#) read together with [subsection 6\(1\)\(i\)](#) of the Act, the issue of the brothers and sisters of the deceased living at the time of his death would be entitled to the deceased's estate; and
- (e) pursuant to [subsection 7\(2\)](#) read together with [subsection 6\(1\)\(i\)](#) of the Act, henceforth the issue of **Gan** Soo Lian who is the 2nd sister of the deceased who was living at the time of death of the deceased, namely Too Heng Khen, is also entitled to the deceased's estate by virtue of his late mother's share.

Facts of the case

[3]The Appellant/Applicant is the administrator of the estate of **Gan Cheng** Keong (deceased) pursuant to a Letter of Administration dated 2.6.2016. The deceased passed away on 27.3.2009. The Respondents' late father **Gan Cheng** Yee is the eldest brother of the deceased who had predeceased the deceased on 27.1.1979.

[4]The Appellant filed the application in the High Court for the Court's determination including whether only the brothers and sisters of the deceased who were living at the time of death of the deceased are entitled to the distribution of the deceased's estate. The application was allowed in part with certain modifications to the prayer (b) sought by the Appellant and hence this appeal.

[5]In his judgment, the learned Judicial Commissioner (JC) was of the opinion that the views expressed by the learned authors in the article entitled "The Distribution (Amendment) Act 1997-Amendments to [Section 6](#) of the Distribution Act 1958" published in [2004] JMCL 6, that the interest of a child who predeceases the intestate and who leaves issue is not forfeited by virtue of [subsection 7\(1\)](#) of the Act, though written in 2004, are not without basis. He also cited the case of *Lim Geik Hoon v Yap Bon Keat* [2012]1 LNS 1243.

[6]The learned JC said that the learned counsel for the Applicant in his submission in reply took pains to explain the

provision on [subsection 7\(2\)](#) of the Act and he said [sub-sections \(1\) and \(2\)](#) of [section 7](#) must be read disjunctively by virtue of a full stop in between and they are quite independent of each other.

[7]It was the learned JC's finding that the applicable provision is [subsection 7\(1\)](#) of the Act and the pertinent words in [subsection 7\(1\)](#) to his mind are "*the share which their parent would have taken if living at the death of the intestate*". He said these wordings would entitle the three interveners to their late father's share in the estate of the deceased. He went on to say that he agreed entirely with the opinion of the learned authors in the aforesaid article and the finding of the learned JC in Lim Geik Hoon and what is more important is [subsection 7\(1\)](#) explains the operation of [subsection 6\(1\)\(i\)](#) of the Act.

[8]In his judgment the learned JC made the following orders:

- (a) the three interveners, being the issue of **Cheng** Yee are entitled to their respective shares in the estate of the deceased under [subsection 7\(1\)](#) of the Act;
- (b) **Cheng** Yee's share in the estate of the deceased is not forfeited although he had predeceased the deceased, because **Cheng** Yee had left issue namely the three interveners;
- (c) the issue of Soo Lian would also be entitled to his respective share in the estate of the deceased pursuant to [subsection 6\(1\)\(i\)](#) of the Act;
- (d) the declarations sought in prayers (a), (c) and (d) of the OS are refused;
- (e) the declaration sought in prayer (b) of the OS is allowed subject to the variation that the issue of **Cheng** Yee and Soo Lian are entitled to equal shares in the deceased's estate; and
- (f) prayer (e) is allowed.

The Appellant's submission

[9]The Appellant submitted that the learned JC had erred in his decision because [subsection 7\(1\)](#) of the Act applies only to situations where the estate of an intestate is directed to be held on trust for the issue of the intestate. It was submitted that the Respondents in this case are not the issues of the intestate or deceased but are the nephews.

[10]The Appellant submitted that the learned JC had erred in misinterpreting [subsection 7\(1\)](#) of the Act because the 'intestate' in [subsection 7\(1\)](#) refers to the deceased, that is, the late **Gan Cheng** Keong and not **Gan Cheng** Yee, the late father of the Respondents.

[11]It was submitted that although the Respondents sought to rely on [subsection 7\(2\)](#) of the Act to support their claim, the Appellant contended that [subsection 7\(2\)](#) when read together with [subsection 7\(1\)](#) provided only a trust for the other class of relatives of the deceased (other than the issue of the deceased) who has not attained the age of majority.

[12]Counsel for the Appellant submitted that by the decision of the learned JC, it would also mean that the nephews and nieces of the intestate will take in priority over the grandparents of the intestate, in the situation where all brothers and sisters of the intestate had predeceased the intestate but left behind issues and this cannot be the intention of the legislation. If it is the intention of the legislation that other classes of relatives of the intestate, other than the issue of the intestate, includes the issue of the members of that class of relatives, it ought to be specifically stated in the Act like how 'issue' is specifically defined in [section 3](#) of the Act to include descendants of the deceased child_

The Respondents' submission

[13]The Respondents contended that the issues of a sibling who had predeceased are entitled to the distribution pursuant to [subsection 6\(1\)\(i\)](#) and [section 7](#) of the Act. It was submitted that [sections 6](#) and [7](#) of the Act are drawn from the English Administration of Estate Act 1925 (1925 Act), wherein, those sections are *in pari materia* with sections 46 and 47 of the 1925 Act

[14]The Respondents submitted that the manner in which section 47 of the 1925 Act should be interpreted is guided in a book entitled "The Law and Practice of Intestate Succession (2nd Edition)". They submitted that there are similar principles found in sections 40 and 47 of the Indian Succession Act 1925 and in section 49 of the Wills, Probate and Administration Act 1898-1954 (N.S.W.).

[15] It was submitted that based on these provisions and the decisions in those jurisdictions, the entitlement of nephews and nieces is not dependent upon a brother or sister of the intestate surviving the intestate. The Respondents argued that the issues of a sibling who had predeceased the intestate are entitled to the distribution pursuant to subsection 6(1)(i) and [section 7](#) of the Act and therefore they are entitled to the distribution under the estate of their late uncle.

The Court's decision

[16] We have read the provisions of sections 46 and 47 of the English 1925 Act and the provisions of [sections 6](#) and [7](#) of our Act and we were unanimous in our conclusion that these provisions are not *in pari materia* with each other. Similarly, the provisions in the Indian and NSW legislations referred to by counsel for the Respondents are not *in pari materia* with [sections 6](#) and [7](#) of our Act. Although they are similar they are not the same. Each piece of legislation must be read and interpreted on its own in accordance to established statutory interpretation principles.

[17] The Respondents relied on sections 46 and 47 of the English 1925 Act in interpreting [sections 6](#) and [7](#) of our Act. The distribution of the estate is determined by the priority on the entitlement to the estate as set out in the Act.

[18] Under section 46(1)(v) of the 1925 Act, if the intestate leaves no spouse or civil partner and no issue and no parents, then the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely; first for the brothers and sisters of the whole blood of the intestate, secondly for the brothers and sisters of the half blood, thirdly for the grandparents and so on. Under section 46(1)(v), which deals with other classes of relatives of the intestate, other than the children of the intestate, the residuary estate of the intestate shall be held on trust firstly for the brothers and sisters of the intestate living at the death of the intestate. The emphasis is on the words "living at the death of the intestate" and do not apply to and do not aid the Respondents' case in this appeal because their late father predeceased and was not living at the death of the intestate.

[19] Section 47(1) of the 1925 Act provides for statutory trusts to be held for the issue of the intestate, in equal shares, if more than one, living at the death of intestate, who attained the age of majority or marry under that age. It goes on to provide for all or any of the issue living at the death of the intestate, who attained the age of majority or marry under that age, of any child of the intestate who predeceases the intestate, such issue shall take the share which their parent would have taken if living at the death of the intestate.

[20] Whereas section 47(3) deals with the statutory trusts for any class of relatives of the intestate, other than the issue or children of the intestate. Sections 46 and 47 clearly make a distinction between the issue, meaning the children, of the intestate and other classes of relatives of the intestate. Section 47(3) provides for the residuary estate to be held on trusts for any class of relatives of the intestate corresponding to the statutory trusts for the issue of the estate as if such trusts were repeated with the substitution of references to the members of that class.

[21] Now coming to the provisions of the Act itself, under subsection 6(1)(i) of the Act, if an intestate dies leaving no spouse, issue, parents or a parent, the whole of the estate of the intestate shall be held on trust for the following persons living at the death of the intestate and in the following order and manner, namely: firstly for the brothers and sisters of the intestate in equal shares, then for the grandparents and so on. The emphasis is on the words "living at the death of the intestate": see *HSBC (M) Trustee Bhd v Kong Kim Hoh & Ors* [1999] 3 MLJ 383.

[22] In this appeal, the father of the Respondents died on 27.1.1979 and was no longer living on 27.3.2009, at the death of the intestate. Their late father did not qualify under '**the brothers and sisters of the intestate who were living at the death of the intestate**' pursuant to subsection 6(1)(i) of the Act. Therefore the Respondents cannot take under their late father's share in the estate of the intestate under subsection 6(1)(i).

[23] The Respondents had tried to come under subsection 7(1). Subsection (1) deals with trusts to be held **for the issue of the intestate** whereas subsection 7(2) provides for trusts in favour of other classes of relatives of the intestate. Both subsections of [section 7](#) specifically refer to [section 6](#) of the Act which means that both [sections 6](#) and [7](#) and must be read together. It is not in dispute that the Respondents are not the issue of the intestate but are the nephews of the intestate which come within 'other classes of relatives' of the intestate. If they are taking a share under their late father's entitlement in the estate of the intestate under [section 7](#) of the Act, they are caught by subsection 6(1)(i).

[24] For the reasons given, the appeal was allowed with no costs. The Order of the High Court dated 18.1.2018 in

paragraphs 1 to 4 were set aside and the Amended OS in prayers (a), (b), (c) and (d) were allowed. Deposit was refunded to the Appellant.

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