

# UNDERSTANDING WILL DISPUTES IN MALAYSIA: LEGAL GROUNDS AND JUDICIAL REASONING

*Amarjit Kaur Pritam Singh<sup>1</sup>*

## **Introduction**

When a person passes away, the responsibility for managing and distributing his estates falls to his loved ones or designated representatives based on an individual's custom, traditions, culture and society beliefs. As of today, the understanding of succession and inheritance has become a topic to debate as it involves emotions and a sense of responsibility among individuals, not leaving aside the resolution by the courts. As we can foresee, in response to evolving societal needs and advancements in technology, the laws pertaining to inheritance have undergone significant changes to enhance clarity, efficiency, and fairness.

Previously, while local customs and colonial influences affected certain aspects of inheritance and property dealings, the administration of estates including matters such as proving a will (probate) and distributing a deceased person's assets has been governed under federal law of general application, which applies to both Muslims and non-Muslims throughout Malaysia. Due to the difference in rules and procedures in managing the administration of estates, based on the states, a lot of difficulties were seen in dealing with matters pertaining to inheritance and succession.

To address this, three main administrative bodies now deal with the administration of estates in West Malaysia namely, the High Court, the Estate Distribution Division (Small Estates), and Amanah Raya Berhad. The jurisdiction of each body depends on the type and total value of the estate left by the deceased. Generally, the High Court handles estates of higher value and those involving complex legal issues or grants of probate and letters of administration, the Estate Distribution Division manages small estates (usually involving immovable property not exceeding a specific value threshold), while Amanah Raya Berhad administers estates where it is appointed as executor, administrator, or trustee under statutory powers.

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<sup>1</sup> Lecturer, Faculty of Law and Government, HELP University.

This process is guided by the law of succession, which ensures that an estate is administered in an orderly and lawful manner. The law of succession plays a vital role in ensuring that the distribution of a deceased person's estate is carried out fairly and in accordance with legal procedures. The administration of an estate generally comprises three main stages.

The first stage involves obtaining a letter of representation, which may be in the form of a Grant of Probate (where there is a valid will) or Letters of Administration (where there is no will). The second stage concerns the management of the estate by the executor or administrator, which includes the settlement of debts and liabilities and, if necessary, disposing of or selling property to meet these obligations. The final stage involves the distribution of the remaining property or proceeds of sale to the lawful heirs or beneficiaries in accordance with the will or, in cases of intestacy, under the relevant distribution laws.

### **Jurisdiction of Administration of estate**

There are three main authorities that have the power to administer a deceased person's estate: the High Court, Amanah Raya Berhad, and the Estate Distribution Division.<sup>2</sup> For the smoother estate administration, all this institution plays their role which differ on a case-by-case basis.<sup>3</sup> Due to the differences in rules and procedures previously used by various states to manage the administration of estates, many difficulties arose in handling inheritance and succession matters. To address this, three main administrative bodies now deal with the administration of estates in West Malaysia namely, the High Court, the Estate Distribution Division (Small Estates), and Amanah Raya Berhad. The jurisdiction of each body depends on the type and total value of the estate left by the deceased. Among these, the High Court possesses the widest and highest authority, as it is established under the *Courts of Judicature Act 1964* and vested with inherent jurisdiction to grant probate and letters of administration for estates of any value and complexity. In contrast, the Estate Distribution Division, operating under the *Small Estates (Distribution) Act 1955 (Act 98)*<sup>4</sup>, only has jurisdiction where the estate includes immovable property not exceeding the prescribed value threshold (currently RM5 million). Meanwhile, Amanah Raya Berhad, created under the *Public Trust Corporation Act 1995 (Act 532)*, functions as a statutory trustee and executor, administering

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<sup>2</sup> Muhammad Amrullah Drs Nasrul, Zati Ilham Abdul Manaf, Syafwendi Syafril and Moh Fathurrohman, 'An Overview of the Inheritance Legal System in Malaysia and Indonesia: Issues Faced by Both Countries' (2021) 6(2) *Journal of Shariah Law Research* 184

<sup>3</sup> Ibid at page 184

<sup>4</sup> Small Estates (Distribution) (Amendment) Act 2022, which came into force on 15 July 2024

estates where it has been formally appointed. Together, these three bodies ensure that estates are administered according to the law of succession, with appropriate oversight depending on the nature and value of the estate.

Besides, the High Court do have the authority to deal with matters pertaining to inheritance. Based on the cases that is being heard, the High Court, will be able to decide on Grant of Probate and Letter of Authority. The Grant of Probate is an issuance under the seal of the court permitting the specified executor or executors to manage the testator's property.<sup>5</sup> It is awarded upon the request of the executor or executors in situations in cases where the deceased has left a valid will.

Following the *Small Estates (Distribution) (Amendment) Act 2022 (Act A1643)*, which came into force on 15 July 2024, the Estate Distribution Division (EDD) under the Department of Director General of Lands and Mines now has wider jurisdiction to handle intestate estates valued at not more than RM5 million, whether consisting of movable or immovable property or both. The previous requirement that the estate must include immovable property has been removed, and the former role of the Land Administrator is replaced by Estate Distribution Officers (EDOs). These officers can issue limited letters of administration and make distribution orders through hearings, while appeals lie to the High Court within 30 days. This expansion reduces the High Court's caseload and allows simpler estate settlement for small estates, while Amanah Raya Berhad (ARB) continues to act mainly in cases involving wills or where it is appointed by beneficiaries or the court, working alongside EDD in intestate matters within its jurisdiction.

Having discussed the administration of estates, it is important to note that the High Court has exclusive jurisdiction over the administration of testate estates, regardless of the total value of the deceased's property. Where a valid will exists, the Court issues a Grant of Probate to the appointed executor, authorising the administration and distribution of the estate according to the will. This process will proceed smoothly unless there is a dispute concerning the validity of the will for example, allegations of undue influence, lack of testamentary capacity, or improper execution or disagreement as to who should act as the

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<sup>5</sup> Muhammad Ridhwan Ab Aziz, Mohammad Noorizzuddin Nooh, Khairil Faizal Khairi, Fuadah Johari & Azrul Azlan Iskandar Mirza (2014). "A Review on Literatures in Planning and Managing of Islamic Wealth Distribution (2001-2013)," *Library Philosophy and Practice* (e-journal). Paper, 1144.

propounded of the will. In such circumstances, the High Court will determine the matter based on relevant case law and judicial reasoning.

### **Creation of Will**

An individual's freedom to make a will is a fundamental aspect of personal choice, but it must be exercised within legal boundaries. According to Section 2 of the *Wills Act 1959*, a will means "a declaration intended to have legal effect of the intentions of a testator with respect to his property or any matter which he desires to be carried into effect after his death." This definition emphasises that a will must clearly express the testator's intentions and only take effect upon their death. It reflects an individual's autonomy to determine how their estate and assets are to be distributed among their successors. However, disputes may arise when the validity of a will is questioned. To minimise such disputes, the *Wills Act 1959 (Act 346)* governs the creation, validity, and execution of wills in Malaysia and applies only to non-Muslims. Further, Section 2 of the *Probate and Administration Act 1959 (Act 97)* extend the meaning of a will to include any codicil or testamentary document.

### **Formalities of Will**

A will is valid where it satisfied the requirement. There are 3 main requirements mainly, formalities for the execution the will, age, and testamentary capacity with compliance of *Section 5 (1) of Wills Act 1959 (Act 346)*.

The general rule is that the will must be in writing and executed in the manner that is stated in *Section 5 (1) of Wills Act 1959(Act 346)*. It is noted that there is no definition of writing in the *Wills Act 1959(Act 346)*. Hence, when we look at the word "writing", it is understood that writing includes any method of visibly recording or reproducing words, including typing, printing, imaging, or other mechanical or electronic means. We have numbered of case laws which explains the meaning of writing.

The court in the case of *Leong Chee Kong & Anor v Tan Leng Kee*<sup>6</sup>, interpreted the word "writing" by referring to the *Interpretation Act 1948 and 1967* which includes typewriting, printing, lithography, photography, electronic storage or transmission, or any other method of recording or fixing information in a form capable of being preserved. If the content can

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<sup>6</sup> [1999] 4 MLJ 537

be preserved until all matters are disposed of, it falls within the meaning of "writing." A will that includes both ink and pencil writing may create problems during probate, as there is an assumption that the pencil markings were only tentative and not intended to be legally binding and therefore should not be admitted to probate.

Reference is made to the case of *Goods of Adams*<sup>7</sup>, where it was held that if a will was initially written in pencil and later traced over or rewritten in ink, the ink version is considered to replace the pencil version. Wills written in pencil are generally viewed as drafts or preliminary versions and, as such, are not accepted for probate. There is no restriction on language that is used in preparing the will. As long the language used is understandable, the will is valid.

This was emphasis in the case of *Khaw Cheng Bok & Ors v Khaw. Cheng Poon & Ors*<sup>8</sup>. Upon preparation of the will, the will shall be signed by the testator or by some other person in his presence and by his direction. The testator's signature shows there is an intention to execute the will. Thus, the signature shall be acknowledged by the testator in presence of 2 or more witnesses. It is understood that lack of intention will invalidate the will. It is significant that a signature can be anywhere on the will provided it is intended to give effect to the will. There are circumstances where the will is signed on behalf of the testator as long it is in the testator's presence and at their direction. The person executing the signature can sign in his own name or in the testator's name. Indeed, it is important that the testator's signature is acknowledged in presence of at least 2 witnesses who is present at the same time.

Further, a witness must either sign the will in the testator's presence or confirm that their signature is genuine while the testator is present. However, it is not necessary for the witnesses to sign in each other's presence. In *Dr Shanmuganathan v. Periasamy Sithambaram Pillai*<sup>9</sup> the will was signed in the presence of two witnesses, both of whom were required to attest to it. However, the law provides that it is not essential for the witnesses to attest the will at the same time, if each witness does so in the presence of the testator.

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<sup>7</sup> (1872) LR 2 P & D 367

<sup>8</sup> [1998] 3 MLJ 457

<sup>9</sup> [1997] 1 MLRA 1

Next for the age of the testator, according to *S.4 Wills Act 1959(Act 346)*, a minor cannot make a valid will and a person must be at least 18 years old, of sound mind<sup>10</sup>, and not a Muslim<sup>11</sup>. The age of majority is 18 years, and this provided in *S.2 of the Age of Majority Act1971*. Hence, to make a valid will, a person must be at least 18 years old. However, there is an exception to the age requirement under *s. 26 (4) Wills Act 1959, (Act 346)*. This exception is applicable only to privileged wills<sup>12</sup>. In the case of *Thiang Kai Goh v Yee Bee Eng*<sup>13</sup>, it was stated that the testator certainly had the legal capacity to make the will, as he was above 18 years of age, the age of majority. The court in *Lee Ban Heng v Tan Soh Gee*<sup>14</sup> held that the will was invalid as it did not satisfy the formal requirements stipulated in Section 5 of the *Wills Act 1959, (Act 346)*.

Lastly, the third requirement is the testamentary capacity which refers to the mental capacity, intention and free choice of the testator in making such a will. According to Section 3 of the *Wills Act 1959(Act 346)*<sup>15</sup>, the person making the will must be mentally sound and intend to create a will (*animus testandi*). It is important to note that the *Wills Act* of 1959 does not define the testamentary capacity to the creation of a will. Testamentary capacity refers to a person's ability to create a valid will. According to legal authorities, testamentary capacity is often described as the disposing mind of the testator. A testator is considered to possess testamentary capacity when they are fully conscious, have a sound mind, and comprehend and approve the contents of the will.

Cockburn CJ in the case of *Bank & Goodfellow*<sup>16</sup> explain the meaning of testamentary capacity in the following words “...shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence

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<sup>10</sup> Sound mind refers to a state of a person who understand the nature of this action or conduct.

<sup>11</sup> S2(2) Wills Act 1959

<sup>12</sup> Privileged will are made by members of the armed forces in active service or mariners at sea, even if they are under the age of 18.

<sup>13</sup> (2004) 1 LNS 382

<sup>14</sup> [2021] MLJU 2327

<sup>15</sup> Except as hereinafter provided, every person of sound mind may devise, bequeath or dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will.

<sup>16</sup> (1870) LR 5 QB 549

his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made... In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of ...”<sup>17</sup>

Looking back at the *Halsbury’s Laws of England (4th edn, vol 17)*, the term “sound disposing mind”. The relevant excerpt of the judgment are as follows:

“*Halsbury’s Laws of England (4th Ed) Vol 17 para 898* thus enunciated a sound disposing mind:

In order to be of sound disposing mind, a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation in that property ... It is essential that no disorder of the mind should poison his affections, pervert his sense of right or prevent the exercise of his natural faculties, that no delusion should influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

Jeffrey Tan J in *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors*<sup>18</sup> explained the term ‘sound disposing mind’ as follows “... formal validity of a will is that the testator’s mind must go with his testamentary act. It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding — words which have consistently been held to mean sound disposing mind. It is essential that the testator should know and approve of its contents ...”

As to testator’s capacity, he must, in the language of law, have a sound and disposing mind and memory. In our daily understandings, the person making the will must understand what a will is, remember what property they own, know who their family or beneficiaries are, and understand how they want to divide their property. Hence, in short, testamentary capacity means having the mental ability to make a valid will knowingly and voluntarily.

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<sup>17</sup> Ibid 565

<sup>18</sup> [1998] 8 MLRH 552

Furthermore, this must be supported by the testator's intention (*animus testandi*). A few case laws have discussion of testamentary capacity and *animus testandi*. In the case of *Thiang Kai Goh v Yee Bee Eng*<sup>19</sup>, the court opined that there was no medical evidence and witness testimony as to the lack of testamentary capacity of deceased, eventually the Plaintiff's case of dismissed. The testator indeed should be *compos mentis* and precisely fully aware of the provisions in the will. Further, *Chin Jhin Thien & Anor v Chin Huat Yean & Anor*<sup>20</sup> explains the meaning of testamentary capacity as "...the law on testamentary capacity (a person's legal ability to make a will) is quite clear. Even if the person making the will (the testator) is ill, it does not automatically mean they lack the capacity to make a valid will. What matters is whether they had a serious mental issue, such as an *insane delusion*, at the time the will was made..."<sup>21</sup>

For a will to be valid under the *Wills Act 1959(Act 346)*, three main requirements must be met. First, the will must be in writing and signed by the testator in the presence of at least two witnesses. Second, the testator must be of sound mind and at least 18 years old. Third, the testator must have testamentary capacity, meaning they understand what a will is and intend to distribute their property freely. However, even when these legal requirements are fulfilled, disputes may still arise in Malaysia, as the validity of a will is sometimes challenged in court for various reasons.

A will is valid until revoke or propound by a beneficiary or propounded of a will. one of the grounds is on lack of testamentary capacity or suspicious circumstances surrounding the making of the will. In such cases, they may challenge or contest the will in court. This usually happens when they believe the will is not valid or was made under unfair conditions. There are several methods exist to challenge the validity of a will. The vitiating elements that may affect the validity of a will can be categorised into several main areas, namely lack of testamentary capacity, failure to understand and approve the contents of the will, undue influence, and forgery or fraud. Nevertheless, before examining each of these elements in detail, it is important to first consider the burden of proof. The burden of proof determines

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<sup>19</sup> (2004)1 LNS 382. This is a case where Plaintiff sought to declare that the 2nd will be executed by the testator as invalid on the ground that the testator has no testamentary capacity as he had affixed his thumbprint to the 2nd will without knowing its true contents and effects

<sup>20</sup> [2020] 7 CLJ 137

<sup>21</sup> *Ibid* at 154

which party is responsible for proving or disproving the validity of the will in cases where its legitimacy is contested.

### **Burden of proof**

It is generally understood that this burden falls on the individual seeking to establish the validity of the will, known as the propounder of the will. Testamentary capacity is always a question of fact, depends on circumstances of each case.

The starting point of this is seen in the case of *Barry v Butlin*<sup>22</sup> where it was emphasised that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the will of a free and capable testator. The case of *Udham Singh v. Indar Kaur*<sup>23</sup>, clarifies that the burden of proving testamentary capacity rests with the person asserting the validity of the will. Further, it was emphasized in the case of *Tho Yow Pew v. Chua Kooi Hean*<sup>24</sup> that the burden of proving the deceased had the requisite testamentary capacity laid with the parties propounding the will, which were the plaintiffs in this instance.

It was stated in the case of *Gan Yook Chin & Anor v Lee Ing Chin & Ors*<sup>25</sup>, it is trite law that the party who seeks to propound a will bears the burden of proof. It is further reiterate that when a will is prepared during a lucid interval, if the testator was of unsound mind at any point prior to creating the will, the proponent of the will must demonstrate to the court either that the testator had recovered sufficiently or that the will was made during a lucid interval. In short, we appreciate that the courts have adopted and applied the meaning of testamentary capacity as enunciated by Chief Justice Cockburn in *Banks v. Goodfellow*.

Now, we shall proceed to discuss the vitiating elements that may affect the validity of a will.

### **Lack of testamentary capacity.**

This refers to the testator's mental ability to understand the nature and effect of making a will, the extent of their property, and the claims of those who might expect to benefit.

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<sup>22</sup> (1838) 2 Moo PCC 480

<sup>23</sup> [1971] 2 MLJ 263

<sup>24</sup> [2002] 4 CLJ 90

<sup>25</sup> [2004] 4 CLJ 309, 322, FC

Revisiting the case of *Banks v Goodfellow*<sup>26</sup>, it was established that a person making a will must understand they are executing a will and grasp its legal effects, have a general awareness of the assets they own and their approximate value, recognize who might reasonably expect to benefit including close family or others and not be influenced by any mental disorder or delusion that would distort their decisions according to law. Therefore, this case makes it clear that even if a person has some mental difficulties, as long as those issues don't affect their overall decision-making or the specifics of how they want to leave property in the will, they can still make a valid will. The test to be applied in ensuring that a testator is mentally capable of making a valid will in *Banks v. Goodfellow*<sup>27</sup> has been reiterated in several Malaysian case laws.

There are several situations that can impair mental performance, most notably delusions, undue influence, forgery, lucid intervals, and vitiating mental capacity. We begin our discussion with the case of *Re Ng Toh Piew*<sup>28</sup>, which deals with the validity of a will, focusing on testamentary capacity and formal requirements. The court examined the requirements for a will to be valid. For a will to be valid, it must be in writing, signed by the testator and correctly witnessed. More importantly, the testator must have had mental capacity at the time of making the will, which means that the person must understand that they are making a will, that they know what assets they own and that they know who could receive something from the will. In this case, the court ruled that the testator had understood all of these things and had followed the correct steps, so the will was deemed valid.

In the case of *Tho Yow Pew & Anor v Chua Kooi Hean*<sup>29</sup>, Gopal Sri Ram JCA made it clear that "... the decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator... What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will. There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here....". Thus, the court

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<sup>26</sup> [1870] LR 5 QB 549

<sup>27</sup> Ibid

<sup>28</sup> (1950) MLJ 273

<sup>29</sup> [2002] 2 MLRA 213

stated that the mere circumstance of a testator being unwell during the signing of a will does not come close to suggesting that the individual lacked testamentary capacity. Further, in the case of *Sethambal Doraiappah v Krishnavani Muniandy*<sup>30</sup>, it was confirmed that very low testamentary capacity is required to make a will. It need not be proved that a testator must be in a perfect state of health or that his mind is so clear that he can give complicated instructions.

From the cases, we can understand that mere bodily ill health or imperfect memory does not necessarily invalidate testamentary capacity. Testamentary capacity cannot be equated with contractual capacity. In the case of *Lee Ing Chin v Gan Yook Chin*<sup>31</sup>, the simple reason that the testator in question was seriously ill with cancer did not give rise to doubts as to the validity of the will because there was sufficient evidence of the testator's testamentary capacity. If the testator knew the terms of his will and executed it accordingly, any collateral issues or suspicious circumstances militating against the validity of the will were dispelled. It can therefore be seen that testamentary capacity is not the same as legal capacity. A person may not have the mental capacity to enter a contract and still have sufficient testamentary capacity.

### **Suspicious circumstances**

To understand the concept of suspicious circumstances in the context of wills, reference is made to *Theobald on Wills* (18th edn)<sup>32</sup> which explains that "...If a will is prepared and executed under circumstances that give rise to a well-grounded suspicion that the will or a particular provision in it, such as a residuary gift does not reflect the true intentions of the testator, then that will (or provision) will not be admitted to probate unless affirmative evidence is provided to dispel the suspicion by proving that the testator had knowledge and approval of its contents..."<sup>33</sup>. Hence, the only circumstances that are connected to the preparation and execution of the will (and not merely general background factors) can amount to suspicious circumstances capable of rebutting the presumption of knowledge and approval. There are numerous case laws explains the suspicious circumstances. It is the Court's discretion to evaluate the evidence that is presented during the trial. Some examples

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<sup>30</sup> [2004] 1 CLJ 869

<sup>31</sup> [2003] 1 MLRA 95, His Lordship Gopal Sri Ram JCA (as he then was) stated that "Thus, it may be soon that testamentary capacity is not to be equated with contractual capacity. A person may lack the mental capacity to enter into a contract and yet may have sufficient testamentary capacity."

<sup>32</sup> John G Ross Martyn and others, *Theobald on Wills* (18th edn, Sweet & Maxwell 2021) 65

<sup>33</sup> *Ibid* at pg. 65

of situations that may be considered "suspicious circumstances" can help illustrate the concept more clearly. In *Wintle v. Nye*<sup>34</sup>, a solicitor who had long acted as the testatrix's legal adviser drafted a will in which he was made a substantial beneficiary. The court found this to be a suspicious circumstance, as he had a significant role in preparing the will and stood to gain from it. In *Sarat Kumari Bibi v. Rai Sakhi Chand*<sup>35</sup>, the writer of the will played a very active role in its preparation and received a substantial benefit under it. The Privy Council held that these were suspicious circumstances, and it was the beneficiary's duty to prove that the testator had made the will freely and with full knowledge and approval. As this burden was not discharged, the will was declared invalid. In the case of *Tho Yow Pew & Anor v. Chua Kooi Hean*<sup>36</sup>, it was opined that in the context of wills, "suspicious circumstances" refer to the events or conditions surrounding how the will was made, not about whether the person had the mental ability (testamentary capacity) to make the will. In *Ch'ng Kheng Phong v Chung Keng Huat & Ors*<sup>37</sup>, the court considered the issue of a substantial gift made under a will to a person who was closely involved in its preparation. This situation raised suspicious circumstances surrounding the validity of the will.

### **Lack of Free Will**

The validity of a Will may be contested on the basis that the testator did not act of their own free will when executing the Will. A person challenging the Will may present evidence to show the presence of vitiating factors that undermine the testator's intention. These factors may include coercion, fraud, undue influence, mistake, or forgery. One of the important elements that needs to be looked at is the undue influence.

### **Undue influence, fraud and coercion**

Our general understanding about undue influence occurs when one person takes advantage of a position of trust or power to persuade another person in a way that overcomes that person's free will. In the context of wills, refer to coercion or pressure that overbears the free will of the testator, resulting in a will that does not reflect the testator's true intentions. The testator is coerced or pressured into doing something that he does not desire to do at the

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<sup>34</sup> [1959] 1 All ER 552

<sup>35</sup> 1929 AIR PC 45

<sup>36</sup> [2002] 4 CLJ 90

<sup>37</sup> [2011] 8 MLJ 32

time of making a Will as stated in the case of *Wingrove v Wingrove*<sup>38</sup>. Further, it was submitted that persuasion and advice do not amount to undue influence if the testator is not restricted from accepting or rejecting them as emphasis in *Parfitt v Lawless*<sup>39</sup>. The burden of proof is on the person challenging the will to show the existence of the undue influence. The court in the case of *Carmel Mary Soosai v Josephine Lourdasamy Ratnavathy R. Soosai & Ors*<sup>40</sup>, the court stated that to show there is a claim for undue influence, the challenger must prove that the testator was coerced into making the will in the form it took, or that it was made involuntarily. Therefore, it is understood that in the law of contract or situations involving *inter vivos* gifts to a fiduciary, there is no presumption of undue influence simply because there is a subsisting relationship between testator and beneficiary. Thus, undue influence must be proved.

In *Hall v Hall*<sup>41</sup>, the court determined that there must be no coercion<sup>42</sup> involved in the creation of a will, stating that a testator may be but not driven. This means that while a testator may be guided in making the will, they must not be forced to do so.

Fraud in a will occurs when someone intentionally deceives the testator, causing them to make decisions they would not have made if they knew the truth. In the case of *Wilkinson v Joughin*<sup>43</sup>, the court ruled that a will is void when the testator has been purposefully deceived or is the victim of fraud.

### **Forged**

A will is not valid in the event the signature of the testator is forged or a fake one. In certain cases where the testator is illiterate or lacks understanding, there is a risk that their signature may be misused. In the case of *Ong Eng Hock & Anor v Ong Cheng Guan & Anor*<sup>44</sup>, the court held that if a will has been granted probate, the party seeking to revoke the probate on the grounds of forgery bears the burden of proof. This means they must provide evidence to support their claim of forgery. If the will hasn't been probated, both the propounder and the challenger must prove their case.

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<sup>38</sup> [1885] 11 PD 81

<sup>39</sup> [1872] LR 2 P&D 462).

<sup>40</sup> [1987] CLJ (Rep) 498)

<sup>41</sup> [1868] LR1 P&D 481

<sup>42</sup> In this case, coercion in this case refers to threat or pressure to the testator.

<sup>43</sup> (1866) LR 2 Eq 319

<sup>44</sup> [2018] 5 MLJ 701

### **Mistake**

A mistake may be described as an error in understanding facts, language, or law that leads a person to act without fully realising the consequences. In the context of wills, there must be no mistake when the executor carries out the will. If an error occurs in the drafting or execution of the will, it may indicate that the testator lacked the necessary testamentary intent. In the case of *Re Meyer*<sup>45</sup>, the court held that a will made without the testator's full knowledge and approval may be declared invalid. Mistakes are usually assessed on two levels the content of the will and its documentation. In practice, an application for a Grant of Probate requires the submission of an affidavit by witnesses to confirm that the will was properly executed and that the testator understood its contents. This process ensures that there is no doubt regarding the authenticity and validity of the will.

### **Conclusion**

Creating a will is a personal choice; however, it is crucial that all legal formalities are properly observed. As discussed earlier, a valid will must satisfy the main requirements under the *Wills Act 1959(Act 346)*, it must be made in writing, signed by the testator in the presence of two witnesses, and executed by a person of sound mind with testamentary capacity. Failure to meet these requirements or the presence of vitiating elements such as undue influence, fraud, or mistake can lead to challenges regarding its validity. If the execution of the will is flawed, it may raise doubts about its authenticity, resulting in disputes and dissatisfaction among the parties involved. Hence, it is essential that the will is properly executed in accordance with the *Wills Act 1959(Act 346)*. As the saying goes, a will can either bring harmony or spark conflict.

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<sup>45</sup> [1908] P 353