

PROBATE & ADMINISTRATION

INTRODUCTION

- Important area of law
 - Applies to everyone
 - Deals with deceased's estate

- Talk will concentrate on practical aspects
 - Advising clients
 - Steps to be taken

- Law on this area
 - Probate & Administration Act 1959
 - Orders 71 & 72 Rules of High Court 1980
 - Distribution Act 1958
 - Small Estates (Distribution) Act 1955
 - Inheritance (Family Provisions) Act 1971
 - Wills Act 1959
 - case law
 - others

- Structure of talk
 - Clients seeking advice/representation 'before death'
 - Preparation of Will
 - Clients seeking advice/representation 'after death'
 - Administration & Distribution of Estate
 - Petition for Probate
 - Petition for Letters of Administration
 - Land Office
 - Duties of Executor/Administrator

PREPARATION OF A WILL

- Benefits of preparing a Will
 - Designate person to execute estate
 - Designate beneficiaries & entitlement
 - Opportunity to clarify list of assets (& liabilities)
 - Saves time & costs when applying for grant
 - no need administration bond
 - no need court order for distribution
 - Can sue immediately on death of testator
 - *Ingall v Moran* [1944] 1 KB 160

- Benefits of lawyer preparing Will
 - Legally trained in this area of law
 - Legally trained in other areas of law
 - Legal services extended to probate & distribution
 - Lawyers have professional indemnity insurance

- Preparing a Will
 - Ensure testator is at least 18 years old
 - Enquire if testator is Muslim
 - Advise only 1/3 of estate can be included in will
 - Advise to consult Syariah lawyer to draft will
 - Ensure testator has testamentary disposition
 - Enquire on previous wills
 - Advise that marriage invalidates a will

- Request for necessary information & details
 - Executor
 - preferably beneficiary
 - preferable that person is aware of his appointment
 - need two if there may be infant beneficiaries
 - Two witnesses
 - cannot be a beneficiary
 - someone who is contactable later to prove will
 - can be lawyers in your firm
 - obtain full name, IC number, address & tel
 - Assets (& liabilities)
 - inquire, question & probe client
 - ensure obtain full list

- Beneficiaries
 - Distribution of assets to beneficiaries
 - May appoint guardian ad litem
- Draft Will
- See Sample
- Retention of Will
- 2 copies for testator
 - 2 copies kept in the firm
 - 1 copy for executor (preferable)

ADMINISTRATION & DISTRIBUTION OF ESTATE

- Client wants to administer and distribute deceased's estate
- Must determine which course of action to be taken
- Enquire whether there is a valid will
- There is a valid will – enquire whether executors available
 - If available – prepare Petition for Grant of Probate
 - If not available – prepare Petition for Grant of Letters of Administration with Will Annexed
- There is no valid will – enquire whether small estate
 - If small estate – advise client to go to Land Office
 - If not – prepare Petition for Grant of Letters of Administration

Note:

- ❖ Small estate
 - immovable property
 - value of estate is less than RM 2 million
- ❖ Can we file Petition for LA in relation to small estate
 - legally it would appear that we cannot
 - section 29 Small Estate (Distribution) Act 1955
 - O71 r 49(1)(a) Rules of High Court
 - Fathimah v Sharifah [1977] 1 MLJ 106
 - in practice we do
- ❖ Can apply to Amanah Raya for summary administration
 - estate consisting only movable property valued less than RM600,000
 - Public Trust Corporation Act 1995

PETITION FOR GRANT OF PROBATE

- Obtain necessary documents
 - original death certificate
 - original will
 - mykad of executor
 - list of assets & liabilities
 - documents to prove
 - value of asset
 - inquire, question & probe client

- Contact witnesses to depose Affidavit

- If one executor and there are infant beneficiaries
 - appoint an administrator

- Draft & file cause papers
 - Petition
 - Affidavit of Witnesses
 - Notice of Appointment
 - See Sample

- Hearing date
 - before Registrar
 - ensure Petitioner attends
 - Court will inform whether Borang C issued
 - obtain Order in Terms
 - Court will issue letter requesting payment & documents

- Comply with letter and file the requested documents
 - Copy of Will
 - List of Assets & Liabilities
 - Sumpah Pentadbiran
 - Payment

- Grant should be ready in 2 weeks, collect from Registry

Note:

- ❖ File Petition more than 3 years after death
 - file Affidavit explaining delay

- ❖ Where executor fails to take out Probate
 - must wait 6 months
 - file caveat at registry
 - issue citation to executor to take out probate
 - if executor fails to reply or refuses
 - compel executor to apply
 - apply for order executor can never apply in future
 - apply for grant yourself

- ❖ Challenge validity of will
 - file caveat at registry (note 6 month validity)
 - petitioner may issue warning – caveator must enter appearance & state interest in estate
 - petition filed will be transferred to Judge for Hearing
 - if no petition yet – may file Writ seeking declaration
 - burden always on executor to prove valid will
 - burden of suspicious circumstances on person who asserts

- ❖ Testator dies without completing execution of estate
 - remaining executor shall continue
 - if no other executors and deceased executor leaves a will, his executor shall complete execution
 - if no will, file Petition for LA 'de bonis non' to appoint administrator to complete execution

PETITION FOR LETTERS OF ADMINISTRATION

- Obtain necessary documents
 - original death certificate
 - original will (if necessary)
 - list of assets & liabilities
 - documents to prove
 - value of asset
 - inquire, question & probe client

- Determine the beneficiaries
 - section 6 Distribution Act 1958
 - Muslims – Sijil Faraid
 - copy of each beneficiary's mykad

- Determine the administrator
 - any person interested in estate
 - preferably main beneficiary – spouse, child, parent
 - for petitions with will annexed
 - section 16 Probate & Administration Act 1959
 - essentially the beneficiaries

- Draft & file cause papers
 - Petition
 - Letters of Renunciation
 - Notice of Appointment
 - See Sample

- Hearing date
 - before Registrar
 - ensure Petitioner attends
 - Court will inform whether Borang C issued
 - obtain Order in Terms

- Obtain or dispense with Administration Bond
 - require 2 sureties to give bond as security for due administration of estate
 - almost impossible to find sureties
 - file application for dispensation of sureties (See Sample)
 - hearing before Registrar – obtain Order in Terms

- Court will issue letter requesting payment & documents
- Comply with letter and file the requested documents
 - Copy of Will (if necessary)
 - List of Assets & Liabilities
 - List of beneficiaries
 - Sumpah Pentadbiran
 - Payment
- Grant should be ready in 2 weeks, collect from Registry

Note:

- ❖ Conflict for position of administrator
 - file caveat at registry, when petition filed, client will be notified
 - alternatively, file petition and serve on all beneficiaries who do not agree
 - Hearing will be transferred to the Judge to decide who to appoint as administrator
 - note that anyone entitled can be passed over (including spouse/child)
 - note creditor can apply
 - Court will decide based on capability, credibility, conflict of interest, ability to work together
- ❖ Beneficiaries who refuse to renounce right to administer
 - issue citation to beneficiary to take/refuse probate
 - beneficiary refuses or remains silent – can proceed
 - beneficiary wants to take probate – see above
- ❖ File Petition more than 3 years after death
 - file Affidavit explaining delay
- ❖ Client unsure status of estate
 - file caveat at Registry
- ❖ Administrator dies without completing administration of estate
 - file Petition for LA 'de bonis non' to appoint administrator to complete administration

- ❖ Revoke / Amend Grant (applies to Probate as well)
 - client aggrieved after Grant issues (not listed as beneficiary, liability not included, will invalid, unsatisfied with administration etc.)
 - issue citation to executor/administrator to deliver Grant to Registry
 - file Writ in High Court to revoke/amend Grant
 - Determining issue
 - validity of Grant
 - due administration of estate
 - welfare & interest of beneficiaries

LAND OFFICE

- Applies to small estates
 - immovable property
 - value of estate is less than RM 2 million

- Meant to be fast and cheap

- Note that lawyers do not attend Hearing

- Advise client to visit Land Office
 - Pejabat Tanah & Galian in district where immovable property situated
 - bring along
 - original death certificate
 - original title to all immovable properties
 - copy of documents verifying beneficiaries
 - section 6 Distribution Act
 - Sijil Faraid
 - copy of documents verifying assets & liabilities
 - car grant
 - bank statements
 - share certificates
 - etc.
 - go to Pembahagian Harta Pesaka Kecil
 - fill up Borang A

- Advise client the process of the Land Office
 - Land Administrator will fix Hearing date
 - All beneficiaries & claimants will be requested to attend
 - Land Administrator will determine assets & liabilities
 - Land Administrator will determine beneficiaries & entitlement (note that beneficiaries can apply for distribution of assets different from Distribution Act)
 - Land Administrator has power to compel attendance of witnesses and production of documents
 - Appointment of Administrator
 - Issue Distribution Order
 - Issue Grant of Letters of Administration (if necessary)
 - May order sale of immovable property to settle estate debts
 - Transmission of immovable property to Administrator

Note :

- ❖ Aggrieved by decision – appeal to High Court
 - 14 days from decision
 - Borang K2 at Land Office
 - High Court's decision final
 - Land Administrator will amend order accordingly

- ❖ Aggrieved party may apply to Land Administrator
 - revoke Grant
 - compel administrator to supply accounts/particulars

- ❖ Beneficiary intentionally not named when application made - Grant or Distribution Order subsequently issued without informing relevant parties – file Writ declaring Order invalid

DUTIES OF EXECUTOR / ADMINISTRATOR

- Steps into shoes of deceased
 - deal with deceased's assets
 - all property vests in him/her

- Collect Assets
 - file legal proceedings if necessary

- Transmission of immovable property
 - standard form – Land Office

- Decide whether there is need to sell assets to pay debts
 - immovable property – need order from Court

- Pay debts
 - funeral expenses
 - costs of taking out probate/LA
 - all creditors
 - ranking of creditors similar to bankruptcy matters
 - large estate – wise to gazette/advertise invitation for creditors to come forward

- Distribute assets
 - immovable property under LA – must apply for Court Order (See Sample)
 - immovable property under probate but outside terms of will – must apply for Court Order (all beneficiaries must consent)

- Prepare proper statement of accounts

- Liable as a trustee and fiduciary