IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 30

District Court Appeal No 11 of 2021

Between

(1) GDR
(2) GDT
as executrices of the estate of
GDV, deceased

… *Appellants*

And

(1) GDL
(2) GDM
(3) GDN
(4) GDP
by their litigation
representative GDQ

… *Respondents*

JUDGMENT

[Succession and Wills] — [Construction]
[Probate and Administration] — [Distribution of assets] — [Assents]

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GDR and another
v
GDL and others

[2022] SGHC 30

General Division of the High Court — District Court Appeal No 11 of 2021
Philip Jeyaretnam J
22 September 2021, 30 November 2021, 18 January 2022

14 February 2022 Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 When a testator gives his daughters shares in his residuary estate and makes provision for annual maintenance for his daughters until they reach a certain age, how does the court determine whether the annual maintenance is to be advanced or drawn from gifts identified in the will or constitutes separate and additional pecuniary legacies?

2 The critical inquiry for the court is to discern accurately and fully the testator's intention, from the will if there is no ambiguity on the face of it, or with recourse to extrinsic evidence if there is. The law also promotes the carrying into effect of that intention with all reasonable speed, so that assets of the testator may benefit the next generation without being stultified or kept out of economic circulation for a long period of time. To achieve this, executors

should adopt a practical, problem-solving approach, keeping the interests of all intended beneficiaries in mind.

Facts

The parties

3 The plaintiffs in these proceedings are the four daughters of the testator suing by their mother as litigation representative. I will refer to them collectively as the daughters and where necessary to distinguish them I will refer to them by their order of birth as first, second, third or fourth daughter. The defendants are the executrices of the estate, namely the testator's sister and his spouse after remarriage. I will refer to them collectively as the executrices and individually as the sister and spouse respectively.

Background to the dispute

4 In 2016, the testator was very ill with leukaemia.[1] He wanted to make provision for his four daughters who were all minors. The previous year, he and their mother had divorced,[2] and he had then remarried. By his last will and testament dated 7 November 2016 (the "Will"),[3] he appointed his spouse and his sister as his executrices and trustees.[4]

5 In respect of his daughters, the testator did three things by his will. The first was to give each of them a share in the eventual proceeds of sale of a

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1 Record of Appeal ("RA") II (Part B) at page 1067.

2 RA II (Part A) at page 8.

3 RA III (Part A) at page 18.

4 RA II (Part B) at page 1067.

property. The second was to give each of them a (different) percentage of the residuary estate. The third was to provide that his trustees distribute $15,000 per year to each daughter until she turned 24.

6 How the different percentage shares of the residuary estate were arrived at can be readily gleaned from emails that the testator wrote prior to execution of the will. Each percentage of the residuary estate (at his valuation) matched the total sum that each child would receive if she received $15,000 per year until she turned 24.[5] This meant that the older the child, the smaller her percentage. The figure of $15,000 per year, per child, fit what the testator had agreed to provide for his daughters by a consent order made in the divorce proceedings, namely a total of $60,000 per year for all four daughters.[6] The testator appears to have correctly understood that his estate would not be bound to continue to pay the maintenance for them under that consent order, and so specific provision needed to be made in his will if he wished that maintenance to be paid.

7 Clauses 3 and 4 of the Will, in so far as relevant to this dispute, provided as follows:[7]

> 3. Subject to the payment of my debts, loans, funeral and testamentary expenses, I GIVE all my real and personal property to my executrixes and Trustees upon trust to distribute the whole of my Estate … to the beneficiaries of my Estate in the following manner:
>
> (i) to give my 80% share of the property at [Property 1] to my spouse, …;
>
> (ii) to let my father, … reside at my property at [Property 2] for as long as he desires or deems fit, and thereafter should my

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5 RA III (Part A) at pages 142–143.

6 RA II (Part A) at pages 9–10.

7 RA III (Part A) at pages 19–21.

> father … no longer reside in the said property, the property shall be sold and the proceeds are to be divided into three (3) equal shares in the following manner:
>
> a) One third (1/3) share to my sister, …;
>
> b) One third (1/3) share to my spouse, …; and
>
> c) The last one third (1/3) share to be divided equally between my daughters, …
>
> (iii) to distribute the balance of my Estate in the following manner:
>
> a) 41% of the balance of my Estate to my spouse, … ;
>
> b) 10.5% of the balance of my Estate to my [first] daughter …;
>
> c) 13.5% of the balance of my Estate to my [second] daughter …;
>
> d) 16.5% of the balance of my Estate to my [third] daughter …; and
>
> e) 18.5% of the balance of my Estate, to my [fourth] daughter….
>
> 4. In the event that any of my daughters … are at the date of my demise under the age of 24, my Trustees shall distribute S$15,000 per year to such daughter(s) for their maintenance until they attain the age of 24, and hold the said share(s) of my Estate on TRUST for my daughter or daughters (as the case may be) until such time that she attains the age of 24 whereupon it shall then be distributed to my daughter(s) in accordance with my Will provided always that my Trustees may use any such amounts or portion of the said share(s) for my daughter(s)' education, medical expenses or benefit, and the residue of my Estate shall accrue for the benefit of my daughter or daughters (as the case may be) when she turns 24 years of age in the share(s) stipulated at Clause 3 above.

The parties' cases

8 Suing by their mother as litigation representative, the daughters claim the sum of $115,000 from the testator's estate, being $15,000 each for the each

of the years 2017 and 2018, less a sum of $5,000 that was paid in September 2017.

9 The executrices say that the daughters' annual maintenance is to be drawn from the daughters' shares of the residuary estate and that payments cannot be made until the debts of the estate have been paid. They say that they never assented to any payment, but if they did, they would be entitled to retract any assent because of the information they have since acquired concerning potential claims of the testator's ex-spouse and potential US tax liability arising from the testator's sale during his lifetime of stock he owned in the US. The daughters say that the annual maintenance is a separate pecuniary legacy and is not to be drawn from their shares of the residuary estate. Further, they say that the executrices have assented to making the maintenance payments for 2017 and 2018.

Decision below

10 The district judge agreed with the daughters. The executrices have appealed. The district judge's grounds of decision appear at [2021] SGDC 118.

Issues to be determined

11 There are two issues arising from the appeal proper:

(a) whether the annual maintenance payments are separate pecuniary legacies; and

(b) whether the executrices assented to the payment of the $115,000 claimed.

12 In addition, further questions of interpretation surfaced in the course of arguments made on the appeal:

(a) whether the estate is to pay off the mortgage loans in relation to Property 1 and Property 2 and if so in what proportions; and

(b) whether payment of such mortgage loans takes priority over the annual maintenance payments.

These questions had some bearing on the issue of whether there had been an assent. Parties confirmed that they wished me to determine these questions as part of the appeal with a view to saving costs and expediting the administration of the estate.[8] Accordingly, I will answer these questions as the third and fourth issues in this judgment.

Issue 1: Whether the annual maintenance payments are separate pecuniary legacies

13 The court's task is to give effect to the testamentary intention expressed by the testator in his will. This intention must be found in the wording of the will, taking into account the circumstances prevailing at the time the will was executed, as explained by the Court of Appeal in *Foo Jee Seng v Foo Jhee Tuang* [2012] 4 SLR 339, at [17]. Where the testator's expressed intention is ambiguous on the face of the will, resort may be had to relevant and admissible extrinsic evidence as an aid to construction: see the Court of Appeal in *Low Ah Cheow and others v Ng Hock Guan* [2009] 3 SLR(R) 1079, at [20].

8 Letters dated 12 January 2022 from each of the appellants' and respondents' solicitors to the court.

Wording of the will

14 In my view, the wording of the Will on this question is clear on its face. Clause 3 deals with who the beneficiaries of his estate are to be, or to put it another way, to whom the testator's assets are to be given. It sets this out logically. The testator's disposition of his property is first subjected to "debts, loans, funeral and testamentary expenses". There are then general words of gift upon trust applicable to all his real and personal property.

15 Thereafter, the clause sets out in three sub-clauses who will receive what. First, he deals with his 80% share of Property 1. He gave this share to his second wife. His second wife and the testator bought this property together and she owns the remaining 20%.[9] It is a straightforward specific legacy.

16 As for Property 2, which the testator owned entirely, he gave his father the right to reside there as long as he desired, after which it was to be sold and the proceeds divided among his sister, his new wife and his daughters. I was informed during the hearing of the appeal that his father, who was 72 at the time the testator made the Will, passed away in 2018. As such, Property 2 is in the process of being sold.

17 The residue of the estate is dealt with under Clause 3(iii). The residue is what remains after the specific, general and demonstrative legacies. In this case, the residue is whatever else the testator had other than his interests in Property 1 and Property 2. What is striking about this sub-clause is that the percentages differ among the daughters and are specified to half a percentage point. Moreover, the older the daughter, the lower her percentage.

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9 RA III (Part A) at page 165.

18 Thus, Clause 3 deals with all the testator's real and personal property. There is nothing left out or left over. This alone makes clear that by the time the Will reaches Clause 4, the testamentary dispositions have been made and nothing remains to be disposed of.

19 Moreover, Clause 4 is not worded as a dispositive clause. It contains no words of gift. Rather, it deals with what the testator wanted his trustees to do, given that his daughters could well be minors at the date of his death. This is because when the testator made the Will, he was ill with leukaemia, and it is not controversial that he considered it possible that he might not see any of his daughters reach the age of 24.

20 The testator made three clear and logical provisions responsive to the fact that his daughters were minors. First, the daughters' shares of his estate (under both clauses 3(ii) and 3(iii)) would have to be held on trust by the executrices until the daughters reached 24. He did not want them distributed while the daughters remained minors, but instead held on their behalf by his trustees. Secondly, the trustees were to distribute $15,000 per year to each daughter until she reached 24. Finally, the trustees could use a daughter's share for her education, medical expenses or benefit until she turned 24.

21 Thus, Clause 4 did not establish a separate fund distinct from gifts made by Clause 3, from which the annual maintenance payments were to be drawn. Instead, the annual maintenance payments had to come from the daughters' shares of the estate given to them by Clause 3.

22 The source of the annual maintenance was not limited to the daughters' shares of the residuary estate. The maintenance could also be drawn from their

shares in Property 2, once that was sold. In other words, Clause 4 empowers the executrices to make advances on what would otherwise come to the daughters at age 24 under both Clauses 3(ii) and (iii). Clause 4 also *obliges* them to pay the annual maintenance (assuming that the estate is solvent).

Extrinsic evidence

23 If, however, there could be said to be a patent ambiguity, there is nonetheless extrinsic evidence that confirms the above construction. The testator put his intention plainly in his own words in an email dated 7 July 2016[10] to his lawyers, copied to his sister:

> I would like to set aside $150K for [first daughter], $195K for {second daughter], $240K for [third daughter] and $270K for [fourth daughter] per my court maintenance ($1,250 per child per month) until they are 24 years olds [*sic*] each respectively. This should be paid out monthly. I know it may not work out exactly as the timing depends.

24 It can be seen that the testator was concerned to honour his commitment to maintain his daughters, and that the amount for each daughter depended on how old she was. The older she was, the lower the amount, because the period of maintenance would end once she turned 24.

25 Adding these amounts to a sum of $500,000 he intended to give his spouse, the total came to $1,355,000.

26 The lawyer responded by email the next day having translated the dollar figures into percentages for what he described as "the balance of your Estate".[11]

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10 RA III (Part A) at pages 145–146.

11 RA III (Part A) at pages 142–143.

This phrase is simpler and more modern than the phrase "residuary estate". It is this plain language which is adopted in Clause 3(iii) of the Will. The lawyer also explained that he was using percentages as there might be less than or more than the total of $1,355,000 in the balance of the estate and expressing the sums in percentages would deal with those possibilities of shortfall or surplus.

27 These percentages were adopted in an earlier will dated 4 August 2016.[12] The testator then realised that there was a problem with the arithmetic because the calculation had included CPF monies that would have to be separately disposed of by a nomination made in accordance with the rules in force under the CPF Act.[13] Accordingly, the testator adjusted the percentages by his email to the lawyers dated 3 November 2016,[14] and it is these percentages that appear in the Will.

28 Prior to this, the testator explained by another email dated 7 July 2016[15] that he was also giving his daughters shares in the sale proceeds of Property 2 as his share of their tertiary education.

29 In an email of 25 July 2016,[16] the testator expressed concern about whether the executrices and trustees would understand from the Will what they would need to do simply from a plain reading of it. He gave examples of paying off all housing loans, the amount of child maintenance and when amounts for tertiary education should be disbursed. He then went on to say:

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12 RA III (Part A) at pages 229–233.

13 RA III (Part A) at page 275.

14 RA III (Part A) at page 289.

15 RA III (Part A) at page 144.

16 RA III (Part A) at page 175.

> Yes, please include clause to have executrices distribute S$15,000 to each daughter per year until they are 24 years old for child maintenance. This should take care of living expenses and allowances. Any other amount is for tertiary education and any balance distributed to them at age 24 years old.

30 The testator used the verb "distribute" which itself shows an understanding and intention that the annual payment of S15,000 was an advance distribution of the daughters' shares of the estate prior to their reaching the age of 24, when any balance would be distributed to them, and hence was neither an additional gift nor did it involve the creation of a separate fund for this purpose.

31 The lawyer responded by email[17] the next day, on 26 July 2016, with a worked example of how the then-draft of Clause 4 would operate:

> This would give each daughter S$15,000 for her yearly maintenance, but your executrice will still be able to administer your daughter's share of her Estate for her education. For example, if your daughter at age 21 had S$100,000 in total from your Estate, your executrixes may distribute S$15,000 to her for her maintenance for that year, but should she require an additional S$20,000 (e.g. she is enrolled in a foreign university with higher school fees) your executrixes will be able to use such monies from her share of S$100,000 from your Estate to pay for her university fees.

32 This worked example illustrates clearly that the yearly maintenance would be an advance distributed from each daughter's share and not an additional or separate gift.

33 Thus, on this aspect of the appeal, I depart from the decision below.

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17 RA III (Part A) at page 176.

34 For completeness, I should deal with the fact that the correspondence suggests that the testator had in mind two sources of funds: one in cash that he was setting aside for his daughters' living expenses and allowances until age 24, and one derived in due course from sale of Property 2 for his daughters' tertiary education. In the correspondence it is clear that the first of these was to be achieved by his allocating to his daughters percentages of the residuary estate that would be sufficient to fund the annual maintenance. However, in the Will as drafted and executed, he did not limit the source of the annual maintenance to the cash he intended to set aside nor did he limit it to the residuary estate alone. The annual maintenance could thus come from other assets in the residuary estate or from the daughters' shares in Property 2.

Issue 2: Whether the executrices assented to the payment of the $115,000 claimed

35 The district judge further held that the executrices had assented to the payment of the $115,000 claimed.

Overview of law of assent

36 I begin with a brief overview of the law of assent. The starting point is that in order for personal representatives to administer the estate, they must hold complete title to it: *Seah Teong Kang v Seah Yong Chwan* [2015] 5 SLR 792 ("*Seah Teong Kang*") at [22]. Thus, an estate is not a trust, although personal representatives are subject to some of the obligations of trustees. It is only when the estate is fully administered with the payment of debts and the collection in of assets that the personal representatives hold it on trust for the beneficiaries in accordance with the terms of the will. Thereupon, the beneficiaries can claim

possession of property left to them under the will. Personal representatives are under a fiduciary duty to the beneficiaries to administer the estate properly and apply the estate to their benefit upon completion of the administration. However, prior to the completion of administration, residuary beneficiaries do not have a specific interest in any assets comprised in the residue, while specific beneficiaries have only an inchoate interest in the assets given them in the will. This is because both assets comprised in the residue and assets that are the subject of specific gifts may yet need to be used to pay liabilities of the estate: *Seah Teong Kwang* at [21].

37 However, it is often the case that it becomes clear that the assets exceed the liabilities of the estate even before administration is complete. It is then entirely possible for the executors to distribute some or all of the specific gifts and perhaps some of the residue. There is no need to wait for every asset to be collected in or every debt paid before distributing assets that are already clearly not needed to meet any debts or liabilities of the estate. Beneficiaries should receive their inheritance as soon as practicable. It is not uncommon for a wealthy testator to have some assets abroad. Collecting in those assets may take substantially longer than those within the jurisdiction and require some expenditure by the estate for which allowance should be made and a reserve kept. In circumstances such as these, it is natural and expected that the executors would convey the assets specifically bequeathed or make interim distributions of the residue, pending completion of the administration, so long as those assets are not needed for the payment of debts or satisfaction of liabilities of the estate. Even if the executors do not yet effect the conveyance of an asset or distribution of cash, they may expressly or impliedly acknowledge that a specific asset or some part of the residue is not needed for payment of debts or liabilities of the estate: *Seah Teong Kwang* at [27]. Such an acknowledgment is described as an

assent. The assent has the effect of making the disposition of that asset under the will operative, and perfects the beneficiary's beneficial ownership of that asset.

38 In this case, there are assets outside Singapore, as the testator held shares in his former employer, a large and well-known US technology company.

39 The executrices have contended that that there can be no assent in respect of any part of the residuary estate prior to ascertainment of the entire residue or, alternatively, that any such assent does not found a right of action. Insofar as their contention appears to be that ascertainment requires first meeting all expenses or at least determining in advance every last dollar of potential expenses, I do not accept this contention. That an executor may assent to part of a residuary gift without yet assenting to the whole is noted in *Halsbury's Laws of England* vol 8(3) (Butterworths, 4th Ed Reissue, 2000) at para 559, citing the case of *Austin v Beddoe* [1893] 41 WR 619. There are several reasons why the law promotes the early distribution of parts of the residuary estate. These reasons include meeting the needs and interests of the residuary beneficiaries and the efficiency of putting assets or funds back to use and circulation in the economy.

40 The executrices rely on the English Court of Appeal and House of Lords' decisions in the well-known tax litigation concerning the testamentary gift of a residuary estate to a charitable institution, reported as *Rex v Commissioners for Special Purpose of Income Tax Acts Ex parte Dr Barnardo's Homes National Incorporated Association* [1920] 1 KB 468 and *Barnardo's Homes v Special Income Tax Commissioners* [1921] 2 AC 1 respectively. By that litigation, the charity sought to obtain the return of tax paid by executors on

income derived from the residuary estate. They argued that the assent of the executors given upon ascertainment of residuary estate related back to the testator's death, and so the income received should have been exempt from income tax. The assent was given on 4 December 1916 upon ascertainment of the residue. In the Court of Appeal, the decision was put upon the ground that at the time when the income was received it was not received on account of the charity and the tax paid was not paid on the charity's behalf: per Lord Sterndale MR at 480. Lord Sterndale also said that "there is no such thing as a residue until the estate has been administered and the residue has been ascertained. No assent could possibly take place in this case before December 4, 1916, because there was nothing before that date to which that assent could attach." It must be noted, however, that these remarks were followed by his saying that "I prefer not to put my judgment in this case upon the doctrine or principle of assent at all".

41 I do not read Lord Sterndale's comments as holding that there cannot be assent in respect of part of the residue, even if such part is no longer needed for the administration of the estate. His comments were made in the context of determining the legal effect of an assent in respect of residue, and do not relate to the issue of whether executors have the power to assent in respect of part of a residuary estate. One should bear in mind that if it were really the case that there could be no assent in respect of part of the residue then equally there could be no conveyance of assets held in the residuary estate prior to completion of administration, nor even interim distributions of obviously excess funds, both of which are commonplace and desirable.

42 The House of Lords upheld the decision of the Court of Appeal, holding, as the Court of Appeal did, that assent to a residuary bequest, unlike to a specific

bequest, does not relate back to the testator's death. The case stands for the proposition, as set out in Alexander Learmonth & Ors, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell 21st Ed, 2018) ("*Williams*") at para 76-22 that:

> At common law the assent of an executor to a specific devise or bequest relates back to the time of the testator's death, so as to confirm intermediate dealing... An assent to a residuary bequest, by contrast, does not relate back to the testator's death, as the legatee has no interest in any defined portion of the estate until the residue is ascertained.

43 That proposition is not relevant to this case. It does not assist the executrices.

44 I turn to the executrices' related point that the daughters have no right of action even after assent. This is only about the form of action. It is true that an action may be brought at law to recover a legacy only if it is a specific legacy to which the executor has assented, but all this means is that in other cases the remedy is to commence proceedings for the administration of the estate: see John McGee & Steven Elliott, *Snell's Equity* (Sweet & Maxwell, 34th Ed), para 35-009. Parties did not address me on the question whether there has been any defect of form or procedure in these proceedings. In this connection, I note that there are aspects of the executrices' counterclaim which should properly be brought within the context of an administration action so that their bringing them in these proceedings suggests a waiver of any defect of form or procedure if the daughters did not properly commence these proceedings as an administration action.

45 When executors assent in respect of a legacy or of a part of the residue they should be satisfied that the transferee is entitled to it and that a valid receipt

can be obtained, as well as that the estate has sufficient funds to meet any remaining liabilities after that conveyance or distribution. An assent may be given notwithstanding that there are debts or other liabilities still outstanding: see *Commissioners of Inland Revenue v Smith* [1930] 1 KB 713, at 737, per Lawrence LJ. Those outstanding debts or liabilities need not be fully determined, so long as the executors make a reasonable reserve for them.

46 There is an element of discretion for executors in assessing whether and when to assent in respect of any assets prior to completion of administration. However, delaying distribution of an estate where there is sufficient value and liquidity to meet liabilities is a breach of duty that has consequences. The traditional consequences lie in removing the executor at the suit of the beneficiaries or an action for an account. The court has also implied assent from acts or communications of executors in relation to specific assets and in other circumstances presumed assent, on the principle that what ought to be done is presumed to have been done, in order that the beneficiary then have the right against the executor turned trustee to require vesting or transfer of the legal title in or to himself. Taking this to a logical conclusion, the court in the Canadian case of *Reznick v Matty* [2013] BCSC 1346 compelled the delinquent executor to give an assent in relation to part of the residue and, in the same order, directed a further interim distribution of the residue. The corollary of the obligation to complete the administration of the estate without delay is that an executor should not withhold assent in respect of any asset except for good reason.

47 It is the case that an assent may be retracted prior to being implemented if unknown debts are unexpectedly claimed causing a deficiency: see *Williams* at para 76-21. However, the burden would be on the executors to establish that that is indeed the case.

Assent on the facts

48 In this case, there was plainly an assent in respect of the annual maintenance payable for the periods in question in these proceedings, namely 30 August 2017 to 29 August 2018 and 30 August 2018 to 29 August 2019. The executrices' solicitors entered into correspondence with the daughters' solicitors in respect of authorising the mother to give good receipt and discharge in respect of payments for the daughters.[18] I agree with the district judge's analysis of this correspondence in [36] of his grounds of decision. Any words of qualification or conditionality concerning the need for estimates showing sufficient funds to meet the payment of debts and expenses related to annual maintenance payments for subsequent periods.

49 The executrices further argue that when they gave the assent they did not then know of certain potential liabilities or claims and thus the assent should not be binding or is revocable by them. Initially, this argument was based on the mother having raised a stock-split that had occurred in the shares of the well-known US technology company that might affect how a share swap had been structured in a consent order made in the divorce proceedings. This was expanded in oral argument to concerns about potential tax liability in the US arising from sales of shares in that company. There would be US tax liability on the sale of such shares by the estate after the testator's death, but any such liability would only reduce the amount realised by such sales. The net after tax proceeds of sale would still be considerable. As for the possible but not confirmed sales of such shares before the testator's death, any claim of potential unpaid tax liability is speculative. The executrices have no evidence that there

[18] RA III (Part A) at pages 46–47.

is in fact any unpaid tax liability of the estate. As for the effect of the stock share split, this would not alter the ability of the estate to fund the annual maintenance for the daughters which the testator had clearly intended to be an obligation of the estate. I do not accept that the executrices are entitled to retract the assent. I note even after payment of the annual maintenance it remains possible in law for the executrices to compel a refund if it really turns out to be the case that the estate is suddenly beset by debts. In that situation, it would be necessary to keep in mind that the annual maintenance may be drawn either from the daughters' shares of the proceeds of the sale of Property 2 or from the residuary estate. Equity has developed rules around rateable contributions and the marshalling of funds that may be applied in the administration of an estate.

Issue 3: Whether the estate is to pay off the mortgage loans in relation to Property 1 and Property 2 and if so in what proportions

50 The starting point is that pursuant to Section 58(1) of the Probate and Administration Act 1934 (2020 Rev Ed), when a deceased person, by his will, disposes of his interest in a property charged with the payment of money, and he has not by will, deed or other document signified a contrary intention, the interest so charged shall, as between different persons claiming through the deceased, be primarily liable for paying the charged debt.

51 Thus, if nothing more is said in a will, any mortgage loan on property gifted by that will is accountable to that gift. The gift is of the encumbered property.

52 In this case however, the Will expresses the testator's contrary intention by the word "loans" appearing at the start of Clause 3. This is sufficient to make

the testator's intention plain on the face of the Will, but it is also supported by the testator's emails to the draftsman as follows:

(a) In an email to the draftsman dated 7 July 2016, the testator stated that he "would like to settle all outstanding loans on the properties";[19]

(b) In an email dated 23 July 2016, he made the following comments in relation to the draft Will:

(i) "Para 3 i) It does not say that the loan for the property is to be paid"; and

(ii) "Para 3 iii) The distribution of the balance of my estate hasn't excluded out the amount to redeem loans on my property. How do we address this?"[20]

(c) In an email dated 25 July 2016, he stated, "Do I need to explain what I want to [the executrices] in person? If not, how will they be guided (eg paying off all housing loans, how much child maintenance to be paid, when tertiary education is to be disbursed, etc) …"[21]

(d) In an email 31 October 2016, he stated "I also added "loans" in Para 3, to be clear that I want the home loans to be settled."[22]

53 Turning to the question of proportions, the only question is whether for Property 1 the testator intended that his estate pay off only 80% of the loan and

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19 RA III (Part A) at page 138.

20 RA III (Part A) at page 164.

21 RA III (Part A) at page 175.

22 RA III (Part A) at page 279.

not 100% given that the beneficiary (his spouse) already owned 20% of Property 1. For Property 2, it is obviously 100% of the loan.

54 As it happens the daughters have not argued that the testator intended that his estate pay off only 80% of the loan on Property 1. I accept that the testator's intention was that his estate would pay off 100% of both loans. First, it is not the case that in relation to Property 1 he was responsible to the lender only for 80% of the loan. Thus, references to his loans would mean 100% of those loans. Secondly, the correspondence referred to at [52] above makes no distinction between the properties and supports the inference that in relation to both of them the testator's intention was that his estate pay off 100% of them.

55 Thus, the testator's gifts of Property 1 and Property 2 were both of unencumbered property.

Issue 4: Whether payment of such mortgage loans takes priority over the annual maintenance payments

56 The testator's intention that the estate pay off the mortgage loans for both properties and their inclusion at the start of Clause 3 means that all the gifts made by Clause 3 are subject to the paying off of the mortgage loans. However, in relation to Property 1, I interpret this as meaning subject to the mortgage loan being paid off in accordance with its tenor, by monthly instalments and not by any accelerated payment. The executrices have not contended otherwise, nor has the testator's spouse sought to intervene in her capacity as beneficiary of the gift of the testator's 80% interest in Property 1 to take any contrary position. In relation to Property 2, it can and should be sold now that the testator's father has passed away so that its proceeds may be distributed in accordance with Clause 3(ii), and thus, among other purposes, contribute to the cost of the

daughters' tertiary education as the testator intended. As part of the final accounting for the estate the mortgage loan for Property 2 should be treated as paid off by the estate. However, in terms of cash flow, it will be possible for the executrices to make and continue the annual maintenance payments to the daughters just as the testator intended. I have alluded at [49] above to how executors may fulfil the testator's intentions on an interim basis pending the final accounting for the estate as a whole.

Future annual maintenance payments

57 Two further facts are clear. First, leaving aside speculative concerns about unpaid US tax liability for the estate from unknown sales of shares during the testator's lifetime, the estate is solvent. I note that the executrices raised concerns that the estate may not be able to pay off both mortgages if the sale of the testator's US stock does not yield a substantial enough sum. That the annual maintenance payments can, as a matter of final accounting, be ascribed to the daughters' share of Property 2 is sufficient to address this potential concern.

58 Secondly, the testator's intention was that the annual maintenance had to be paid promptly while his daughters were young. This is clear from the use of the imperative "shall" in Clause 4 of the Will. It is also supported by the email correspondence that I have reviewed. It is a compelling inference that the testator, understanding that his obligation to pay annual maintenance agreed by him in the divorce proceedings would cease upon his demise, desired to remain responsible for his share of the daughters' maintenance, further understanding that when it comes to children's maintenance there is value in its being paid promptly while they are young. To take a hypothetical example, paying for music or computer science lessons when a child is young is likely to be worth

more to the child than receiving the equivalent money at some later point in time when the child has grown up and could even be earning their own income. In short, not making the annual maintenance payments now would defeat the testator's intention to provide for his daughters while they are young.

59 Thus, as a practical matter, the executrices should not only have paid the annual maintenance that is the subject of these proceedings promptly, but they should make payment of subsequent years' annual maintenance, including what is now in arrears, promptly, unless and until there is a real risk to the estate's solvency.

Conclusion

60 While it is obvious that the testator's intention must be the court's focus of inquiry, there are at least two potential difficulties that still arise. The first is discerning the testator's intention. Today, the use of email communications may well offer multiple glimpses into a testator's mind, as is the case here, but interpreting those email communications must be done sensitively and with full awareness that they may not represent the final intention expressed in the will. Secondly, the accretion of arcane rules within the law of succession over the years may sometimes impede both the conversion of a plain intention into the legal language of the will and later on the carrying out of that intention. Here, it is obvious that the testator intended that his daughters receive the annual maintenance while they were young. The decision not to carve out a separate fund for this purpose created an unintended potential for delay. The remedy is to remember that the common law develops at the deeper level of principle and so rules of an earlier age are to be interpreted in response to the needs of the

present day. The court should always return to the testator's intention as the guiding light.

61 Inasmuch as the court is guided by the testator's intention, so too must be the executors. Most executors are not legally trained and are unpaid volunteers. It can be a thankless task. Putting things off is understandable. However, the law requires executors to act without unreasonable delay, applying an objective standard to the circumstances of the case. Moreover, it is hard for a testator to foresee every eventuality and executors may need to use common sense to seek practical solutions, rather than being dragged into the morass of pitfalls that those arcane rules may sometimes dig for them.

62 Indeed, what I have encapsulated in the preceding two paragraphs has been eloquently said by the daughter's mother in this matter:[23]

> When a loved one passes, they hold in their hearts a prayer of love for those they leave behind in the world of the living, that they are able to move forward and keep living well in honour of the memory and legacy of the one who has departed.
>
> Sometimes, the will one leaves behind and the law which empowers it are blunt instruments for conveying this care and intention.
>
> In the more than 4 years since [the testator's]'s passing, as I observed how the turn of matters has exacted a heavy emotional and financial toll on all parties, including the children and me, his spouse, his sister, his parents, I can't help but feel that this is a far cry from what [the testator] must have intended and envisioned as the care for the people in his life.
>
> Along this journey, I have become very cognizant of the adage that one should focus on giving away as much of their legacy as they can to the people and causes they care about whilst alive. It was deeply unfortunate that [the testator] did not have the benefit of time to do so with his sudden passing after a short bout with a very aggressive form of leukemia.

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[23] Respondents' further written submissions dated 18 January 2022 at para 5.

> I sincerely hope that the areas of consideration the Court determines parties should focus upon and the resulting decisions will provide us with wise and fruitful considerations and guidance that will help everyone [the testator] loves to move forward and keep living in honour of his memory and legacy.

63 I therefore:

(a) dismiss the appeal against the order that the executrices pay the sum of $115,000 from the estate forthwith;

(b) dismiss the appeal against the dismissal of the executrices' counterclaim for a declaration subjecting the payment of the annual maintenance to payment of debts and loans; but

(c) allow the appeal against the dismissal of the executrices' counterclaim that the annual maintenance is to be drawn from the daughters' shares as set out in Clause 3 of the Will; and

(d) declare that the annual maintenance is to be drawn from the daughters' shares as set out in Clause 3 of the Will, i.e. either or both of Clauses 3(ii) and 3(iii); and

(e) direct that the annual maintenance be paid promptly, unless and until there is a real risk to the estate's solvency.

64 Turning to costs, I invite parties to seek to agree on both incidence and amount of the costs here and below within 14 days of this judgment, including whether this is an appropriate case for costs to be drawn from the estate. Failing

agreement, parties may file brief submissions on costs limited to 8 pages, within 28 days of this judgment, and if requested I will hear them orally thereafter.

Philip Jeyaretnam
Judge of the High Court

Loh Hui-Qi Vicki, Charmaine Elizabeth Ong Wan Qi and Claudia Liu (Legal Solutions LLC) for the appellants;
Foo Yeung Chern Mervyn (Lee & Lee) for the respondents.