DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
[GUAMAN SIVIL NO: WA-22NCVC-649-09/2019]

ANTARA

1. RYAN KOH YUE LOONG @ KOH TECK LOONG
(NO. PASPORT SINGAPURA: K0979473N)

2. TAN GUAT LIAN
(NO. PASPORT SINGAPURA: E6390244D)
...PLAINTIF-PLAINTIF

DAN

1. KOH SHING YEE
(NO. PASPORT SINGAPURA: E6275648K)

2. CHEONG LAI SIN
(NO. PASPORT SINGAPURA: E6274983L)
...DEFENDAN-DEFENDAN

DAN

KOH CHING KEW
(No. K/P: 640306-10-6365) ...PENCELAH

Digabungkan dan dibicarakan dengan
[SAMAN PEMULA No.: WA-31NCVC-702-04/2019]

Dalam perkara harta pusaka Koh Seng Kar @ Koh Hai Sew (No. K/P: 430719-10-5509) ("Si Mati")

Dan

Di dalam perkara Akta Probet dan Pentadbiran 1959

Dan

Di dalam perkara Aturan 71 Kaedah 5
Kaedah-Kaedah Mahkamah 2012

ANTARA

KOH SHING YEE
(NO. PASPORT SINGAPURA: E6275648K) ...PEMOHON

RYAN KOH YUE LOONG @ KOH TECK LOONG
(NO. PASPORT SINGAPURA: K0979473N) ...PENGKAVEAT

JUDGMENT

PREFACE

The suits before this Court, pertains to competing claims by the parties (alleged survivors from three families) over the estate of the Kor Seng Kar @ Koh Hai Sew (the Deceased) who died intestate on 23.03.2019.

INTRODUCTION

[1] There are two suits to be heard and determined together, i.e.:

(a) Civil Suit No: WA-22NCVC-649-09/2019 **(Suit 649)**; and

(b) Ex-parte Originating Summons No: WA-31NCVC-702-04/2019 **(OS 702).**

Parties are as follows:

1.1 The First Plaintiff (P1) and Second Plaintiff (P2), [referred as the Ps, collectively] claim to be the biological son and the lawful

widow from the Deceased's 2nd marriage (customary) on 19.02.1988 that was never registered in the Republic of Singapore.

1.2 The First Defendant (D1) and Second Defendant (D2) [referred as the Ds, collectively] claim to be the lawful biological daughter and the lawful widow from the Deceased's monogamous marriage registered under the Civil Marriage Ordinance 1952 on 04.05.1979 in Malaysia.

1.3 The Intervener claims to be the biological son from the Deceased's 1st purported customary marriage to Ho Ah Nya @ Ho Cheng Bak (Ho Ah Nya) in 1962-1963.

[2] The parties filed two (2) separate suits, as follows:

2.1 Civil Suit No: WA-22NCVC-649-09/2019 (**Suit 649**) filed by the Ps on 03.09.2019, seeking a declaration that P1 is the issue of the Deceased and P2 as the lawful wife of the said Deceased and other prayers.

2.2 Ex-Parte Originating Summons No: WA-31NCVC-702-04/2019 (**OS 702**) filed by D1 on 16.04.2019 for a Letter of Administration (LA) of the Deceased estate and P1 as the caveator.

2.3 Under a Consent Order dated 24.07.2020, OS 702 was consolidated and to be heard together with Suit 649.

2.4 Under the Court Order dated 28.04.2021, the Intervener was granted leave to intervene in the combined Suit of Writ 649 and OS 702.

2.5 For completeness, it is to be noted that the Defendants had in their counter claim referred to another suit Originating Summons No: WA-31NCVC-901-05/2019 (**OS 901**) filed by the Ps seeking a Letter of Administration for the estate of the Deceased. However, this OS was later withdrawn by them on 06.09.2019 with costs of RM2,120.88 paid to the Ds.

Suit 649: 22NCVC-649-09/2019

[3] The Ps case:

3.1 Is anchored on the claim by P2 that she and the Deceased had allegedly conducted a customary marriage ceremony on 19.02.1988 in the Republic of Singapore.

However, it is to be noted that the evidence at the trial could not definitively evince the supposed marriage. That said, the purported customary marriage was never registered under the Women's Charter of Singapore as legally required, rendering it invalid.

3.2 Since that purported customary marriage, it is claimed that they allegedly lived together in Singapore as husband and wife for over 30 years until the Deceased's demise.

Again, evidence at the trial places substantial doubt on this claim.

3.3 P1 claimed to be the child/biological son of the Deceased from that supposed customary marital union, though his birth certificate named the Deceased's adopted brother (Koh Seng Lee/PW1) who worked for the Deceased, as his father.

Evidence at the trial is merely speculative, with no definitive evidence that P1 is the biological offspring of the Deceased.

3.4 In defending the position he's taken and to facilitate his case in insisting that the Deceased was his biological father, one (1) month before he filed Suit 649, P1 took out a suit in the High Court of Kuala Lumpur (No. WA-22NCVC-543-08/2019 **(Suit 543)** against Koh Seng Lee (his uncle). P1 secured an Order of the High Court on 10.12.2019 that:

(a) Declared Koh Seng Lee was not his father, and P1 is not the child of Koh Seng Lee.

(b) Koh Seng Lee is to deliver within fourteen days from the order a statutory declaration that he is not the father of P1.

(c) A mandatory injunction was granted to compel Koh Seng Lee to remove his name from the birth certificate of P1 within fourteen days of the Order, complying with all requirements of the Immigration & Checkpoints Authority of Singapore and

(d) Koh Seng Lee is to take a DNA test.

3.5 The Court records show that Koh Seng Lee (PW1) did not appeal the findings of the High Court of Kuala Lumpur to the Court of Appeal as an aggrieved party:

(i) I do take cognisance that throughout the course of the present trial, no replacement/rectified Certificate of Extract from the Register of Births from the relevant Singaporean Authority was adduced by P1 since the Kuala Lumpur High Court Order was granted three years ago. The Original Birth Certificate with Koh Seng Lee as the father remains on official record in Singapore and herein in this proceeding. It has not been proven otherwise with persuasive evidence.

(ii) This is a matter within the domain of the Singaporean Government. The Order of the High Court of Kuala Lumpur on 10.12.2019 cannot be taken to alter that position since P1's Certificate of Extract from Register of Births is an official document of the Government of the Republic of Singapore. This legal issue must necessarily involve the reciprocal enforcement of foreign judgments (Kuala Lumpur High Court Order) in Singapore.

(iii) There is no evidence that it was done. It cannot be that the High Court Order was merely taken for the purpose of the present proceeding and was never intended to be ultimately

taken up with the Singaporean Authority for whatever reason. If so, that can amount to an abuse of process, as it reflects poorly on the intent of P1 and Koh Seng Lee. If the findings in Suit 543 are to stand legal scrutiny. It must be ultimately addressed and determined by the relevant Singaporean Authority on the matter leading to the rectification of the Register of Births concerning P1.

(iv) There is no convincing evidence before me during the trial.

(v) It begs the question:

Why was this legal issue that is serious in nature in attempting to vary an official document issued by the Government of Singapore, not raised in the High Court in the Republic of Singapore?

(vi) Notwithstanding the said High Court of Kuala Lumpur Order dated 10.12.2019, as it stands, on the official record, Koh Seng Lee remains the father as named in the Certificate of Extract from Register of Births (No: S8908403B, Enclosure 95, p.440) of P1 issued by the Registrar of Birth unless a new rectified Certificate of Extract from Register of Births by the relevant Singaporean Authority is produced to state expressly otherwise.

(vii) Consequently, it is my considered view that even the self-serving Statutory Declaration by P1 on 18.04.2019 (enclosure 92, p.31) that the Deceased was his biological father cannot alter the Certificate of Extract from Register of Births No: S8908403B by the Singaporean Government. To take a legal position that it has would be a grave error in judgment. In the circumstances, it has no probative value for the purpose.

3.6 In OS 702, P1, as the caveator in opposing D1's application for the LA, he alleged that the Ds had acted oppressively and unfairly against the Ps by depriving their rights to be the administrators of the Deceased's estate.

3.7 P1 and the Deceased had allegedly lived together as father and son for more than 30 years (unproven at trial) since P1 was born until the Deceased's demise on 23.03.2019.

[4] Briefly, the Ps in Suit 649 claims in the Writ of Summons and Statement of Claim as follows:

> *"a) Perintah deklarasi bahawa Seksyen 5 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 yang melanjutkan bidang kuasanya di luar Malaysia adalah diluar bidang kuasanya dan adalah salah dan tidak boleh dikuatkuasakan ke atas Plaintif Kedua yang pada setiap masa material adalah diluar bidang kuasa;*
>
> *b) Perintah deklarasi bahawa undang-undang yang menyekat, menghalang dan/atau melucutkan hak waris seseorang anak luar nikah atas alasan beliau adalah anak di luar nikah adalah menindas ("oppressive"), tidak adil ("injustice"), diskriminasi, salah, bercanggahan dan bertentangan dengan Artikel 8 Perlembagaan Malaysia, adalah undang-undang buruk ("bad law') dan bertentangan dengan keadilan asasi ("against natural justice'^dan adalah terbatal dan tidak boleh dikuatkuasakan ("null and void'');*
>
> *c) Perintah deklarasi bahawa Akta Pembahagian 1958, terutamanya Seksyen 3 dan 6, tidak boleh ditafsirkan bagi maksud menyekat, menghalang dan/atau melucutkan hak waris seseorang anak berdasarkan status undang-undang atau klasifikasi/golongan anak tersebut dan tafsiran tersebut adalah menindas .("oppressive"), tidak adil ("injustice"), diskriminasi, salah, bercanggahan dan bertentangan dengan Artikel 8 Perlembagaan Malaysia,*

adalah undang-undang buruk ("bad law') dan bertentangan dengan keadilan asasi ("against natural justice") dan adalah terbatal dan tidak boleh dikuatkuasakan ("null and void'');

d) Perintah deklarasi bahawa perkahwinan antara Si Mati dan Defendan Ke.2 telahpun dibubarkan apabila Si Mati meninggal dunia pada 23.03.2019;

e) Perintah deklarasi bahawa setelah perkahwinan antara Si Mati dan Defendan Ke-2 dibubarkan apabila Si Mati meninggal dunia pada 23.03.2019, Defendan-Defendan tiada hak untuk mewaris atau memohon surat kuasa wakil bagi harta pusaka Si Mati;

f) Perintah deklarasi bahawa perkahwinan di antara Si Mati, dan Plaintif Ke-2 adalah sah mengikut kepercayaan, adat istiadat dan/atau budaya mereka yang terpakai pada masa itu

g) Perintah deklarasi bahawa Plaintif Ke-2 adalah isteri sah kepada Si Mati;

h) Perintah Deklarasi bahawa Plaintif Pertama adalah anak (kandung lelaki dan/atau zuriat dan/atau keturunan dan/atau baka dan/atau "issue" kepada kepada Si Mati;

i) Surat Kuasa Mentadbir bagi harta pusaka Koh Seng Kar @ Koh Hai Sew (No. K/P: 430719-10-5509) yang tersebut diberikan kepada Plaintif-Plaintif secara bersama-sama;

j) Plaintif-Plaintif diiktirafkan sebagai benefisiari dan waris kadim bagi harta pusaka Koh Seng Kar @ KohHai Sew (No. KIP: 430719-10-5509), Si Mati yang dinamakan di atas, dan nama Plaintif-Plaintif dimasukkan dan dinyatakan sebagai benefisiari dalam senarai benefisiari bagi harta pusaka Koh Seng Kar @ Koh Hai Sew (No. KIP: 430719-10-5509), Si Mati;

k) kos; dan.

l) apa-apa relif dan perintah lain yang dianggap sesuai dan patut oleh Mahkamah Yang Mulia ini."

4.1 The witnesses for the plaintiffs are as follows:

PW1 - Koh Seng Lee;
PW2 - Tan Beng Kiow;
PW3 - Cheng Chin Yong;
PW4 - Tan Guat Lian (P2); and
PW5 - Ryan Koh Yue Loong @ Koh Teck Loong (P1).

4.2 The witnesses for the defendants are as follows:

DW1 - Cheong Lai Sin (D2);
DW2 - Koh Shing Yee (D1);
DW3 - Teo Siok Khoong; and
DW4 - Poonam Lachman Michandani.

4.3 The witnesses for the Intervener are as follows:

IW1 - Ho Hock Keong;
IW2 - Koh Ching Kew;
IW3 - Koh Sing Puck; and
IW4 - Koi Ah Long.

[5] After perusing and considering all the evidence, relevant cause papers and the respective written submissions/replies by the learned counsels on 07.09.2023, I find that:

5.1 The Ps and the intervener failed to discharge their burden to establish their case with compelling evidence.

5.2 Their claims were dismissed with costs:

(i) as against P1-P2: global costs of RM100,000.00 to be paid to D1-D2 within 30 days; and

(ii) against the intervener RM15,000.00 to be paid to D1-D2 within 30 days.

5.3 The Ds counterclaim is allowed with costs and for damages to be assessed. Prayer (c) interest at 5%. However, prayers d, e, and f are disallowed (no appeal was filed by the Defendants).

5.4 D1's application for the Grant of LA in OS 702 is allowed with costs.

[6] Dissatisfied with the above decisions, the plaintiffs and the intervener are appealing against the said decisions. Since both suits were jointly tried and to avoid duplicity, I will only prepare a single judgment and my reasons are as follows:

BRIEF FACTS

[7] The brief facts are as follows:

7.1 From the parties' cause papers, it has been discerned that:

(a) The Deceased, born in Pulau Ketam in 1943, was a Malaysian citizen and domiciled in Malaysia. The Intervener claims that sometime in 1962-1963, the Deceased and one Ho Ah Nya underwent a customary marriage in Pulau Ketam (1st Marriage). This purported union resulted in the alleged birth of the Intervener on 06.03.1964 (Intervener's Birth Certificate at PDF 5, pg.2, Enclosure 179). Sometime in 1968, the Deceased left Ho Ah Nya and Pulau Ketam and never returned.

(b) The Deceased married D2 in 1973 in a customary Chinese tea ceremony in Singapore (PDF 48-49, pp 459-460, Enclosure 95). Six years later, on 04.05.1979, this 2nd marriage was registered in Malaysia under the Civil Marriage Ordinance 1952 (The Marriage Certificate: PDF6, pg.417, Enclosure 95). D1 was later born on 27.07.1980 from this marital union (Birth certificate: PDF7, pg.418, Enclosure 95), with the Deceased confirmed as the father.

(c) The Ps took the position that sometimes on 19.02.1988, the Deceased allegedly took a 3rd marriage when he and P2 underwent a purported customary tea ceremony in Singapore (Ps Statutory Declaration: PDF43-86, pp.34-78, Enclosure 92). On 08.05.1989, P1 was born, but his Certificate of Extract from the Register of Births indicates that Koh Seng Lee (the uncle) is his father (Certificate of Extract from Register of Births No: S8908403B: PDF29, pg.440, Enclosure 95).

I take cognisance, as pointed out by the learned counsel for the Ds, that:

(i) The deponents of the Statutory Declarations (witnesses listed by the Ps) to support the alleged 3rd customary marriage between the Deceased and P2 were not called by the Ps.

(ii) I also take cognisance that the witness who claimed to be the photographer who allegedly took photos of the purported 3rd marriage was also not called.

(iii) The witnesses listed by the Ps, supposedly the interpreters who prepared the translation and transcripts of the recordings in the CDs marked as IDP1-6, were also not called.

In the circumstances, those issues above in this trial remained unproven for the Ps case.

(d) The crux of the suit before the Court, therefore, pertains to competing claims by these three families over the estate of the Deceased:

(i) 1st purported customary marriage in Pulau Ketam Malaysia, 1962-1963, being pursued by the Intervener.

(ii) 2nd customary marriage in Singapore in 1973, but registered on 04.05.1979 under the Civil Marriage Ordinance 1952 in Malaysia being pursued by Ds, and

(iii) 3rd purported customary marriage in Singapore, 19.02.1988, that was not registered under the Women's Charter of Singapore being pursued by the Ps.

7.2 During the course of the proceeding, the Federal Court ruled in Tan Kah Fatt & Anor on the position of an illegitimate issue in the estate of the deceased's father. I had then instructed parties to examine how the Federal Court ruling in *Tan Kah Fatt & Anor v. Tan Ying* [2023] 2 MLJ 583, FC could impact the outcome of the present proceeding. In that case, the FC observed:

(i) That an illegitimate issue is entitled to inherit from the deceased parent's estate under sections 3 and 6 of the Distribution Act 1958.

(ii) It further observed that accepting the testimonies of the illegitimate issue's mother and paternal grandparents that the mother had a reasonable belief (at the time of the solemnisation of the marriage) that the marriage was valid, the issue was a legitimate child who was entitled to inherit under her deceased father's estate. Applying s.75 LRA 1976.

(iii) The FC overruled the HC and CA's determination that the Child was illegitimate because her parents' Chinese customary marriage was not a valid marriage under the LRA 1976 and, as such, was not entitled to inherit under sections 3 and 6 of the Distribution Act 1958.

(iv) The FC opined that the "issue" concerning the deceased did not depend on the legitimacy of the issue or the descendant of the deceased. The Court adopted the purposive approach to interpretation over a literal interpretation of the Distribution Act 1958.

(v) It reasoned that the word '*includes'* in the definition of '*issue'* suggests an enlarging or non-exhaustive definition and is intended to "*expand or enlarge the category of persons who may succeed or inherit, consonant with the purpose* "of the DA 1958. In contrast, the more definitive or comprehensive word '*means'* is used in the definition of '*child*'. The Court concluded from its survey of the respective dictionary definitions of '*issue'* in relation to the deceased that the term '*issue'* "*suggests descendants by blood lineage, not dependent on the matter of legitimacy of the descendant'*. The DA 1958 does not, whether expressly or by implication, state that only legitimate children may inherit in the case of intestacy.

7.3 The position taken by the learned counsels of the parties herein on Tan Kah Fatt & Anor, FC, on the outcome of this present proceeding are as follows:

(a) The Ps:

(i) The learned counsel argued that the FC had clarified the inheritance rights of children born in void marriages. It will benefit many children of void marriages. It would protect children's rights and not be discriminated against simply because their parents were not legally married.

(ii) It is a positive development for the law of succession in Malaysia.

(iii) The FC ruling in Tan Kah Fatt & Anor is binding on this Court since the Ps case is closely like it. Stare decisis applies.

(b) The Intervener:

(i) As with the position the Ps took, the learned counsel for the Intervener submitted that stare decisis applies to this Court.

(c) The Ds:

(i) The learned counsel for the Ds took the legal position and strongly argued that Tan Kah Fatt & Anor does not apply to the facts of the present case, whose views provided some valuable food for thought and interesting insights from the legal perspective of a senior legal practitioner in family matters, and its continuing development notwithstanding the binding effect of the FC ruling.

(ii) The learned counsel, in distinguishing facts, in a nutshell, respectfully argued that:

(a) The per-incuriam decision by the FC goes against legislation precisely placed to deal with the issue of succession rights of illegitimate children.

(b) There is no ambiguity in Sections 3 and 6 of the Distribution Act 1958. The word "issue" in Section 6 must be read together with Section 3 of the Distribution Act provides:

"child" means a legitimate child, and where the deceased is permitted by his personal law, a plurality of wives includes a child by any of such wives but does not include an adopted child

other than a child adopted under the provisions of the Adoption Act 1952 [Act 257].

"Issue" includes children and the descendants of deceased children.

She cited *Re Tan Cheng Siong Deed; Charles Clement Dunman v. Tan Seng Hwee; Tan Chin Tuan* [1937] 1 MLJ 87, per McElwain CJ said that there is no doubt that the ordinary meaning of "child" is *a* person born by *a* woman to her lawful husband. A bastard, annulus filius, is not *a* son....as said by *Arden M.R. in Godfrey v. Davis 6 Ves* Jun 43 noted that *"Such persons only could be intended, who could entitle themselves as children by the strict rule of law; and no illegitimate child can claim under such a description unless particularly pointed out by the testator."*

(c) The term "issue", as it is, already had a more comprehensive application than "children". It includes all lineal descendants of the legitimate child(ren), i.e., children, grandchildren, and great-grandchildren. Because it does not include illegitimate children, it would not be rendered 'otiose and redundant'.

(d) The Distribution Act 1958 contemplates a situation where the deceased and the person they leave behind were married. The references to "child," "children", and "issue" must necessarily refer to the legitimate daughter or son of that marriage and their descendants. The context would militate against reading the word "issue" to include an illegitimate child of the deceased

with another woman or man to whom the deceased was never married. Under common law, reference in a statute to "child" or "children" would *prima facie* mean a legitimate child or legitimate children: see *Galloway v. Galloway* [1956] AC 299 at 316 *(per* Lord Oaksey), at 318 *(per* Lord Radcliffe and at 323 *(per* Lord Tucker).

(e) The learned counsel argued further that the position taken by the FC in Tan Kah Fatt on the interpretation of "issue" and/or "children" would render redundant other legislation in the country. When a child is illegitimate, its mother would be the sole guardian to the exclusion of the father. Section 11 of the Legitimacy Act 1961 allowed an illegitimate child to inherit from the mother's estate, but only if the mother did not have other legitimate children. Section 6 of the Legitimacy Act 1961 was to legitimise a person so that they may inherit under their parents' estate. In this premise, if an illegitimate child is permitted to inherit without being legitimised, section 6 would be redundant.

(f) Section 13 of the Births and Death Registration Act 1957 only permits a father to be named on an illegitimate child's certificate if it is at the joint request of the mother.

(g) Section 1 of the Guardianship of Infants Act 1961 distinguished between guardians of legitimate and illegitimate children. In this case, the former is the father, and the latter is the mother.

(h) To date, illegitimate children cannot be conferred citizenship by their father because of this: *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 237, FC.

(i) The learned counsel also argued that in the context of the inter vivo transfer of immovable properties from a parent to a child, the exemption of stamp duty under the Stamp Duty (Exemption)(No.3) order 2023 might only benefit legitimate children, stepchildren, or legally adopted children. Notably, illegitimate children are excluded from such exemption of stamp duty.

(j) It was further argued that Article 8 of the Federal Constitution of Malaysia deals with equality, which was amended to prohibit discrimination. It has no application concerning personal law. Article 8(5)(a) clarifies that the Article does not invalidate or prohibit any provision regulating personal law.

(k) By Article 8(5)(a), any provisions regulating personal law, including questions of marriage, divorce, and succession, even if discriminatory, are not invalidated or prohibited. **As the issues of marriage and succession fall within areas of personal law, Article 8 has no part to play in the matter.** Article 8(2) of the Federal Constitution further permits discrimination against non-citizens. Thus, there is no breach of any of the Ps' constitutional rights as alleged.

(l) In children born out of wedlock, the father is under a limited legal duty to an illegitimate

child. He must only provide maintenance by Section 3 of the Married Women and Children (Maintenance) Act 1950.

(m) The learned counsel made her argument that applications by illegitimate children competing with the claims of legitimate children, whether under a will or intestacy, unnecessarily burdens the courts and causes profound injustice to the legal expectations of the legal wife and legitimate offspring by rendering the succession law uncertain, particularly if they may not know any other illegitimate dependants who might still make succession claims.

(h) In Singapore, the default position is still that illegitimate children are not entitled to inherit in respect of their parent's estate. However, the High Court and Court of Appeal have called upon Parliament to consider changes to be made to the distinction between legitimate and illegitimate children**:** *AAG v. Estate of AAH* [2010] 1 SLR 769 at [41]-[43].

(o) The learned counsel went further to point out that in other jurisdictions, the entitlement of illegitimate children to inherit has explicitly been legislated for, like in the United Kingdom (UK) via the **Family Law Reform Act 1987,** Hong Kong via the **Intestates' Estates Ordinance (IEO).** It was also noted that the UK and Hong Kong laws especially provide that the rights under the intestacy of a person dying before the relevant sections come into force remain unaffected.

(p) It was also argued that some of our laws have already been amended. Section 75 of the LRA 1976 recognises an otherwise illegitimate child to be legitimate if the parents were under a reasonable belief that their marriage was valid. Its wording is like Section 1 of the UK's Legitimacy Act 1976.

(q) **Tan Kah Fatt & Anor,** in paragraphs [97] to [100], considered and applied Section 75(2) to find the second appellant to be a legitimate child and entitled to inherit. This was not the case in the present proceeding.

(r) Section 18 (2A) UK Family Law Reform Act 1987 even makes special provisions for children born of surrogacy and artificial insemination, who would otherwise be entitled to inherit from their biological parents' estates. However, this was not considered in **Tan Kah Fatt** *(supra)*. As it stands now, even a child born from a surrogacy arrangement or sperm/egg donors will have a right to inherit from their unknowing / unsuspecting parents.

(s) In her closing arguments, the learned counsel emphasised that the separation of powers should be fortified. The Court's powers are confined to interpreting legislative and constitutional provisions. It ought not to encroach into legislative powers within the strict purview of Parliament. Though Tan Kah Fatt & Anor is a Federal Court decision, it may be revisited in future cases with similar facts as the plethora of authorities had shown: *PP v. Kok Wah Kuan* [2008] 1 MLJ 1, FC; *Asean Security Paper Mills*

Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1, FC.

(t) The learned counsel asks that the Ps and the Intervener's claim of inheritance under the deceased's estate in Suit 649 ought to be dismissed, and D1's application for the LA in OS 702 is allowed.

THE PLAINTIFFS (Ps) CASE

[8] I observed the Ps' arguments in canvassing and ventilating for their position in Suit 649 and OS 702 as follows:

8.1 It is the position of P1 that the Deceased and P2 married customarily on 19.02.1998 and have cohabited as husband and wife for more than thirty years since then in the Republic of Singapore. P1 was born a year after the marriage on 05.03.1989 (Certificate of Extract from Register of Births: L95, pg.440). P1 claims that the Ds has denied his right to be the administrator of the Deceased's estate. The Ps seek an order from the Court to place and cement their position in the Deceased's estate.

However, as I have observed and addressed in paragraph 3.4 hereof:

(a) The Certificate of Extract from the Register of Births stated that Koh Seng Lee (PW1) is the father of P1. Notwithstanding the 10.12.2019 High Court of Kuala Lumpur Order finding that Koh Seng Lee is not the father, nothing has been done by either P1 or Koh Seng Lee to rectify the Singaporean Certificate of Extract from Register of Births or to bring up this matter with the relevant Singaporean Authority. There is no evidence from either party that it had been done.

(b) For all intent and purpose, Koh Seng Lee remains on Singapore's official record as the father of P1. It is my view that fact cannot be ignored. That the said Koh Seng Lee has

been complicit in the Certificate of Extract from the Register of Births of P1 debacle for the past thirty-plus years, and necessarily with the knowledge of P2 as the mother of P1, gives me grounds for concern about the veracity of their evidence.

(c) The High Court Order of 10.12.2019 was explicit in ordering (mandatory injunction) that Koh Seng Lee (PW1) must remove his name from the Register of Births in Singapore within fourteen days from the date of that Order, and P1 has done nothing about it since more than three years ago.

(d) In his evidence, P1 said that he did not know of the contents of his Certificate of Extract from the Register of Births, that he doesn't know Kho Seng Lee was named as his father. I find the evidence too far-fetched to be believed. The Certificate of Birth is an essential, primary document you must use as you grow up in Singapore or Malaysia for education, work, etc.

(e) Claiming complete ignorance of Koh Seng Lee being the named father for over thirty years in the birth certificate, premised on the facts before me, is just so improbable. This outright denial does not assist, nor does it augur well for the credibility of P1.

(f) This does not augur well for their credibility, nor does it instil confidence in the truth of their evidence before me. In the circumstances, I read the facts against P1 and Koh Seng Lee (PW1), who appear to be acting in concert. I will regard the official document of the Government of Singapore (the Certificate of Extract from Register of Births No: S8908403B, in Enclosure 95, p.440) as still valid and subsisting unless official evidence from the Singaporean Authority to the contrary is produced.

(g) It is my considered judgment that the Kuala Lumpur High Court order of 10.12.2019, though valid and enforceable in Malaysia, unless it is set aside, varied, or stayed, it cannot, however, invalidate an official governmental document of a foreign sovereign nation.

(h) Save for the Intervener; all other parties (the Ps and the Ds) are Singaporean nationals in this proceeding.

(i) As for the customary marriage of P2 to the Deceased, it is irrefutable at the trial that the said union was never registered under the Singaporean Women's Charter as required by the law in the Republic of Singapore. DW4: Ms Poonam Mirchandani (an Advocate and Solicitor of the Supreme Court of Singapore), an expert from Singapore, gave evidence that the purported customary union of P2 and the Deceased is void since it was never registered under the Women's Charter. I find this evidence to be relevant to this proceeding and admit the evidence of the said expert. I see no basis for the objection by the Ps to exclude it. In the circumstances, irrespective of the duration (alleged over thirty years) that the Deceased cohabited with P2 in the customary union, it was still not sanctioned by the law in Singapore for failure to register.

(j) With the unregistered status of the purported customary marriage of P2 to the Deceased confirmed, any child born from such a marriage in the circumstances would not be legitimate in Singapore, just as it is in Malaysia under section 22(4) LRA where it says expressly that every marriage purported to be solemnized in Malaysia shall be void unless a certificate for marriage or a license has been issued by the Registrar or Chief Minister or a statutory declaration under sub-section (3) has been delivered to the Registrar or Assistant registrar, as the case may be.

(k) However, it must be pointed out that, illegitimate or not, when there is doubt about the child's lineage, it would be required to be satisfactorily proven that the child is the biological offspring of the Deceased. This doubt is created by the official Singaporean Certificate of Extract from the Register of Births, which clearly says that Koh Seng Lee (PW1) is the father of P1. To date, there is no other official document from the Singaporean Authorities to state otherwise as it involves their national. The Kuala Lumpur High Court order of 10.12.2019 cannot officially or unofficially alter that official Singaporean position. If that biological connection (the illegitimate biological offspring of the Deceased) cannot be conclusively established, Tan Kah Fatt, FC *(supra)* would not apply.

(l) As I have addressed the position of the Intervener in this proceeding, there is no other definitive evidence to establish P1 as a lineal descendant (biological offspring) of the Deceased than a relationship DNA (deoxyribonucleic acid) report that would constitute compelling evidence for genetic or hereditary information (paternity/ancestry testing):

(i) But there is none in this proceeding.

(ii) Talking about or being willing to do is not sufficient.

(iii) It is the Ps suit, and P1 must manage how best to do it. The Court will not conduct his case for him.

(iv) As the cumulative evidence stands in this proceeding, I am in doubt as to the lineage of P1 to the Deceased. Irrespective of how much time the Deceased spends with P1 (that remains unproven), as alleged, it is inconsequential if the biological link cannot be established for succession purposes.

(v) What the Ps have offered thus far is fundamentally speculative evidence at best in the hope that it is

sufficient to tilt the scale of evidence. Well, legally, it doesn't for this proceeding.

(vi) I agree with the learned counsel for the Ds that the burden lies on the Ps to prove their assertion that P1 is the biological offspring of the Deceased (s.101 Evidence Act 1950).

(vii) The Ps could have applied for a Court Order to compel the DNA test by the parties, but that was not done.

(viii) Adverse inference against the Ds is unjustified in the circumstances.

(ix) The burden of proof lies on the Ps throughout the proceedings.

(m) That said, there is also no evidence that the Deceased had lawfully adopted P1 to protect the interest of P1 considering the status of an unregistered customary marriage in Singapore, there is no conclusive evidence save for bare assertions of any purported gifts of property (movable or immovable) before death to P1 by the Deceased, and there is no convincing evidence to show that the Deceased expressly brought P1 into his life and his work, as the Deceased did with D1 and D2. It is sad to say, but those are the facts which cannot be denied.

8.2 During the trial, I directed the parties to submit on the admissibility of the audio-video recording (IDP1-IDP6) tendered by P1 to support his case. P1 argued:

(i) Cited s.3 Evidence Act 1950 that the audio-video recording constitutes a document under the EA 1950. Therefore, s.90A EA applies to IDP1-IDP6, where a certificate under s.90A had been submitted as Exhibit P8, enclosure 202. Tan Guat Lian (P2) was called to testify as she did the recording using her mobile phone.

(ii) The phone was produced in Court for inspection but could not be powered on. The original contents have been lost for examination. The Ps argued that IDP1-IDP6 should nevertheless be admitted as secondary evidence under s.65(1)(c) EA 1950.

(iii) Therefore, the objections the Ds raised should be denied.

(iv) The transcripts for the video recordings in IDP1-IDP6 were agreed to be placed in Part B Documents, which would still require its contents to be proven. IDP1-IDP6 are recordings purportedly of P1 and the Deceased.

(v) Though the video recordings were referred to during the trial, it has not been admitted as exhibits for this proceeding. The Ps pray that IDP1-IDP6 be admitted.

I observed:

(a) The video recordings were edited into IDP1-6 segments when it was evident that it was a continuous recording. The Ds learned counsel pointed out that the recording was for a continuous recording on the same day, while IDP5 appears to have been taken on a different day. The Ps have yet to offer a plausible explanation for why the recordings were edited into five segments. The Ds' counsel further pointed out that IDP1-6 were placed in Part C Documents in 2020, which require proof of both source and content. But on 09.03.2023, on the 7th day of the trial, the Ps informed the Court that the device could no longer be powered on.

(b) The learned counsel for the Ds argued that notwithstanding the s.90A certificate by P2, the edited recordings should not be admitted because they do not provide complete, accurate or reliable evidence. She cited: *Dato Kanalingam a/l Vellupillai v. Majlis Peguam Malaysia* [2022] 3 MLJ 699,

CA said that it is authentic as in a precise reproduction of the event and the relevant contents have not been tampered with unless the appellant is saying that the part not produced would exonerate him. In *Mohd Ali Jaafar v. PP* [1998] 4 CLJ SUPP 208, HC, it was noted that the tapes' integrity, accuracy, and continuity were relevant and admissible. There must be no tampering. In *Lim Peng Hock & Anor v. Chuah Peng San & Anor* [2021] 1 LNS 119, CA, it was ruled that the Court cannot take it lightly as to digital evidence. It is very fragile and could be easily altered. Therefore, the issue of authenticity and reliability are essential for digital evidence. The plaintiffs had not proved the issue of non-tempering.

(c) The learned counsel of the Ds further drew the Court's attention to the fact that there is no proof adduced to confirm the identity of the voice recorded in IDP1-6 was that of the Deceased. Citing **Lim Peng Hock & Anor** *(supra)*, the law requires the voice of the speaker to be duly identified, and since the 1st defendant disputes, strict proof is necessary to determine the identity of the speaker (*PP v. Zul Hassan & Anor* [2013] 7 CLJ 141). It was said in **Mohd Ali Jaafar** *(supra)* that proof of identity of the conversation is the most crucial element to be established when introducing evidence of a tape recording. Therefore, it was argued that IDP1-IDP6 should not be admitted as exhibits.

(d) Considering the arguments and respective positions taken by the parties, I believe the integrity of the IDP1-IDP6 is suspect. Without the original continuous recording, it would be impossible to compare and ascertain its authenticity and degree of tempering, if any. When the continuous recording has been cut/edited into six parts, it would have involved some element of editing, no matter how you argue it.

Without editing works, it cannot be segmented into six pieces. As the Court of Appeal in **Lim Peng Hock** *(supra)* said, the Court must exercise caution when dealing with digital evidence as it is susceptible and prone to digital alteration. I observed that with today's sophisticated equipment and technology, once the audio-video recordings are digitised, they can be edited and altered to angle support to any proposed issue or purpose.

(e) Therefore, it is my considered judgment that IDP1-IDP6 documents in Part C should not be admitted as exhibits in this proceeding. Their integrity is suspect without the original recording to confirm their contents and the part that had been excluded, if at all. The duty to preserve the integrity of the said evidence falls squarely on the Ps. In the circumstances, the Ps failed to observe that duty if IDP1-6 is fundamental to their case. There is no one to be faulted but the Ps themselves.

8.3 P2 submitted laboriously on the customary wedding of P2 and the Deceased, as shown in the various pictures in enclosure 93, and many repetitive pages in their arguments.

(a) I find no evidence to definitively support the alleged customary marriage of P2 and the Deceased. What has been produced is highly speculative evidence suggesting an alleged customary wedding.

(b) Even if the alleged customary wedding took place, it does not change the fact that it was not registered under the Women's Charter 1961 as required by the law in Singapore, rendering it void. Since it had been rendered invalid, P2 would not derive any rights under it, and there is no arguing out of it. That is the law as it stands. Legislation supersedes customs and practises save where it is excepted.

(c) The legal consequences of that incompliance have been stated in the preceding paragraph. It is my observation that Ps submission places so much emphasis and time on the peripherals and unsupported suppositions rather than on the fundamental root issue that would ultimately determine the entitlement of the Ps in this suit.

(d) From the facts before me, it is irrefutable that:

(i) The Deceased took a 2nd customary marriage to D2 in 1973 in Singapore. Six years later, in 1979, they registered the marriage in Malaysia under the Civil Marriage Ordinance 1952 (CMO).

(ii) Section 4(1) CMO disallows a subsequent marriage to be contracted while the subsisting marriage subsists.

(iii) A subsequent marriage in default of that prohibition, the women and any issue from that prohibited union shall not have any succession rights of the man if he dies intestate.

(iv) LRA 1976, which superseded the CMO under section 5(1), which also extended such prohibition as in s.4 of CMO. Section 6 (1) and (2) void such marriages in contravention of the prohibition in s.5, and no rights of succession or inheritance shall be granted to the women or any issue from such a prohibited union.

(v) In 1978, the Deceased purportedly took a 3rd customary marriage with P2 in Singapore but did not register the said marriage under the Women's Charter in Singapore. SEDW4: Ms Poonam Mirchandani, an expert from Singapore, gave evidence that the purported customary union of P2 and the Deceased is void since it was never registered under the Women's

Charter. Evidently, P2 cannot claim any inheritance right in the Deceased's estate by law.

8.4 The P1 claimed to have:

(i) The original title deed of the property held under HS(D) No. 13953, PT No.MLO 8301, Mukim Plentong, Daerah Johor Baru, Negeri Johor; (pg 371 - 375 of Enclosure 94).
(ii) The property held under Geran Hakmilik No. 92354, Lot No. Lot 1544, Mukim Tebrau, Daerah Johor Bahru, Negeri Johor (pg 356-359 of Enclosure 94) (under WSI).
(iii) The property held under Title No. 6994, Presentation No. 168055, Lot No.1545, Mukim Tebrau, Daerah Johor Bahru, Negeri Johor (pg 385-387 of Enclosure 94) (under WSI).
(iv) The property held under Title No. 6995, Presentation No. 168056, Lot No. 1546, Mukim Tebrau, Daerah Johor Bahru, Negeri Johor (pg 388-390 of Enclosure 94) (under WSI.
(v) The original Share Certificates of the 500,001 unit of shares in the company named WSI Sdn Bhd; (pg 392, 394 of Enclosure 94), and
(vi) The original Share Certificates of the 10,000 units of shares in the company named Herald Heights Sdn Bhd (pg 395 of Enclosure 94).

He claimed that the Deceased handed them over to him during his lifetime. Other than that, and bare assertions, no cogent evidence is adduced that it was intended as a gift (inter vivos) to him. The Ps referred to the video recordings with the transcripts that had been disallowed. It was also argued that the Ds never challenged his evidence on the properties being gifted to him, and therefore, they ought to be taken out or excluded from the list of the Deceased assets.

My attention has been drawn to the fact:

(a) The assets in paragraphs (ii), (iii), (iv) and (vi) above were never pleaded by the Ps (O.18. r.12.RC 2012).

(b) In the circumstances, I believe these four assets are to be excluded from the Ps claim on gifts inter-vivos.

(c) Save for self-serving unsupported statements by the Ps, I find no compelling or persuasive evidence to support the Ps' claim that the Deceased had intended the assets pleaded by the Ps as gifts inter-vivos.

8.5 The Ps cited section 34 LRA 1976, that says nothing in the Act, or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or invalid merely because it has been or is not registered. I observed:

(a) This argument is wholly misplaced and unnecessary since LRA is applicable in Malaysia. The purported customary marriage that is the subject matter of this proceeding is in the Republic of Singapore, where the Singapore Women's Charter applies for marriages solemnised and registered there. Evidence has been produced that if at all it took place (the 3rd customary wedding), it is void for failure to register.

(b) It would be too farfetched for the Ps to suggest or imply that the provisions of the LRA apply in the Republic of Singapore. If it is rendered invalid for legal incompliance in Singapore, it could not be validated by the LRA provision in Malaysia under the LRA.

(c) There is no evidence that this 3rd customary marriage by the Deceased with P2 was intended to be registered in Malaysia as the Deceased did with the customary marriage with D2.

(d) Because of the registration of the 2nd marriage to D2 under the Civil Marriage Ordinance 1952 on 04.05.1979 (L.95,

pg.417), the Deceased would not be able to lawfully take a 3rd marriage as he did with P2 as the CMO 1952 expressly prohibits it.

(e) The purported 3rd marriage would not receive any legal recognition while the 2nd marriage subsists to ensure monogamy in civil marriages.

8.6 On the issue of OS 901 that had been withdrawn, an issue in the counterclaim by the Ds, the Ps argued that it is no longer a relevant issue to be considered since it is no longer before the parties after it was withdrawn by the Ps with cost already paid to the Ds. Therefore, it should no longer be an issue with the Ds. OS 901 and Suit 649 were not taken for any collateral purpose as alleged by the Ds to constitute an abuse of process. Any purported technical incompliance should not be taken to impair the proceedings.

The Ps had no choice but to file OS 901 after the Defendants had excluded the Ps from claiming their right to administer and inherit the Deceased's estate by filing the ex-parte OS 702. The sole purpose of filing OS 901 was to include both the Ps and the Defendants (without having the Intervener, whose existence at the material time was not within the knowledge of the Plaintiffs) to ensure that all relevant parties would be heard. The Plaintiffs also filed applications to consolidate and transfer OS 702 and OS 901 to expedite the process.

These applications were later withdrawn with OS 901 by the Plaintiffs on 06.09.2019 due to the filing of the current suit 649 on 03.09.2019. The Ds have failed to prove what damage they have suffered because of it to justify their claim for damages as a result thereof.

8.7 On the issue of the Intervener, the Ps took the position that it is incumbent on the Intervener to prove that he was the legitimate son of the Deceased. *Shanmugam v. Pappah* [1994] 1MLJ 144, HC held that the plaintiff had the burden of establishing that he was the legitimate son of the deceased to establish his right to succeed to the estate of the deceased who died intestate, the plaintiff must not only prove that he was the son of the deceased but must, because of the Distribution Act 1958, also prove that he was the legitimate son of the deceased. However, this issue is now rendered academic due to the ruling in Tan Kah Fatt, FC *(supra)*.

8.8 The Ps asks:

(i) A declaration that s.5 LRA (Disability to contract marriages otherwise than under the Act) does not apply to P2, a Singaporean and has never been within the local jurisdiction of this Court.

(ii) An Order declaring any law restricting and preventing an illegitimate child from claiming contradicts Article 8 of the Federal Constitution.

(iii) An Order declaring s.3 and 6 of the Distribution Act cannot be construed to deprive a child of their entitlement based on their legal status.

(iv) An Order declaring the marriage by the Deceased to D2 is null and void. The Ds has no right to claim over the estate of the Deceased. D1 is not the lawful child of the Deceased.

(v) The customary marriage between P2 and the Deceased is valid, and P1 is the lawful heir of the Deceased. The Ps will be granted the Letter of Administration to administer the Deceased's estate.

(vi) An Order declaring that the Deceased had given all his shares, interest, and title in WSI Sdn Bhd, Isotank Container Services Sdn Bhd, and the property held under the deed title H.S.(D) No. 13953, PT No. MLO 8301, Mukim Plentong, Daerah Johor Baru, Negeri Johor, to the Plaintiffs as gifts inter vivos, and an Order giving effect for the ownership in those assets to vest in the Ps.

In the premise, the Ps pray for order in terms of their prayers and cost.

THE DEFENDANT (Ds) CASE

[9] I observed the Ds' arguments in canvassing and ventilating for their position in Suit 649 and OS 702 as follows:

9.1 It was submitted that:

(a) It is the Ds contentions that:

(i) the Deceased had lived with them at all material times. Sometime in 1987, they resided at No.52 Bayshore Road, Ruby Tower# 06-01, Bayshore Park, Singapore 469978.

(ii) But from 2009 until his passing, they lived at No. 53, Jalan Awan Cina, Taman Yarl, 58200 Kuala Lumpur, while D1 continued to reside at the Bayshore Residence in Singapore.

(iii) On 23.03.2019, the Deceased passed away at the Taman Yarl Residence in Kuala Lumpur (Death Certificate: PDF4, pg.1, Enclosure 91).

(b) During his lifetime, the Deceased:

(i) Named D2 as his wife in his tax returns/statements (Tax Statement: PDF12-23, pp.423-43, Enclosure 95).

(ii) His official documents were sent to the Bayshore residence in Singapore or the Taman Yarl residence in Kuala Lumpur.

(iii) D2 was named his sole beneficiary in his Great Eastern Insurance Policy (PDF40-41, pp.451-452, Enclosure 95).

9.2 In opposing Suit 649 by the Ps, the Ds argued that:

(a) The inheritance rights are governed under s.6 of the Distribution Act 1958.

(b) The late Ho Ah Nya of the purported 1st customary marriage [1968] in Malaysia to the deceased would be disentitled to make any claim on his estate by predeceasing the Deceased. In the circumstances, she would not be entitled to claim even if her purported customary marriage was valid at the time.

(c) As for D2, the lawfully registered spouse in the Deceased's 2nd customary marriage (1973 in the Republic of Singapore) but subsequently, six years later, registered it under the Civil Marriage Ordinance 1952 (CMO) in Malaysia on 04.05.1979 (L.95, pg.417).

(d) Under section 4(1) CMO, the Deceased could not take a subsequent marriage lawfully for so long as the 2nd marriage subsists. S.4(1) says that a male person married by the provisions of this Ordinance shall be incapable of contracting a valid marriage with any third person, whether as a principal or secondary marriage.

(e) The learned counsel also drew my attention to s.5(1) CMO, which makes clear the inheritance position of the Ps in this suit:

"(1) If any male person la wfully married under this Ordinance shall thereafter during the continuance of such marriage contract a union with a woman which but for such marriage would confer rights of succession or inheritance upon such woman or upon the issue of such union, no issue of such union shall

be legitimate or have any right of inheritance in or succession to the estate of such male person, and no such woman shall have any right by reason of the death intestate of such male person".

(f) Subsequently, the LRA 1976 came into force on 01.03.1982.

(g) The 3rd customary marriage to P2 was on 18.02.1988 in Singapore, six years after the LRA came into force, which would have certainly rendered it void (s.5(1) LRA 1976). Section 5(1) says:

"(1) Every person who on the appointed date is lawfully married *under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under* any *law, religion, custom or usage with any other person. Whether the first-mentioned marriage or the second-mentioned marriage is contracted within Malaysia or outside Malaysia.*

Section 6(1) and (2) LRA says:

(1) Every marriage contracted in contravention of section 5 shall be void.

(2) If any male person lawfully married under any law, religion, custom, or usage shall during the continuance of such marriage contract another union with any woman, such woman shall have no right of succession or inheritance on the death intestate of such male person.

(h) Evidently, P2 cannot claim any inheritance right in the Deceased's estate by law.

9.3 Of the three, P1, the Intervener and D1, only D1, the legitimate child of the Deceased from a lawfully registered 2nd customary marriage, is entitled to a claim in the Deceased's estate. The Deceased is named the father in her Birth Certificate (PDF7, pg.418, L.95).

9.4 At this juncture, I agree with the arguments of the Ds that the Birth Certificate of the Intervener is indeterminable, as I had addressed in my observation in the Intervener's submissions. For P1, as I observed, Koh Seng Lee is named the father in the official Certificate of Extract from the Register of Births in Singapore. Till now, no rectified certificate has been produced from the relevant Singaporean authority to say otherwise.

9.5 During the trial, P2 agreed that because the Deceased was married to D2, he refused to put his name on P1's birth certificate.

9.6 Tan Kah Fatt was distinguished in that, even though the 1st customary marriage, in that case, could not be proven with photographs, evidence from the relevant family members shows that the 2nd appellant was accepted into the Deceased's family as a grandchild. Therefore, it was argued that even if Tan Kah Fatt, FC *(supra)* did not determine the issue of an illegitimate child, s.75 LRA would have stepped in and saved the 2nd appellant as a legitimate child and eligible for inheritance. Section 75 (2) says:

> *"(2) Subject to the provisions of this section, the child of a void marriage shall be treated as the legitimate child of his parent if, at the time of the solemnisation of the* marriage, *both or either of the parties reasonably believed that the marriage was valid."*

9.7 There is no compelling evidence produced by either P1 or the Intervener that they had at any time been accepted into the family

of the Deceased, nor were they treated as part of the Deceased's family. During the trial:

(a) P2 admitted she had never met the Deceased's mother.

(b) P1 admitted he had never met the Deceased's family or Koh Seng Lee before the Deceased's passing.

(c) P1 agreed that the Deceased did not live with him and P2 seven days a week.

(d) P2 admitted that she and P1 did not participate in the Deceased's funeral rite ceremony on 26.03.2019.

(e) P2 admitted that she only told Koh Seng Lee at the Deceased's funeral that P1 was the Deceased's son.

(f) P2 agree that she was not introduced as Mrs Koh at the Deceased's funeral,

(g) P2 agreed that the Ps never celebrated Chinese New Year with the Deceased's family in Malaysia.

(h) P1 admitted that the Deceased never spent Chinese New Year's Eve with the Ps.

(i) P2 admitted that she did not attend the Deceased's mother's funeral on 08.11.2004.

(j) The Ps were not named as family members in the Deceased's late mother's obituaries.

(k) P1 admitted that he never went to pay any respects to the Deceased's ancestors in Malaysia.

(l) The intervener also admitted that he was never accepted as part of the Deceased's family.

(m) The intervener admitted that he did not attend the Deceased's funeral, and he and his mother, Ho Ah Nya, were not named in the obituaries.

(h) The Intervener admitted that he had never met the Ds or the Ps before this proceeding.

(o) The Intervener admitted he never celebrated Chinese New Year with the Deceased's family.

(p) The Intervener did not attend the Deceased's mother's funeral.

(q) The Intervener could not produce any supporting document on the claim that the Deceased had given to the late mother, Ho Ah Nya, RM100,000.00 to rebuild their house after it burnt down.

9.8 The Intervener could not produce compelling evidence of the purported 1st customary marriage between his mother, Ho Ah Nya, and the Deceased. He merely relied on the unsupported evidence of:

(i) Ho Hock Keong (IW1) was not even familiar with the name of the Deceased, nor has he ever met the deceased's family, and nor has he attended his funeral.

(ii) Koh Sing Puck (IW3) could not prove his relationship with the Deceased and had not met him for over twenty years.

(iii) Koi Ai Long (IW4) provided untrue evidence of his alleged relationship with the late Ho Ah Nya or the Deceased

9.9 The purported 1st customary marriage either did not exist or was not consensual. The Deceased had left Pulau Ketam and never returned. He never took the late Ho Ah Nya as part of his family.

9.10 Regarding the purported 3rd customary marriage, the Ps rely primarily on the Statutory Declarations from P2's brother, sister, and in-laws. None were affirmed by the Deceased's family (SD at PDF 42-86, pp.34-78, enclosure 92). None of the deponents of the Statutory Declarations were called to own up to their SDs during the trial. P2 admitted that none of the Deceased's family members attended the purported 3rd customary marriage. The photographic evidence could not prove definitively that there was a customary marriage. P2 admitted in evidence that she did not serve tea to the Deceased's mother or D2.

9.11 The Ps family knew that the Deceased could not marry P2, and such a union was invalid. The evidence Ps witnesses:

(i) P2's bother, Tan Beng Kiow (PW2):

(a) admitted he knew the 3rd customary marriage was not registered.

(b) He knew that the Deceased was not named as the father of P1 in the birth certificate.

(c) He also agreed that the Deceased did not live or stay with the Ps.

(d) He also knew that the Deceased and P2 could not register the purported customary union as required under Singaporean law.

(e) The Deceased did not spend Chinese New Year's Eve with the plaintiff or their family:

(ii) Koh Seng Lee (PW1) is a witness with a vested interest in the outcome of this proceeding:

(a) He is a director and shareholder of K Seng Seng Corporation Berhad, founded by the Deceased.

(b) His evidence is contrary to other evidence adduced in Court:

(i) He pleaded ignorance of his name on the birth certificate of P1, which I find improbable.

(ii) The Intervener informed the Court on 20.4.2021 that he was told about this proceeding by Koh Seng Lee, though Koh Seng Lee denied that he did.

(iii) He claimed that he could not remember when the Deceased left Pulau Ketam but could remember that the late adoptive mother allegedly told him that the Intervener was the deceased's son.

(iv) In preparing the obituaries of the Deceased and the deceased's mother, he did not name Ho Ah Nya or the Ps.

9.12 It is highly improbable, given the circumstances, that P1 did not know throughout his growing up years that Koh Seng Lee was the named father in his birth certificate until this proceeding began, as he is an educated person (Degree in Accountancy and a Degree in Business). He only sought a declaratory order from the Kuala Lumpur High Court that Koh Seng Lee was not his father on 10.12.2019, nine months after the Deceased's passing.

9.13 The evidence of P2 that she did not know that the Deceased was a married man when she was working as his administrative assistant in Singapore (1983-2012) is also highly improbable in the circumstances.

9.14 While there is clear evidence that the Deceased did not include the Ps and the Intervener in his life and businesses when he did not make them directors or shareholders in his companies, he made the Ds directors and shareholders of KSK Realty Sdn Bhd (PDF 62, pg.575, enclosure 101) as the Deceased intended to transfer all immovable assets under KSK Realty Sdn Bhd where D2 would be a shareholder.

9.15 Regarding the inter-vivos claim by the Ps. The Ds argued that:

(a) The Ps relied fundamentally on IDP1-IDP6 to support their arguments on the purported gifts inter-vivos by the Deceased. Since I have disallowed the said recordings, it would not be necessary to address these recordings as their evidence.

(b) The Deceased did not take steps to realise and/or perfect the alleged inter-vivo gifts. Therefore, it is incomplete and

ineffective: *Tan Chong Kiat v. Kwan Ah Soh & Anor* [1998] 3 MLJ 884, HC.

In this regard:

(i) WSI Sdn Bhd: The Ps were not made directors or shareholders of the company. There is no evidence that he had taken any steps to do so (PDF 66-71, pp.579-584, enclosure 101).

(ii) Isotank Container Services Sdn Bhd: The Ps were not made directors and shareholders of the company, and neither is there any evidence that the Deceased has taken steps to do so (PDF 4-9, pp.639-644, enclosure 105).

(iii) Property H.S.(D) No.13953, PT No. MLO 8301, Mukim Plentong, Daerah Johor Bharu (GRN 485717, Lot 9625, Mukim Plentong, Daerah Johor Bharu). This property was not gifted to the Ps but was transferred to D1 (PDF 78-79, pp.591-592, enclosure 101).

It is **trite** that the Court will not perfect an imperfect gift: *Milroy v. Lord* [1862] 45 ER 1185; *Re Rose (deceased) Midland Bank Executor and Trustee Co Ltd v. Rose and Others* [1948] 2 All ER 971; *Kwan Teck Meng & Ors v. Liew Sam Lee* [1963] 1 MLJ 333; *Kumarappa Chettiar Son of Raman Chettiar of Klang v. the Federated Malay States* [1938] 1 MU 9.

9.16 On the Ds counterclaim against the Ps, it was argued by the Ds that:

(a) At the time the Ps filed their several suits against the Ds, it was before the Federal Court decided Tan Kah Fatt, FC *(supra)*. It was a time when the Ps had no right to interfere and intervene in the Ds' succession rights in the Deceased's estate.

(b) Those action taken by the Ps was an abuse of process designed to extort or oppress the Ds to secure an outcome

for which they had not but for Tan Kah Fatt *(supra)*. Provided the conditions can be proven; otherwise, the P1 would not be entitled.

Malaysian Building Society Berhad v. Tan Sri Ungku Nazruddin Bin Ungku Mohamed [1998] 2 MLJ 425, CA cited *Lord Denning in Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR that it is abused when it is diverted from its true course to serve extortion or oppression: or to exert pressure to achieve an improper end. When it is so abused, it is a tort, *a* wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process they can before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer. Neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of this tortuous wrong. It is only upon proof of the elements that make up the tort of collateral abuse of process that a plaintiff is entitled to an award of damage:

(i) The process complained of must have been initiated.
(ii) The dominant purpose for initiating that process must be for some other purpose than to obtain genuine redress, and
(iii) The plaintiff has suffered damage or injury in consequence.

(c) I have examined the chronology of events (OS 901 and Suit 649) meant to suppress the Ds in claiming their rights of succession to the Deceased's estate initiated by the Ps as set out in the Ds arguments, from April 2019 - 01.08.2022.

(d) The Ps has no right or legitimate interest in the Deceased's estate to protect. To date, P2 still has no such right. As a result of the Ps action, the Ds have (1) suffered mental stress

and a waste of time and energy, (2) cost and expenses incurred of approximately RM86,183.26 (breakdown given) as at the date of their defence and Counterclaim in Suit 649 on 10.10.2019.

(e) Therefore, the Ds in their counterclaim asks for:

(a) Damages to be assessed.
(b) General Damages.
(c) Interest at the rate of 8% from the date of defence and counterclaim to the date of full realisation.
(d) An injunction against the Ps from dealing with any media and K Seng Seng until the final disposal of OS 702 and Suit 649.
(e) The Ps are declared vexatious litigants under clause 17 of the Schedule to Section 25(2) of the Court of Judicature Act 1964.
(f) The Ps are prohibited from filing and proceedings in any Court without the Court's permission against the Ps and the Ps solicitors, and such an Order must be gazetted before such proceedings can be filed.
(g) The Ps is subject to committal in default thereof.
(h) Costs for the Counterclaim.

9.17 In the circumstances, the Ds pray that:
(a) Suit 649 be dismissed with costs.
(b) The Grant of Letters of Administration in Enclosure 1 of OS 702 is allowed with costs and
(c) The Ds counterclaim is allowed with costs.

THE INTERVENER'S CASE

[10] I observed the Intervener canvassing his position as follows:

10.1 To support the alleged purported customary marriage of his mother (Ho Ah Nya) with the Deceased, he argued that section 4

LRA Act 1976 stipulating that the Act shall not affect the validity of any marriage solemnised under any law, religion, custom or usage before the appointed date. That such marriage, if valid under the law, religion, custom or usage under which it was solemnised, shall be deemed to be registered under the act. In his Counterclaim, the Intervener is asking for the following:

> *"(i) Perintah deklarasi bahawa perkahwinan antara Si Mati dan ibu Pencelah iaitu Ho Ah Nya@ Ho Cheng Bak adalah sah mengikut kepercayaan, adat istiadat dan/atau budaya Cina;*
>
> *(ii) Perintah Deklarasi bahawa Pencelah iaitu Koh Ching Kew NO. K/P:640306-10-6365) adalah anak kandungan lelaki dan /atau zuriat kepada Si Mati;*
>
> *(iii) Pencelah, Koh Ching Kew (NO. K/P:640306-10-6365) diiktirafkan sebagai benefisiari dan waris kadim harta pusaka Koh Seng Kar @ Koh Hai Sew (NO. K/P: 430719-10-5509), Si Mati yang dinamakan di atas dan nama Pencelah, Koh Ching Kew (NO.K/P:640306-10-6365) dimasukkan dan dinyatakan sebagai benefisiari dalam senarai benefisiari bagi harta pusaka Koh Seng Kar @ Koh Hai Sew (NO.K/P: 430719-10-5509);*
>
> *(iv) Kos; dan*
>
> *(v) Apa-apa relif lain yang dianggap sesuai dan patut oleh Mahkamah Yang Mulia ini."*

(a) I observe that s.4 LRA would not validate an invalid or void marriage. The reading of the said section is obvious. It only applies to valid marriages. In a legal article by **Mr Balwant Singh Sidhu**: Married or Not married? -That is the Question [2002] 3 MLJ xxix, the learned author pointed out that by s.4 LRA, subsisting valid marriages are deemed to be registered under the Act. However, these marriages are still open to challenge as to their validity according to the law,

religion, custom or usage under which they were solemnised. In addition, in the absence of actual registration, subsisting customary marriages would still have to be proven. Parties to any marriage solemnised prior to the appointed date of the LRA may apply to the Registrar for the registration of the marriage.

(b) To demonstrate the workings of s.4, in *Sabrina Loo Cheng Suan v. Eugene Khoo Oon Jin* [1995] 1 CLJ 875, the High Court in Penang had to determine the legality of a second marriage under Chinese custom while the man was still married to his first wife. The Chinese customary marriage was in 1973, before the enforcement of the Act. The Court held that in 1973, there was no legal impediment against the plaintiff and the defendant entering a Chinese customary marriage between themselves while the defendant was married to one Dorothy Khoo, thus making the latter the principal wife and the plaintiff the second wife. Although polygamous, Chinese customary marriages entered before March 1, 1982, were valid. Therefore, the plaintiff's marriage to the defendant was valid under sections 4(1) and (2) of the Act.

(c) After the Act comes into force, a second marriage contracted while a first marriage is still in subsistence is invalid under s.5(1). Section 34 of the LRA says that nothing in the Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or invalid merely because it has been or is not registered. The decision by the Court of Appeal in *Chai Siew Yin v. Leong Wee Shing* [2004] 1 CLJ 752 was reversed in the **Federal Court Appeal No: 02-10-2003(W)** when the FC ruled that s.34 must not be read in isolation but must be construed in harmony with other provisions of the Act which encapsulates the overall intention of the

legislature. To do otherwise would defeat the intent and purpose of the Act, which is to provide for monogamous marriages and the solemnisation and registration of such marriages.

(d) Therefore, s.4 cannot be read in isolation but must be in tandem/harmoniously with other relevant provisions of the Act. One must do more than angled it to support an unsustainable/unproven position. That would not be tenable and most certainly be a misplaced effort.

(e) In the present case, it must be pointed out that the alleged customary marriage between the Deceased and Ho Ah Nya had yet to be proven or established by the Intervener to the satisfaction of the Court. There is no compelling evidence save for unsupported and sweeping hearsay oral evidence that is vague on the existence of the alleged marriage. It is neither here nor there with no definitive value.

10.2 The Intervener had exhibited his Birth Certificate (Enclosure 179, part B, pg.5 PDF) to prove that he is the biological son of the Deceased. However, as pointed out by the learned counsel for the Ds, I observed that the details of the Deceased had not been correctly stated. It says the Deceased is not a Malaysian, the Deceased is a permanent resident, and the Deceased has been identified as Hokkien, which does not accord with the present information in the Deceased's death certificate adduced by the Intervener in Enclosure 179, pg.4 PDF. that he was just Chinese. No evidence was found at the trial to prove the information on the Birth Certificate. This is a ground for concern on the integrity of the information stated that can only be resolved by the Registration Department. But unfortunately, no officer from the said department was called to clarify the discrepancies in the details concerning the alleged Deceased.

(a) It is my legitimate concern that if it can happen in the Certificate of Extract from Register of Births for P1, it can

also occur with the Intervener. A common person in these two issues is Koh Seng Lee (PW1), who appears to have played a covert role in both instances.

(b) The Intervener's Birth Certificate is a Part B Document that requires the contents to be proven, though the authenticity is not disputed. As it stands, I am not persuaded by the contents, which require clarification from the appropriate party/authority on the discrepancies. To reiterate, no officer from the Registration Department was called to clarify those discrepancies. It is not for the Court to conduct the Intervener's case, but it is entirely up to him to manage it and do what is necessary to persuade the Court with cogent evidence.

(c) Any attempt at evidence by implication would not be sufficient in the premise. Other than the said Birth Certificate with discrepancies in the details that have not been clarified, there is no other evidence to establish the Intervener as a lineal descendant (blood relation) with the Deceased, such as a relationship DNA (deoxyribonucleic acid) report that would constitute a definitive prove for genetic or hereditary information (paternity/ancestry testing). What was produced before the Court was merely unsupported postulation or evidence by implication and uncorroborated oral hearsay evidence. What matters most is that a definitive piece of evidence (DNA Report) that would have tilted the scale of evidence in his favour was never produced. Therefore, even before the Court can consider the issue of legitimacy or otherwise, a blood relation with the Deceased must be satisfactorily established before the Court.

(d) **DNA test by the Department of Chemistry Malaysia:**

Paternity testing simply means establishing fatherhood. Paternity is done to confirm or exclude the biological father

of a child. ***The DNA test is accurate, rapid, and affordable, with a power of discrimination (accuracy) as high as 99.9999%.*** *DNA paternity tests can be performed on individuals of any age. It has become the most accepted method to determine identity within the legal scientific communities.*

(e) As it is, there is no convincing evidence of the purported customary marriage between the Deceased and the mother of the Intervener, rendering the claim by the Intervener highly speculative. The legal position is trite that the Court does not act on mere speculation or supposition.

10.3 The Intervener relied fundamentally on the oral hearsay evidence of his witnesses, saying the Deceased and the late Ho Ah Nya were purportedly married in 1968 and cohabited as husband and wife. Other than that, no definitive or persuasive evidence was adduced to corroborate that contention. The intervener claimed that there was no photograph to evince the tea ceremony to indicate the wedding as a fire in Pulau Ketam had destroyed a shophouse owned by Ho Ah Nya that the Intervener currently occupies. He cited *Seow Beng Hay v. Seow Soon Quee* [1933] 11 MLJ, which held that such customary marriage could be established by oral or circumstantial evidence.

(a) It is my observation that it cannot be any oral or circumstantial evidence but must be cogent or persuasive oral evidence for the Court to make a favourable finding. At this point of the proceeding, I find no compelling evidence to favour the Intervener. Oral hearsay evidence is never good evidence to establish a fact.

(b) Ho Hock Keong (IW1), the younger brother to Ho Ah Nya, gave evidence that Ho Ah Nya told him that she and the Deceased were married. No corroboration was provided.

(c) Koi Ah Long (IW4) gave a sweeping statement that the Deceased and Ho Ah Nya were married to each other. All seniors in Pulau Ketam know they were married. But no relevant seniors were called to corroborate that statement.

(d) Koh Seng Lee (PW1) said that the Deceased had never mentioned to him that the deceased was married in Pulau Ketam. Only that their mother and father allegedly informed him. No tangible evidence was adduced to corroborate the position taken.

To reiterate, I am unpersuaded with the foregoing unsupported evidence.

10.4 The Intervener further claimed that the Deceased had presented a payment of RM100,000.00 to the late mother, but he could not prove it since the mother had passed away long ago. Maybank does not want to disclose any financial information, though requested by his solicitor due to secrecy provisions under the Financial Services Act 2013.

10.5 He relied fundamentally on the testimony of Koh Seng Lee (PW1), the adopted brother of the Deceased, who was complicit in the Certificate of Extract from Register of Births of P1 debacle addressed in the foregoing paragraph 3.4 herein. It was claimed that Koh Seng Lee had notified the Intervener for whatever reason that the Deceased was married in Pulau Ketam. There was no cogent evidence to corroborate that statement.

(a) I observed that Koh Seng Lee (PW1) seems to have played a role everywhere in this proceeding. The fact that the said Koh Seng Lee (PW1) has been complicit in the Certificate of Extract from the Register of Births of P1 debacle for the past thirty-plus years, and necessarily with the knowledge of P2 as the mother of P1, gives me grounds for concern about the veracity of his unsupported oral evidence.

(b) The very debacle that has yet to be addressed and resolved by the relevant Singaporean Authorities and what action is to be taken, if any, on the Kuala Lumpur High Court Order that had made some findings on the details of the P1 Certificate of Extract from Register of Births.

(c) The deafening silence by both P1 and Koh Seng Lee (PW1) on the matter can only mean that the issue had not been raised with the relevant Singaporean Authority since the day the Order was granted (more than three years ago) for whatever reason that only they know and do not wish to be forthcoming about it.

(d) The High Court Order of 10.12.2019 was explicit in ordering (mandatory injunction) that Koh Seng Lee (PW1) must remove his name from the Register of Births in Singapore within fourteen days from the date of that Order. This does not augur well for their credibility in this Court.

In those foregoing circumstances, the Intervener prays for order in terms of his counterclaim.

THE LAW

[11] It is trite in law that all cases are decided on the legal burden of proof being discharged:

11.1 It is the acid test applied in any particular case.

(a) Lord Brandon in *Rhesa Shipping Co.SA v. Edmunds* [1985] 1 WLR 948 at 955 said:
"No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

(b) In *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 it was said that:

"The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms 'proved', 'disproved', and 'not proved' are statutory definitions contained in the Evidence Act (Cap 9), 1997 Rev Ed), the term 'proof'. Wherever it appears in the Evidence Act and unless the context otherwise suggests, means the burden to satisfy the Court of the existence or non-existence of some fact, that is, the legal burden of proof".

(c) The burden of proof in establishing its case is on the plaintiff. It is not the Ds' duty to disprove it. The evidentiary burden is trite that those who allege a fact are duty-bound to prove it (see **s.101, 102, and 103 of the Evidence Act 1950**).

(d) In *Selvaduray v. Chinniah* [1939] 1 MLJ 253, 254 (CA) held:

"The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly, the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his.

The defendant can say it is wholly immaterial whether I prove my case or not. You have not proved yours".

(e) In *Johara Bi bt. Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139, held:

"It was all a matter of proof and that until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant, and no matter if the defendant's case was

completely unbelievable, the claim against him must in these circumstances be dismissed. With respect, we agree with this judicial approach."

11.2 **Distribution Act 1958 (Act 300):**

Section 3.

In this Act, unless the context otherwise requires—

"child" means a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives but does not include an adopted child other than a child adopted under the provisions of the Adoption Act 1952 [Act 257].

"issue" includes children and the descendants of deceased children; "parent" means the natural mother or father of a child, or the lawful mother or father of a child under the Adoption Act 1952; "Peninsular Malaysia" has the meaning assigned thereto in section 3 of the Interpretation Acts 1948 and 1967 [Act 388] and includes the Federal Territory.

Section 4

(1) The distribution of the movable property of a person deceased shall be regulated by the law of the country in which he was domiciled at the time of his death.

(2) The distribution of the immovable property of a person deceased intestate shall be regulated by this Act wherever he may have been domiciled at the time of his death.

Persons held to be similarly related to deceased.

Section 6

(1) After the commencement of this Act, if any person shall die intestate as to any property to which he is beneficially entitled to an interest which does not cease on his death,

such property Distribution 7 or the proceeds thereof after payment thereout of the expenses of due administration shall, subject to the provisions of section 4, be distributed in the manner or be held on the trusts mentioned in this section, namely–

(a) if an intestate die leaving a spouse and no issue and no parent or parents, the surviving spouse shall be entitled to the whole of the estate;

(b) if an intestate die leaving no issue but a spouse and a parent or parents, the surviving spouse shall be entitled to one-half of the estate and the parent or parents shall be entitled to the remaining one-half;

(c) if an intestate die leaving issue but no spouse and no parent or parents, the surviving issue shall be entitled to the whole of the estate;

(d) if an intestate die leaving no spouse and no issue but a parent or parents, the surviving parent or parents shall be entitled to the whole of the estate;

(e) if an intestate die leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the estate and the issue the remaining two-thirds;

(f) if an intestate die leaving no spouse but issue and a parent or parents, the surviving issue shall be entitled to two-thirds of the estate and the parent or parents the remaining one-third;

(g) if an intestate die leaving a spouse, issue and parent or parents, the surviving spouse shall be entitled to one-quarter of the estate, the issue shall be entitled to

one-half of the estate and the parent or parents the remaining one-quarter;

(h) subject to the rights of a surviving spouse or a parent or parents, as the case may be, the estate of an intestate who leaves issue shall be held on the trusts set out in section 7 for the issue;

(i) if an intestate die leaving no spouse, issue, parent or parents, the whole of the estate of the intestate shall be held on trusts for the following persons living at the death of the intestate and in the following order and manner, namely:

Firstly, on the trusts set out in section 7 for the brothers and sisters of the intestate in equal shares; but if no person takes an absolutely vested interest under such trusts, then

Secondly, for the grandparents of the intestate, and if more than one survives the intestate in equal shares absolutely; but if there are no grandparents surviving, then

Thirdly, on the trusts set out in section 7 for the uncles and aunts of the intestate in equal shares; but if no person takes an absolutely vested interest under such trusts, then Fourthly, for the great grandparents of the intestate and if more than one survives the intestate in equal shares absolutely; but if there are no such great grandparents surviving, then

Fifthly, on the trusts set out in section 7 for the great grand uncles and great grand aunts of the intestate in equal shares.

(j) In default of any person taking an absolute interest under the foregoing provisions the Government shall be entitled to the whole of the estate except insofar as the same consists of land.

(2) If any person so dying intestate be permitted by his personal law a plurality of wives and shall leave surviving him more wives than one, such wives shall share among them equally the share which the wife of the intestate would have been entitled to, had such intestate left one wife only surviving him.

(3) When the intestate and the intestate's husband or wife have died in circumstances rendering it uncertain which of them survived the other, this section shall, notwithstanding any rule of law to the contrary, have effect as regards the intestate as if the husband or wife had not survived the intestate.

11.3 **Civil Marriage Ordinance 1952:**

Section 4:

(1) A male person married in accordance with the provisions of this Ordinance, shall be incapable during the continuance of such marriage, of contracting *a* valid marriage with any third person. whether *as* principal or secondary wife.

Section 5:

(1) If any male person lawfully married under this Ordinance shall thereafter during the continuance of such marriage contract a union with a woman which but for such marriage would confer rights of succession or inheritance upon such woman or upon the issue of such union, no issue of such union shall be legitimate or have any right of inheritance in or succession to the estate of such male person, and no such

woman shall have any right by reason of the death intestate of such male person.

11.4 **The Law Reform (Marriage and Divorce) Act 1976 (LRA)**

Section 4:

(1) Nothing in this Act shall affect the validity of any marriage solemnized under any law, religion, custom or usage prior to the appointed date.

(2) Such marriage, if valid under the law, religion, custom or usage under which it was solemnized, shall be deemed to be registered under this Act.

(3) Every such marriage, unless void under the law, religion, custom or usage under which it was solemnized, shall continue until dissolved—

(a) by the death of one of the parties;
(b) by order of a court of competent jurisdiction; or
(c) by a decree of nullity made by a court of competent jurisdiction.

Section 5:

(1) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia.

(2) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such

spouse or all such spouses, shall, if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the second mentioned marriage or purported third mentioned marriage is contracted within Malaysia or outside Malaysia.

(3) Every person who on the appointed date is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia.

(4) After the appointed date, no marriage under any law, religion, custom or usage may be solemnized except as provided in Part III.

Section 6:

(1) Every marriage contracted in contravention of section 5 shall be void.

(2) If any male person lawfully married under any law, religion, custom or usage shall during the continuance of such marriage contract another union with any woman, such woman shall have no right of succession or inheritance on the death intestate of such male person.

(3) Nothing in this section shall affect the liability of any person to pay such maintenance as may be directed to be paid by him under this Act or any other written law.

Section 22:

(1) Every marriage under this Act shall be solemnized—

(a) in the office of a Registrar with open doors within the hours of six in the morning and seven in the evening;

(b) in such place other than in the office of a Registrar at such time as may be authorized by a valid licence issued under subsection 21(3); or

(c) in a church or temple or at any place of marriage in accordance with section 24 at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess or practise.

(2) A valid marriage may be solemnized under paragraph (1)(a) or (b) by a Registrar if a certificate for the marriage issued by the Registrar or Registrar concerned or a licence authorizing the marriage is delivered to him.

(3) A valid marriage may be solemnized under paragraph (1)(c) by an Assistant Registrar if he is satisfied by statutory declaration that—

(a) either—

(i) each of the parties is twenty-one years of age or over, or, if not, is a widower or widow, as the case may be, or

(ii) if either party is a minor who has not been previously married and the female party not under the age of sixteen years that the consent of the appropriate person mentioned in section 12 has been given in writing, or has been dispensed with, or has been given by a court in accordance with section 12;

(b) there is no lawful impediment to the marriage;

(c) neither of the parties to the intended marriage is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted; and

(d) in so far as the intended marriage is a Christian marriage and is to be solemnized in accordance with the rites, ceremonies or usages of a Christian religious denomination, the provisions of the canons of such religious denomination relating to the publication of banns or the giving notice of the intended marriage have been complied with or lawfully dispensed with in accordance with such canons.

(4) Every marriage purported to be solemnized in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under subsection (3) has been delivered to the Registrar or Assistant Registrar, as the case may be.

(5) Every marriage shall be solemnized in the presence of at least two credible witnesses besides the Registrar.

(6) No marriage shall be solemnized unless the Registrar is satisfied that both the parties to the marriage freely consent to the marriage.

Section 75:

(2) Subject to the provisions of this section, the child of a void marriage shall be treated as the legitimate child of his parent if, at the time of the solemnisation of the marriage, both or either of the parties reasonably believed that the marriage was valid.

FINDINGS OF THIS COURT

[12] I have examined all-cause papers, the evidence and/or the lack thereof at the trial, and the parties' respective submissions in canvassing for their position in the present suit. Considering my observation in paragraph **[3]** 3.4 and my observations in the parties' respective arguments in paragraphs **[8]** 8.1-8.8, **[9]** 9.1-9.18, and **[10]**

10.1-10.5 hereof, and in addition to, it is my considered determination that:

12.1 The Ps and the Intervener have failed to discharge their burden of proof to establish their respective claim of entitlement to the estate of the Deceased under ss 101-103 Evidence Act 1950: *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855.

12.2 Evidently, the Ps and the Intervener failed to adduce the required compelling evidence to tilt the scale of evidence in their favour. The arguments and assertions by the Ps and the Intervener are simply speculative at best, and the Court will not act on speculation. As observed by the Federal Court in *Guan Soon Tin Mining Co v. Wong Fook Kum* [1969] 1 MLJ 99, FC, that there was no positive proof, but only a possibility. In the circumstances, it is not good enough.

12.3 It is trite in law that the burden of proof in establishing its case is on the Ps and the Intervener. It is not the Ds' duty to disprove it. The evidentiary burden is that those who allege a fact are duty-bound to prove it (see **s.101, 102, and 103 of the Evidence Act 1950**).

[13] It is an established foundation that in Malaysia, marriage under the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (LRA) anchors on registration for legal recognition of marital union. A similar position would apply under the Women's Charter 1961 in the Republic of Singapore. It is trite; a customary wedding does not constitute, nor does it satisfy, the legal requirement of a valid registration under the LRA. In our present case, the Deceased elected to register his customary marriage to D2 in Malaysia under the Civil Marriage Ordinance 1954 on 4.5.1979 (L.95, pg.417) before the LRA superseded it. It is trite that registration is to facilitate monogamy in civil unions and that is the basic principle behind it. It is my considered 1685

judgment that the 2nd customary marriage by the Deceased to D2 is a lawful marriage under the CMO. Consequently, the birth of D1 (PDF7, pg.418, L95) under this lawful marriage cements her succession rights to the Deceased's estate with her mother (D2). The Ds are, undoubtedly, the lawful heirs (lawful daughter and widow) from the duly registered marriage of the Deceased:

13.1 I find the Intervener's claim to be entitled as the supposed son of the purported 1st customary marriage of the Deceased in the 1960s fundamentally flawed with no compelling evidence to establish his claim save for hearsay evidence and utter speculation as I had observed in paragraph **[10]** hereof.

13.2 The Ps claim to be the lawful son and widow of the Deceased arising from an unproven customary marriage (19.02.1988) that was not registered under the Women's Charter 1961, as legally required in Singapore, is unsustainable. I have addressed this in paragraph **[9]** hereof.

13.3 Among others, the plaintiffs alleged that the Deceased had gifted specific properties inter-vivo (gifts before death) to them, but no evidence was adduced that the said gifts had been duly completed or perfected during the Deceased's life. No evidence of the Deceased's intention was produced save for self-serving assertions by the Ps. I observed that this claim by the Ps had been entirely negated by the Ds arguments in paragraph **[9]** 9.6 hereof.

13.4 From the entirety of the evidence before, it is evident that:

(a) No rectified Certificate of Extract from the Register of Births for P1 from the relevant Singaporean Authority exists. Koh Seng Lee remains the named father on the official record. There are no definitive materials other than suggestive/speculative materials that the Deceased is the biological father of P1. In failing to establish factually that

P1 is the natural offspring of the Deceased (legitimate or illegitimate), P1 has no claim on the Deceased's estate. Tan Kah Fatt, FC *(supra)*, is distinguished and is of no assistance in the circumstances.

(b) Grounding her claim on the Deceased's estate on an invalid customary marriage (non-registration under the Women's Charter 1961) provides P2 with no right to succession. Otherwise, an Order from the Singaporean High Court would have been sought for reciprocal enforcement in Malaysia. The Ps objection to the expert evidence from Singapore on the legal status of the purported customary marriage of D2 to the Deceased is dismissed. The Ps did not offer an expert of their own to say otherwise. This invalid marriage cannot be used to premise a claim for succession in Malaysia as well. This invalidity caused by the non-registration of the customary marriage would sever her claim for succession to the estate of the Deceased. Even if the Deceased and P2 elect to register this 3rd customary marriage, they could not do so. At the same time, there is evidence of an existing 2nd customary marriage to D2 that had been registered under the CMO in Malaysia at the time. The said 2nd customary marriage is still subsisting. A will or perfected gifts inter-vivos would have assisted her, but there is none to be proven in this case.

(c) The Civil Marriage Ordinance 1952, the Law Reform (Marriage & Divorce) Act 1976 in Malaysia, and the Women's Charter 1961 in Singapore are predicated on promoting and maintaining monogamy in civil marriages and the protection of women's rights and interests as well as their valid offsprings. Customary rites personal to the parties cannot be used to override legislative requirements for validity.

(d) The owners of the self-serving Statutory Declaration (SDs' at PDF 42-86, pp.34-78, enclosure 92) were not called to verify the contents of their respective SD to support the Ps position on the existence of the alleged 3rd customary marriage. It renders the contents unproven. Though the SDs' are Part B documents, their contents must still be proven. However, it cannot alter nor exculpate the 3rd customary marriage for invalidity due to non-registration.

(e) IDP1-IDP6 (the video recording) is disallowed. It cannot be referred to or used to support the claim and arguments of the Ps in this proceeding. As a Part C Document, its authenticity and contents need to be satisfactorily proven, and it wasn't. Editing the recording into six segments is an indication to it being edited in one way or another. The Ps are to be blamed for not ensuring the integrity of the evidence as required by law since it is fundamental to their case. The interpreter who carried out the transcript was not called to verify the proposed evidence and its contents. The transcript may have been placed in Part B Documents, but the contents still need to be proven to the satisfaction of the Court. Without IDP1-IDP6 and the transcript, the Ps have lost a fundamental part of their supposed evidence to support their claim. Without fundamental supporting evidence, their claim must naturally fail.

(f) Concerning the Ds counterclaim on the tort of collateral abuse of process against the Ps. It is my considered judgment that after considering the facts and the relevant law, the Ds has proven the requirements for the alleged tortious wrong by the Ps:

(i) **The process complained of must have been initiated:**

OS 901 and Suit 649 were started much before the FC's decision in Tan Kah Fatt was delivered.

(ii) **The dominant purpose for initiating that process must be for some other purpose than to obtain genuine redress:**

At the time the action was taken, the Ps had no succession rights over the estate of the Deceased, and from the facts of proceedings herein, still, today has none that can be proven in this proceeding.

(i) **The plaintiff has suffered damage or injury in consequence:**

(ii) Tabulated by the Ds in paragraph 139, **enclosure** 233 from April 2019 – 01.08.2022, with expenses incurred as tabulated in enclosure 233, pp.58-59.

Malaysian Building Society Berhad v. Tan Sri Ungku Nazruddin Bin Ungku Mohamed [1998] 2 MLJ 425, CA cited Lord Denning *in Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR, made it clear that neither malice nor the termination of the proceedings (OS 901) in the plaintiff's favour (with costs ordered to be paid to the Ds) are necessary elements of this tortuous wrong. Only upon proof of the elements that make up the tort of collateral abuse of process is a plaintiff entitled to an award of damage.

(g) Concerning the Intervener claiming to be the lawful natural offspring of the Deceased by his purported 1st customary marriage to Ho Ah Nya, no compelling evidence was adduced to establish the marriage or that the Deceased was his biological father. The Birth Certificate he produced in Court at trial is indeterminable due to discrepancies in its information. The Intervener failed to call the officer from the Registration Department to clarify the ambiguity and doubt. In such circumstances, no DNA Report was produced

to establish that he is the biological offspring of the Deceased for Tan Kah Fatt, FC *(supra)* to apply. Just like P1, he did not pursue for an Order from the Court to compel a DNA test to be carried out. For want of convincing evidence, the Intervener's claim must be dismissed with costs. The Court will not act on speculative evidence.

(h) It is a cardinal rule in litigation that parties cannot conduct nor pursue their respective cases by instalments.

[14] It is my considered judgment that the Ps and the Intervener have failed to establish their claim. To cite Lord Brandon in *Rhesa Shipping Co.SA v. Edmunds* [1985] 1 WLR 948 at 955, that no judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take. Accordingly, the respective claims by the Ps and the Intervener are dismissed with costs.

CONCLUSION

[15] In light of the foregoing and after closely scrutinising and examining all evidence adduced before me, it is my considered judgment that:

15.1 On the balance of probability, I find that the scale of evidence had tilted in the Ds' Favor.

15.2 I hold that the Ps and the Intervener failed to discharge their burden and prove their case.

15.3 Their claims (Ps and the Intervener) were dismissed with cost:

(a) Against P1-P2: Global costs of RM100,000.00 to be paid to D1-D2 within 30 days, and

(b) Against the Intervener: RM15,000.00 to be paid to D1-D2 within 30 days.

15.4 After considering the parties' arguments for the tort of collateral abuse of process, I find for the Ds. The Ds' counterclaim:

(a) Prayer (a) and (b) are allowed with costs and for damages to be assessed.

(b) Prayer (c) interest at 5%.

(c) Prayers (d), (e), and (f) are disallowed.

15.5 Grounded on the facts in present Suit 649 and its appropriate dismissal thereof, there is no more impediment to OS 702 for the Grant of the letter of Administration to the Deceased's estate. Consequently, it is granted to D1 as prayed with costs.

Dated: 02 NOVEMBER 2023.

(HAYATUL AKMAL ABDUL AZIZ)
JUDGE
HIGH COURT OF MALAYA
KUALA LUMPUR

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