

**Krishnaveni a/p Munusamy & Anor v Bawaneswary a/p R
Chinniah & Ors** A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 24
NCVC-1712-07 OF 2012 B
YEOH WEE SIAM J
10 JANUARY 2013

*Civil Procedure — Declaration — Application for — Validity of EPF nominations
— Deceased made two nominations and named different nominees during lifetime
— Whether first nomination valid since nominee and deceased divorced —
Whether deceased's thumbprint in second nomination forged — Whether nominees
in second nomination holding monies in trust — Whether first nomination revoked
or canceled by deceased — Whether first nomination superseded by second
nomination* C D

The present application concerned the dispute over the validity of the deceased's Employees Provident Fund ('EPF') nominees and nominations. During his lifetime, the deceased had made two nominations and named different nominees to be beneficiaries for his EPF savings. In the first nomination dated 9 March 2003 ('the first nomination'), he had named his former wife ('the first plaintiff') whom he had divorced as nominee or beneficiary. In the second nomination dated 24 June 2006 ('the second nomination'), the deceased nominated his sisters ('the first and second defendants') as his nominees or beneficiaries. Dispute arose upon the deceased's death. The first plaintiff contended that the nominations of the first and second defendants were defective and invalid as it was alleged that the deceased's thumbprint in the nomination form was forged. The first plaintiff further contended that the first nomination was valid as the deceased did not revoke nor cancel it. In the present application, the plaintiffs, through originating summons ('encl 1), sought, inter alia, a declaration that the first nomination was valid and that the first and second defendants were only holding the deceased's EPF monies in trust. The issue that arose for the court's determination was whether which nomination, out of the two, should prevail. In considering the issue, the court had to determine whether the first nomination had been revoked or canceled by the deceased, and had been superseded by the second nomination. E F G H

Held, dismissing the application: I

- (1) Regulation 7(1)(a), (b) and (c) of the Employees Provident Fund Regulations 2001 ('EPF Regulations') should be read disjunctively in view of the connecting word 'or' that appeared between para (b) and (c)

- A of reg 7. It would be totally illogical to read reg 7(1)(a), (b) and (c) conjunctively, and even fatal to the plaintiff if reg 7(1) (a) had to be read together with reg 7(1) (b) and (c), because it would mean that even the first plaintiff's claim would be defeated straightaway since under reg 7(1)(a), the nominee had to pass away first ie as envisaged by the
- B words 'upon the death of the nominee'. The deceased acted under reg 7(1)(c) of the EPF Regulations and this would suffice to meet the requirements of that regulation for the first nomination to cease to have effect. The first nomination was no longer valid as it had ceased to be of legal effect upon the second nomination being made by the deceased (see para 19).
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- (2) Where a nomination under the Employee Provident Fund Act 1991 was made, it would not operate as a will. An EPF nomination was an express statutory nomination which existed independently and was not a will or testamentary disposition. It did not come under the ambit of s 6(1) of the
- D Inheritance (Family Provision) Act 1971 and the Distribution Act 1958 (see para 22).
- (3) The first plaintiff had no legal claim to the amount standing to the deceased's credit in the EPF not for the reason that she was the ex-wife and not the lawful wife of the deceased, but mainly because she was no longer a nominee of the deceased when the deceased made the second nomination which revoked the first nomination (see para 25).
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[Bahasa Malaysia summary

- F Permohonan ini adalah berkenaan pertikaian ke atas kesahan calon-calon dan pencalonan-pencalonan Kumpulan Wang Simpanan Pekerja ('KWSP') si mati. Semasa hayatnya, si mati telah membuat dua pencalonan dan menamakan dua calon-calon berlainan untuk menjadi benefisiari untuk simpanan KWSPnya. Di dalam pencalonan pertama bertarikh 9 Mac 2003 ('pencalonan pertama'), dia menamakan bekas isterinya ('plaintif pertama') yang diceraikannya sebagai calon atau benefisiari. Di dalam pencalonan kedua bertarikh 24 Jun 2006 ('pencalonan kedua'), si mati mencalonkan saudara-saudara perempuannya ('defendan pertama dan kedua') sebagai calon-calon atau benefisiari-benefisiarinya. Pertikaian berbangkit setelah kematian si mati.
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- H Plaintif pertama berhujah bahawa pencalon-pencalon defendan pertama dan kedua adalah cacat dan tidak sah kerana ia didakwa bahawa cap ibu jari si mati di dalam pencalonan telah dipalsukan. Plaintif pertama selanjutnya berhujah bahawa pencalonan pertama adalah sah memandangkan si mati tidak membatalkannya. Di dalam permohonan ini, plaintif-plaintif melalui saman pemula ('lampiran 1') memohon, antara lain, perisytiharan bahawa pencalonan pertama adalah sah dan bahawa defendan pertama dan kedua hanya memegang wang KWSP si mati dalam amanah. Isu yang berbangkit untuk penentuan mahkamah adalah sama ada pencalonan yang mana, daripada kedua-duanya, patut mengatasi. Dalam mempertimbangkan isu
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tersebut, mahkamah mesti menentukan sama ada pencalonan pertama telah dibatalkan oleh si mati, dan telah digantikan dengan pencalonan kedua. A

Diputuskan, menolak permohonan:

- (1) Peraturan 7(1)(a), (b) dan (c) Peraturan-Peraturan Kumpulan Wang Simpanan Pekerja 2001 ('Peraturan-Peraturan KWSP') patut dibaca secara berasingan mengambil kira perkataan yang menghubungkan 'or' yang terdapat di antara perenggan-perenggan (b) dan (c) peraturan 7. Adalah tidak logik untuk membaca peraturan 7(1)(a), (b) dan (c) secara bersama, dan ia juga kritikal kepada plaintif jika peraturan 7(1) (a) terpaksa dibaca bersama dengan peraturan 7(1)(b) dan (c), kerana ia akan bermaksud bahawa tuntutan plaintif pertama juga akan dikalahkan terus memandangkan di bawah peraturan 7(1)(a), calon mesti meninggal dunia dahulu iaitu seperti yang ditetapkan oleh perkataan-perkataan 'upon the death of the nominee'. Si mati bertindak di bawah peraturan 7(1)(c) Peraturan-Peraturan KWSP dan ini adalah mencukupi untuk memenuhi keperluan peraturan tersebut untuk pencalonan pertama berhenti berkuat kuasa. Pencalonan pertama tidak lagi sah kerana ia telah terhenti mempunyai kesan undang-undang ke atas pencalonan kedua yang telah dibuat oleh si mati (lihat perenggan 19). B
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- (2) Di mana pencalonan di bawah Akta Kumpulan Wang Simpanan Pekerja 1991 dibuat, ia tidak akan beroperasi sebagai wasiat. Pencalonan KWSP adalah pencalonan statutori nyata yang wujud secara bebas dan bukan wasiat atau pemberian berwasiat. Ia tidak terangkum di dalam skop s 6(1) Akta Perwarisan (Peruntukan Keluarga) 1971 dan Akta Pembahagian 1958 (lihat perenggan 22). F
- (3) Plaintif pertama tidak mempunyai tuntutan undang-undang kepada jumlah kredit si mati di dalam KWSP bukan kerana sebab yang dia adalah bekas isteri dan bukan isteri sah si mati, tetapi hanya kerana dia bukan lagi calon si mati apabila si mati membuat pencalonan kedua yang membatalkan pencalonan pertama (lihat perenggan 25).] G

Notes

For cases on application for, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2664–2698. H

Cases referred to

How Yew Hock (Executor of the Estate of Yee Soo Thoo, deceased) v Lembaga Kumpulan Wang Simpanan Pekerja [1996] 3 CLJ 1, FC (refd) I

Legislation referred to

Distribution Act 1958

Employees Provident Fund Regulations 2001 reg 7, 7(1)(a), (b), (c)

A Employees Provident Fund Rules 1991 r 34, 34(2)
Inheritance (Family Provision) Act 1971 s 6(1)

*Joseph Iruthayam (Siti Khadijah with him) (Joseph Iruthayam & Co) for the
plaintiffs.*

B *Malathi Krishnan (Voon & Malathi) for the first and second defendants.
Nabila bt Rosli (Azrul Afifi & Azuan) for the third defendant.*

Yeoh Wee Siam J:

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ENCLOSURE 1

D [1] Enclosure 1 is the plaintiffs' originating summons ('OS') seeking the
following reliefs:

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- 1) satu deklarasi bahawa borang penamaan bertarikh 9 Mac 2003 yang memihak kepada Plaintiff-Plaintif adalah sah dan dengan demikian, wang Paribalan yang dipegang oleh Defendan Ketiga hendaklah menjadi sebahagian daripada harta pusaka Paribalan yang mana Plaintiff-Plaintif merupakan waris / benefisiari yang sah di sisi undang-undang;
 - 2) sekiranya pencalonan yang dibuat bertarikh 26.4.2008 memihak kepada Defendan Pertama dan Kedua menjadi sah dan menggantikan pencalonan yang dibuat memihak kepada saya iaitu pada 9 Mac 2003, satu deklarasi bahawa Defendan Pertama dan Kedua memegang wang si mati sebagai amanah untuk kanak-kanak yang menjadi sebahagian daripada harta pusaka mendiang Paribalan;
 - 3) dan sekiranya mahkamah berpendapat bahawa borang penamaan bertarikh 9 Mac 2003 adalah sah, maka satu Perintah bahawa Defendan Ketiga membayar wang yang disimpan dengan mereka pada Plaintiff-Plaintif dalam tempoh empat belas (14) hari daripada tarikh Perintah ini untuk kepentingan kanak-kanak mendiang Paribalan a/l Chinniah;
 - 4) satu deklarasi bahawa wang simpanan mendiang Paribalan a/l Chinniah yang masih di simpanan Defendan Ketiga, ia adalah harta pusaka mendiang Paribalan a/l Chinniah;
 - 5) sekiranya deklarasi di perenggan 4 dibenarkan, satu Perintah bahawa wang caruman dalam Kumpulan Wang Simpanan Pekerja bagi Paribalan a/l Chinniah (simati) (No. Ahli: 5066453), diberikan kepada Plaintiff Pertama sebagai ibu yang sah bagi Plaintiff Kedua sebagai pentadbir kanak-kanak tersebut;
 - 6) kos atas dasar peguamcara-anak guam; dan
 - 7) Perintah lain atau selanjutnya dianggap sesuai dan munasabah diberikan oleh Mahkamah yang mulia ini.

BRIEF FACTS

[2] The first plaintiff is the mother of the two children, Tineswaran a/l Paribalan and Thevaraj a/l Paribalan, ages 15 and 12 respectively ('the two children').

[3] The first plaintiff was married to Paribalan a/l Chinniah ('the deceased'). They had two children from their marriage, but were subsequently divorced on 4 July 2007.

[4] The deceased, in his lifetime, made two nominations regarding the nominee for his monies left in the Employees Provident Fund ('the EPF'):

- (a) the nomination dated 9 March 2003 ('the first nomination') where the deceased nominated the first plaintiff as his nominee or beneficiary for his EPF savings with the third defendant; and
- (b) the nomination dated 24 June 2006 ('the second nomination') where he nominated his two sisters ie the first and second defendants as his nominees or beneficiaries for his EPF savings with the third defendant.

[5] The first plaintiff alleged that the first and second defendants attempted withdrawal of the deceased's EPF savings with the third defendant.

[6] The first plaintiff is contending that the second nomination in favour of the first and second defendants appear defective and invalid due to fraud or forgery regarding the thumbprint of the deceased in the nomination form.

[7] The first plaintiff further contends that the first nomination made in her favour remains valid and it was not revoked or cancelled by the deceased or the third defendant, and the monies of the deceased in the EPF rightfully belong to her and the two children.

ISSUE

[8] The issue is whether the first nomination or the second nomination of the deceased is valid. In considering this issue, the court has to determine whether the first nomination has been revoked or cancelled by the deceased, and has been superseded by the second nomination.

A DECISION

[9] On 23 October 2012 I dismissed the plaintiffs' application in encl 1 and ordered that the first plaintiff pays costs of RM2,500 to each of the three defendants forthwith.

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GROUNDS FOR THE COURT'S DECISION

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[10] In the OS, the first plaintiff challenged the second nomination dated 24 June 2008 ('the second nomination') on grounds of fraud or forgery, in particular, on the authenticity of the deceased's thumb print on the EPF Nomination Form. Since fraud or forgery is alleged, the proper mode of commencement for the action would be by way of a writ of summons, and not by an OS. However, during case management on 20 September 2012 counsel for the plaintiffs informed the court that the plaintiffs are no longer contesting the second nomination based on fraud or forgery, but would only be contesting it on the issue whether the second nomination is valid and supersedes the first nomination made by the deceased on 9 March 2003 ('the first nomination'). That being the case, the court allowed the action to proceed by way of the OS, and did not require the plaintiffs to withdraw the OS and file afresh a writ of summons instead.

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[11] Learned counsel for the first and second defendants raised the preliminary objection that the first plaintiff has no locus standi to bring this action since she is not the lawful widow of the deceased considering that she was divorced from the deceased vide the court order or decree nisi dated 4 July 2007 (exh KM3) ('the decree nisi'). However, the issue here is whether the first nomination is still valid, or whether the second nomination has superseded the first nomination. The first plaintiff is therefore bringing the action in her capacity as a nominee under the first nomination, and not in her capacity as the lawful widow of the deceased.

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[12] The first plaintiff has no locus standi to bring this action as the lawful widow of the deceased in view of the divorce on 12 May 2010. Be that as it may, the court holds the first plaintiff has locus standi to maintain this action as an alleged nominee under the first nomination.

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[13] As for the first plaintiff's capacity to bring the action as a next friend of the two children, the decree nisi proves that the first plaintiff has been awarded guardianship of the two children. Therefore, the first plaintiff has the locus standi to bring this action for and on behalf of the two children. A

[14] On the issue whether the first nomination is still valid or whether it has been superceded by the second nomination, the court considers the following: Rule 34 of the Employees Provident Fund Rules 1991 ('the EPF Rules 1991') provides: B

34 Nominations to be made in Form EPF 4. C

- (1) Every nomination shall be made in writing in Form EPF 4 and shall be signed by the member of the Fund in the presence of a witness, and the signature of such member shall be attested by the witness. D
- (2) *Where a member of the Fund having made a nomination in accordance with these Rules wishes to make a second or subsequent nomination he shall complete and forward a fresh Form EPF 4 containing such nomination*
- (3) A nomination shall be of no effect unless the Form EPF 4 duly completed is sent and reaches the Board during the lifetime of the member.
- (4) Every nomination form registered shall be retained in safe-keeping by the Board. E
- (5) Any person who attests the signature of the member of the Fund in respect of a nomination shall be disqualified from any benefit thereunder. (Emphasis added.) F

[15] In accordance with r 34(2) of the EPF Rules 1991, the deceased made the second nomination by completing and forwarding a fresh Form EPF 4 containing the nomination. Such form has been duly received and registered by the EPF ie the third defendant. There is no dispute of such registration. G

[16] Regulation 7 of the EPF Regulations 2001 provides:

7 Cessation of nominations.

- (1) A nomination shall cease to have effect — H
 - (a) upon the death of the nominee, or, where there is more than one nominee, upon the death of all the nominees, during the lifetime of the member;

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- A (b) by written notice of revocation made in Form EPF 4A; or
(c) by any subsequent nomination in Form EPF 4.
- (2) *The nomination mentioned in subregulation (1) shall not be revoked by any will or by any other act, event or means.*
- B (3) Where there is more than one nominee and one of the nominee predeceases the member, then in the absence of any subsequent nomination made by such member disposing the share of the deceased nominee, such share shall revert to the estate of such member. (Emphasis added.)

C [17] By reading the above reg 7 with the above r 34, it is very clear that the first nomination has ceased to have effect under reg 7(1)(b) of the EPF Regulations 2001 when the deceased made the second or subsequent nomination under r 34(2) of the EPF Rules 1991. The side notes to the EPF Form 4 do not contain the word 'or' between reg 7(1)(b)–(c). However, it must be stressed here that the side notes are merely notes and they must be read together with the substantive provisions in reg 7(1) of the EPF Regulations 2001 where the word 'or' appears in between or connects reg 7(1)(b)–(c).

D [18] Counsel for the plaintiffs submitted that the provisions of reg 7(1)(a)–(c) of the EPF Regulations 2001 should be read conjunctively, which means the deceased is required to fill in Form EPF 4 together with Form EPF 4A before the second nomination is valid, and the first nomination is revoked. He contended that the deceased did not fill in Form EPF 4A and therefore the first nomination is still subsisting and valid.

E [19] With respect to counsel for the plaintiffs, the correct position in law is that reg 7(1)(a)–(c) of the EPF Regulations 2001 should be read disjunctively in view of the connecting word 'or' that appears between paras (b)–(c) of reg 7. In fact, it would be totally illogical to read reg 7(1)(a)–(c) conjunctively, and even fatal to the plaintiff if reg 7(1)(a) has to be read together with reg 7(1)(b)–(c), because it would mean that even the first plaintiff's claim would be defeated straightaway since under reg 7(1)(a) the nominee has to pass away first ie as envisaged by the words, 'upon the death of the nominee'. In other words, the nominee or the first plaintiff has to pass away first before her ex husband, the deceased, can make the second nomination.

F [20] In the present case, the deceased acted under reg 7(1)(c) of the EPF Regulations 2001 and this would suffice to meet the requirements of that regulation for the first nomination to cease to have effect.

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[21] I therefore hold that the first nomination is no longer valid. It has ceased to be of legal effect upon the second nomination being made by the deceased. For this reason, the first plaintiff has no locus standi to maintain the action as a nominee. However, she can maintain the action on behalf of the two children as their lawful guardian.

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[22] I agree with the submission of counsel for the third defendant that where a nomination under the EPF Act 1991 is made, it does not operate as a will. In my view, an EPF nomination is an express statutory nomination which exists independently and is not a Will or testamentary disposition. It does not come under the ambit of s 6(1) of the Inheritance (Family Provision) Act 1971 and the Distribution Act 1958.

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[23] In *How Yew Hock (Executor of the Estate of Yee Soo Thoo, deceased) v Lembaga Kumpulan Wang Simpanan Pekerja* [1996] 3 CLJ 1, the Federal Court held:

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The nomination was made in the prescribed Form under reg 9 of the EPF Regulations 1969. It was obvious therefore that the said nomination was a statutory nomination which operated by force of the EPF Act and Regulations and not a testamentary disposition.

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[24] In *The Law of Succession* by Anthony R Mellows, (4th Ed) (p 10), it is clearly stated:

A nomination is a direction to a person who holds funds on behalf of another to pay those funds in the event of death to a nominated person. In many cases, nominations operate by statute ... Where a nomination is made, it does not operate as a will. While the document does affect the devolution of property on death, the property passes directly from the fund to the nominee, and at no time forms part of the estate. The nomination operates by virtue of the rules of the scheme, and not as a will, and it does not, therefore, have to satisfy the requirement of the Wills Act. (Emphasis added.)

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[25] The first plaintiff has no legal claim to the amount standing to the deceased's credit in the EPF for the reason that she is the ex-wife and not the lawful wife of the deceased, but mainly because she is no longer a nominee of the deceased when the deceased made the second nomination which revokes the first nomination.

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[26] The two children do not have any legal claim to the deceased's EPF money since they have not been nominated as the deceased's nominees for such money.

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A [27] For the above reasons, I ordered accordingly.

Application dismissed.

B Reported by Afiq Mohamad Noor

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