

Legal Insider

Probate & Administration Of Estate

"If I stop a bullet everything of mine will be yours" : The Privileged will.



Prepared By:
Dr. Faridah Hussain

A will is a declaration of a man's mind as to the proper disposition of his property after death. As such, a person who owns property during his lifetime has the power to direct its disposition after his death (Weisbord, Reid Kress, 2012). In the making of wills, the testator is the owner of the property and is granting the power to determine his successors in ownership (Gulliver, Ashbel G., and Catherine J. Tilson, 1941; Leslie, Melanie B., 1996). However, a will has no legal effect until the death of the testator, and it must be made in writing.

In contrast, a privileged will is an informal will. The right to make a privileged will is only granted to soldiers and airmen "in actual military service" and sailors (which include mariners, seamen and members of the naval forces of Malaysia) while "being at sea". They are given the right to make a will in the best way they can without observing the formalities because of the imminent dangers, diseases, disasters, and sudden deaths, which may befall them during "actual military service" and while "being at sea" (Faridah Hussain, 2019). The underlying reason for the preservation of privileged will is the imminent dangers, diseases, disasters and sudden deaths, constantly faced by soldiers and sailors (Crowley, Wallace E., 1918). Hence, this immunity is granted by almost all jurisdictions, to this class of persons (Proffatt, John, 1876).

Historically, soldiers have had free power to make a will temporarily in the best way that they can since the time of Julius Ceasar (Gillis, Edward, 1914). The term "in the best way" is well illustrated in the case of *Re Stable Dalrymple v. Campbell* [1918-19] All ER 299. In this case, the deceased, while under orders to leave for France, said to the plaintiff, in the presence of an independent witness: "If I stop a bullet everything of mine will be yours." The Probate, Divorce and Admiralty Division's Court held that the words used by the deceased were deliberately intended to give expression of his wishes as to what should be done with his property in the event of his death and constituted a valid soldier's will. In this case, Horridge J. pronounced for probate of the oral declaration as a will.

In Malaysia, a privileged will can be made by declaration or disposition, oral or in writing (section 26(2) of the Wills Act 1959) as long as the testator has the testamentary intention expressed by such declaration (section 26(3) of the Wills Act 1959). It is not necessary for a privileged will to comply with the formalities, and it is not needed to be signed by the testator (section 26(4) of the Wills Act 1959).

In Malaysia, although section 4 of the Wills Act 1959 provides that no will made by any person under the age of majority shall be valid, however, section 26(4) of the same Act provides that section 4 is not applicable to privileged wills. As such, soldiers in Malaysia are free to make a will temporarily provided they are "in actual military service". However, it has to be noted that section 26(5) provides that a privileged will made by soldiers in Malaysia shall be null at the expiration of one month after the testator being still alive has ceased to be entitled to make a privileged will.

To date, there is no decided case in Malaysia which addresses the issue of privileged will. Despite Malaysia not being in a state of war, the imminent risk faced by security forces of deadly danger is significant towards the study on the importance of privileged wills in Malaysia (Faridah Hussain, 2019). An extreme example may be seen in the incident of invasion in Lahad Datu Sabah on 9th February until 1st March 2013, which involved the death of security members raising the question as to whether the privileged will has its place in the occurrence of enemy attacks ("Chronology of Intrusion," The Star, April 18, 2013).

However, in Malaysia, only non-Muslims soldiers and the airmen "in actual military service" and non-Muslim sailors (including members of the naval forces of Malaysia) "being at sea" have right to make privileged wills as the Wills 1959 is not applicable to Muslims. As such, it is submitted that specific law be formulated to enable Muslim soldiers and airmen "in actual military service" and Muslim mariners and seamen (including members of the naval forces of Malaysia) "being at sea" to make a privileged will as Muslims are allowed to bequeath not more than one-third of their properties by way of will (Faridah Hussain, 2019).

References

- Crowley, Wallace Edgar. (1918). "Soldiers' Wills." *Maine Law Review* 12(8), 8-24.
- The Star. (2013). "Chronology of Intrusion". The Star, April 18, 2013
- Faridah Hussain. (2019). *The Application of Privileged Wills in Malaysia and Other Selected Countries: A Comparative Analysis*. Ph.D Dissertation. (International Islamic University Malaysia).
- Gillis, Edward. (1914). "Wills of Soldiers on Active Service." *Canadian Law Times* 34(12), 1166-1176.
- Gulliver, Ashbel G., and Catherine J. Tilson, (1941). "Classification of Gratuitous Transfers." *The Yale Law Journal* 51(1), 1-39.
- IRe Stable Dalrymple v. Campbell* [1918-19] All ER 299.
- Leslie, Melanie B. (1996). "The Myth of Testamentary Freedom." *Arizona Law Review* 38(1), 235-290.
- Weisbord, Reid Kress, (2012). "Wills for Everyone: Helping Individuals Opt Out of Intestacy." *Boston College Law Review* 53(3), 877-952.
- Wills Act 1959.

Issue 3/2019

@ UiTMLaw 2020

All rights reserved. No part of this publication may be reproduced or transmitted in any forms or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is restored in a retrieval system of any nature.

This newsletter has 2 versions, printed and online. The online version is available at the Faculty of Law, UiTM website. This newsletter is published in April, August and December every year.