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**PPRIVILEGED WILLS AND THE APPLICATION FOR
PROBATE IN MALAYSIA:
A LEGAL STUDY**

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ABSTRACT

Privileged wills may be made informally. An application for probate may be filed if soldiers, airmen and sailors die leaving privileged wills. Soldiers and airmen in actual military service may make a privileged will. Similarly, sailors (including members of the naval forces) being at sea may make privileged wills. This paper aims to highlight the mode of making an application for probate in privileged wills case. Using qualitative method and comparative analysis, this paper analyses the provisions of the law on privileged wills under the Wills Act 1959, Sabah Wills Ordinance, Armed Forces Act 1972, Merchant Shipping Ordinance 1952, Muslim Wills (Selangor) Enactment 1999, Muslim Wills (Negeri Sembilan) Enactment 2004, Muslim Wills (Malacca) Enactment 2005, Kelantan Muslim Wills Enactment 2009 and Muslim Wills Enactment 2017 (Pahang). Besides, case reports, journal articles and textbooks are analysed. The law relating to privileged wills in Malaysia which allow for non-compliance with the formalities in the execution of a will may lead to fraud. This paper examines whether there is a need to formulate a new form for filing an application for probate for privileged wills cases in Malaysia. This paper argues that the new form for an application for probate for privileged wills cases is necessary to help the applicant in proving the privileged wills made by privileged personnel in Malaysia.

Keywords: *Privileged Wills, Application for Probate, Malaysia*

INTRODUCTION

This paper adopts a qualitative methodology by analysing provisions of law. The provisions of the law are from the Wills Act 1959, Sabah Wills Ordinance, Armed Forces Act 1972, Merchant Shipping Ordinance 1952, Muslim Wills (Selangor) Enactment 1999, Muslim Wills (Negeri Sembilan) Enactment 2004, Muslim Wills (Malacca) Enactment 2005, Kelantan Muslim Wills Enactment 2009 and Muslim Wills Enactment 2017 (Pahang). Besides, case reports, journal articles and textbooks are analysed. The first part of this paper begins by explaining about privileged wills in Malaysia. The second part will then go on to explain about the application for probate for privileged wills in Malaysia. The final part concludes the paper.

DISCUSSION AND ANALYSIS

PRIVILEGED WILLS IN MALAYSIA

Privileged will means any declaration or disposition, oral or in writing,¹ made by the members of the armed forces² of Malaysia being in actual military and mariners or seamen (including members of the naval forces of Malaysia) being at sea. In Peninsular Malaysia, subsection 26 (1) of the Wills Act 1959 is the authority which provides that a member of the armed forces of Malaysia being in actual military service may make a privileged will.³ Similarly, a mariner or seaman (including a member of the naval forces of Malaysia) being at sea may dispose of his property by a privileged will.⁴

In Sabah, pursuant to section 137 of the Sabah Wills Ordinance, a soldier in an expedition or engaged in actual warfare, an airman so employed and any mariner being at sea are privileged. They might execute a privileged will if they completed the age of twenty-one years.⁵ In Sarawak, there is no Act or Ordinance governing law on making a privileged will.

¹ See subsection 26(2) of the Wills Act 1959.

² "Armed Forces" or "His Majesty's Armed Forces" includes the Regular Forces and Volunteer Forces of Malaysia and other forces which may be declared by the *Yang di-Pertuan Agong* from time to time to be Armed Forces. Regular Forces includes the Malaysian Army, the Royal Malaysian Navy and the Royal Malaysian Air Force. See section 2 of the Armed Forces Act 1972.

³ Section 2 of the Wills Act 1959 provides that Wills Act is not applicable to Muslim.

⁴ Section 26. "Privileged wills of soldiers, airmen and sailors.

- (1) A member of the armed forces of Malaysia being in actual military service, and a mariner or seaman (including a member of the naval forces of Malaysia) being at sea may dispose of his property or the guardianship, custody and tuition of a child or may exercise a power of appointment exercisable by will by a privileged will."

⁵ Section 137 of the Sabah Wills Ordinance thereof provides:

The Armed Forces Act 1972 is an Act to consolidate the law relating to the establishment, government and discipline of the Armed Forces of Malaysia. However, it has no provision on privileged wills.⁶ The Merchant Shipping Ordinance 1952 is silent on privileged wills.

Muslims in Malaysia are allowed to make wills. A few states like Selangor,⁷ Negeri Sembilan,⁸ Malacca,⁹ Kelantan,¹⁰ and Pahang¹¹ in Malaysia have enacted laws governing wills for Muslims. However, other States do not have such special enactments on Muslim wills. Nevertheless, there is no mention about soldiers' will and sailors' will in these Enactments.¹² Faridah Hussain and Mohd Hisham Mohd Kamal highlight that if Muslim soldiers and airmen in actual military service and Muslim mariners and seamen (including members of the naval forces) comply with the *shari'ah* law, they may execute privileged will as Islam permits Muslim to make a will regardless of time and place (Faridah Hussain and Mohd Hisham Mohd Kamal (2016))¹³.

APPLICATION FOR PROBATE FOR PRIVILEGED WILLS CASES IN MALAYSIA

O.71 r.5 of the Rules of Court 2012 provides for a procedure for an application for the grant.¹⁴ An application for grant of probate may be filed

"Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged or any mariner being at sea, may, if he has completed the age of twenty-one years, dispose of his property by a will made in the manner provided in the following section. Such wills are called privileged wills."

⁷ The law governing Muslim wills in Selangor is the Muslim Wills (Selangor) Enactment 1999.

⁸ See Muslim Wills (Negeri Sembilan) Enactment 2004.

⁹ In Malacca, the law governing Muslim wills is the Muslim Wills (Malacca) Enactment 2005.

¹⁰ In Kelantan, the law governing Muslim wills is the Kelantan Muslim Wills Enactment 2009.

¹¹ In Pahang, the law governing Muslim wills is the Muslim Wills Enactment 2017.

¹² The Muslim Wills (Selangor) Enactment 1999, Muslim Wills (Negeri Sembilan) Enactment 2004, Muslim Wills (Malacca) Enactment 2005, Kelantan Muslim Wills Enactment 2009 and the Muslim Wills Enactment 2017 (Pahang).

¹³ Faridah Hussain and Mohd Hisham Mohd Kamal. (2016). "Sudden Death in the Line of Duty: The Extension of Privileged Wills in Malaysia". *The Social Sciences*, 11: 7206-7209. DOI: 10.3923/sscience.2016.7206.7209. A few authors provide in-depth about the right of Muslim Members of the Armed Forces of Malaysia in actual military service and mariners and seamen (including members of the naval forces of Malaysia) while being at sea to make privileged wills due to the dangerous nature of duty faced by them. See Faridah Hussain, Mohd Hisham Mohd Kamal, Akmal Hidayah Halim and Tajul Aris Ahmad Bustami. (2016). "Privileged Wills in Malaysia: The Sustainability of Privileged Wills Among Soldiers, Airmen and Sailor." *Journal of Asian and African Social Science and Humanities* 2, no. 3: 61-73.

¹⁴ O.71 r.5 provides:

by filing an application of Originating Summons Ex-Parte¹⁵ together with the Affidavit Pursuant to Probate and Administration Act 1956.¹⁶ Few other documents must be filed together with these pleadings.¹⁷

The burden of establishing that the will is a privileged will lies on the applicant in an application for probate. The applicant needs to satisfy that the said deceased is a member of the armed forces of Malaysia being in actual military service/who is a mariner or seaman or a member of the naval forces of Malaysia being at sea. He must exhibit a true certified copy of the Death Certificate of the said deceased. The Applicant needs to exhibit a copy of the true and original last Privileged Will of the said deceased. He needs to state in his affidavit that the declaration in oral made by or at the directions of the testator to be the true and original last Privileged Will of the said deceased. He may need to state in his affidavit that he believes the declaration in writing made by or at the directions of the testator is a certified true copy and original last Privileged Will of the said deceased. Besides, the applicant may also need to state that the disposition in oral made by or at the directions of the testator to be the true and original last Privileged Will of the said deceased or the disposition in writing made by or at the directions of the testator to be the true and original last Privileged Will of the said deceased.¹⁸ As such, a suitable Form for privileged wills cases is important.

The Registrar of the High Court must determine that the testator has an intention to dispose of his property although the will was made informally. In *Selwood v Selwood*¹⁹, the grant of probate was not granted because there was no deliberate expression of the soldier's wishes as to the disposition of his property in the event of his death. The applicant may need to affirm more in the affidavit that the deceased had done something under orders and actual military service have commenced (See *In the Goods of Hiscock* [1900-03] All ER Rep 63). Furthermore, the applicant in the application for probate for privileged wills cases must affirm that the deceased testator is a soldier or airman in actual military service. He may need to prove that the

(1) Every application for a grant shall be made by originating summons in Form 6 and shall be supported by an affidavit setting out the information in Form 159 and other information and/or documents as the Registrar may require".

¹⁵ See Form 6 of the Rules of Court 2012.

¹⁶ An affidavit shall support an application for grant of probate. In the affidavit, information such as the death certificate, list of assets and liabilities, the last privileged will of the testator (if it is made in writing) or state if the privileged will is made by oral and a copy of the list of beneficiaries. See Form 159(a) of the Rules of Court 2012 for further explanation.

¹⁷ Documents such as Notice of Appointment of Solicitors, Affidavits of witnesses, Affidavit of the executors (in case if one of the witness or both witnesses could not be traced) and Administration Oath.

¹⁸ See subsections 26(1) and (2) of the Wills Act 1959 and paragraph 138(2)(a),(b),(c),(d),(e),(f) and (g) of the Sabah Wills Ordinance.

¹⁹ [1920] All ER Rep 413.

soldier and airman abandoned his civilian status by taking part in the war. He may need to state in his affidavit that the testator died while he was in actual military service or inactive military service. As such, the applicant has a duty to prove that the testator is actually serving the Armed Forces in connection with military operations which are or have been taking place or believed to be imminent (See *In reWingham (deceased): Andrews and Another v Wingham* [1949] P. 187).

Sailors which include mariners and seamen at sea may execute privileged will because those who were at sea were without legal assistance and also faced a greater risk of death.²⁰The case of *In the Goods of Alfred John Wilson, Decd. Wilson v Coleclough* [1952] P. 92 illustrates about a nuncupative will made by a merchant navy. The court found that at the time the deceased made his nuncupative will, he had been ordered to join a ship for a specific voyage. As such, in this case, the court held that there will be a grant of letter of administration to the plaintiff of the estate of the deceased with the contents of the nuncupative will annexed. For cases of sailors (including members of the naval forces of Malaysia), the applicant needs to satisfy his affidavit that the testator made his last will while being at sea. In the case of *Morrell v Morrell*,²¹ the court held that a merchant seaman's will is valid for it was made at sea.

CONCLUSION

In Malaysia, the Wills Act 1959 and the Sabah Wills Ordinance are only applicable to non-Muslims. As such, this paper highlights that there is no provision of law for Muslim soldiers and airmen to make privileged wills while in actual military service or active service. Also, there is no clear provision for Muslim sailors (including members of the naval forces of Malaysia) to make a will while being at sea.

The law relating to privileged wills in Malaysia which allow for non-compliance with the formalities in the execution of a will may lead to fraud. In the application for probate, if the privileged will is made before one witness, the applicant needs to satisfy the Registrar of the High Court that the will made by the deceased testator fall under section 26 of the Wills Act 1959 or section 137 of the Sabah Wills Ordinance. As such, this paper suggests the importance of having a special Form for the application of privileged wills in Malaysia. The new Form is necessary to help the applicants in proving the privileged wills made by privileged personnel and applying grant of probate for privileged wills cases in Malaysia.

²⁰See the discussion about the words "at sea" in the case of *Re Rapley's Estate: Rapley v Rapley* [1983] 3 All ER 248.

²¹(1827) 1 Hag Ecc 51.

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