

Chapter 10

Multiple-Choice Questions

1. B
2. A
3. D
4. B
5. C
6. A
7. D
8. D
9. A
10. C

Short-Answer Questions

Question 1

If a beneficiary dies before the testator, the gift provided in the Will would lapse. If the testator has a residuary clause in his will, the gift will now form part of the residuary estate. This was observed in the case of *Tay Seck Loong @ Tay Seck Long v The Chor Chen*, it was held that gifts to a school in China and two of the testator's grandson lapsed. This is because the school ceased to exist when the Will was executed. The grandsons of the executor also had died before the testator.

Question 2

In *Banks v Goodfellow*, Cockburn CJ explained that the testator has capacity when he understands the nature of the act and effect of making a Will. The question is whether the testator had a sound mind when making the Will. The court would not be concerned with the physical state of the testator unless it affects the mind.

In *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin*, the court held that if physical condition of the testator is used to raise the issue of testamentary capacity, it must be proved that the testator's poor physical condition was to such a degree that it could affect his mind at the time the Will was made.

Question 3

Suspicious circumstances refer to circumstances surrounding the making of the Will. While the burden is on the executors to show that the Will is valid, persons challenging the Will would have to show suspicious circumstances creating doubt on the validity of the Will. In *Wintle v Nye*, it was held that the degree of suspicion varies according to circumstances. In *Karn Woon Lin v Cheah Chor Bok*, it was held that there must be strong evidence to show suspicious circumstances.

Question 4

Suggested answers include:

	Will	Trust
General	An individual testator can only have one will at a time. Newer will automatically revokes the older will	The settlor can have more than one trust.
Transfer of assets	Only upon death of testator	During the lifetime of the settlor
Future assets	Future and residual assets included I the estate	Applicable for specific assets specified in the trust deed
Probate	Yes – Assets of the testator are frozen during the probate process	Avoid probate
Appointment of guardians	Yes	No
Cost	Relatively cheaper	More complex and costly

Question 5

Suggested answers include:

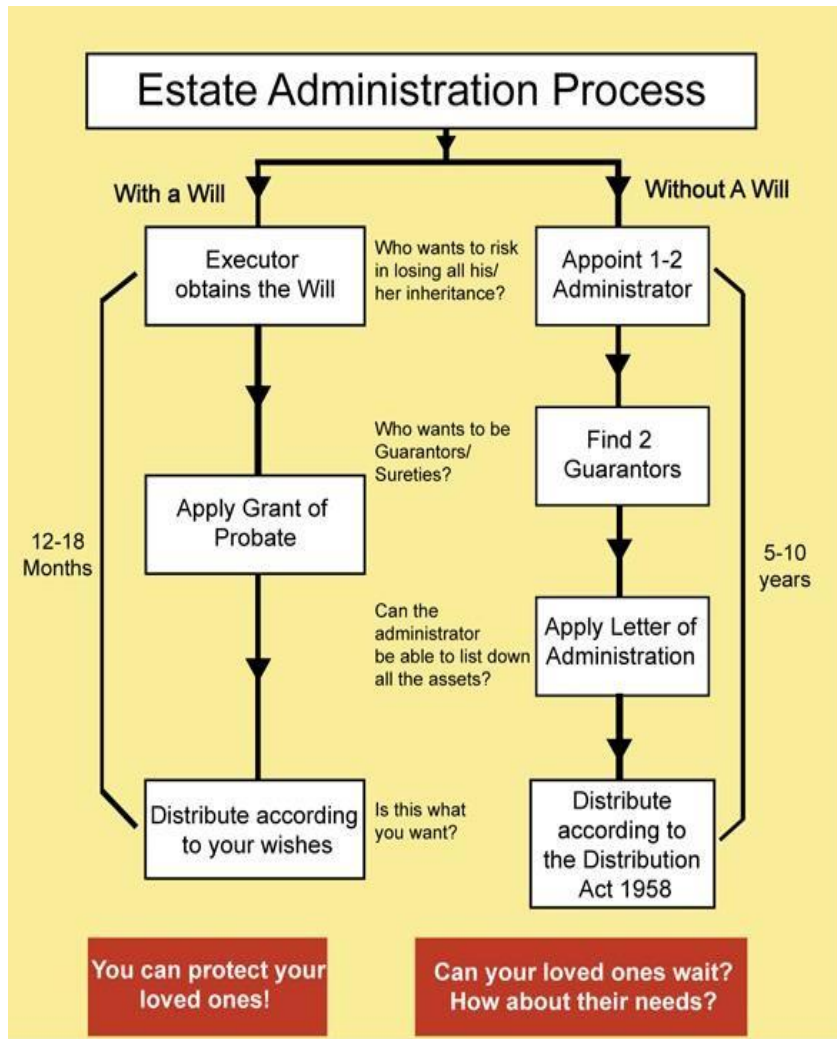
	Non-Muslim	Muslim
Law	<ul style="list-style-type: none">▪ Wills Act▪ Distribution Act 1958▪ Inheritance (Family Provision) Act 1971	<ul style="list-style-type: none">▪ Faraid Law
Will	<ul style="list-style-type: none">▪ Testator is free to specify his intentions on the beneficiary and entitlements according to his/her wishes	<ul style="list-style-type: none">▪ Only 1/3 of the estate can be distributed to non-Faraid heirs.▪ The remaining two thirds will be distributed according to Faraid law based on the sequence starting from Quranic Heirs followed by Residual Heirs (Male Agnatic Heirs followed by Female Heirs) and finally the Baitul Mal▪ Male heirs will receive double portion as compared to female heirs
Transfer during lifetime	<ul style="list-style-type: none">▪ At the discretion of the individual▪ Can be done via direct transfers to beneficiaries (subject to ownership right restrictions) or trusts	<ul style="list-style-type: none">▪ Allowed via Hibah and Wakaf
Nomination	<ul style="list-style-type: none">▪ Statutory trust created.▪ Can nominate anyone.▪ Nominee is the beneficiary	<ul style="list-style-type: none">▪ No–statutory trust created.▪ Nominee as the executor▪ Relevant nominee is the wasi or Amanah Raya Berhad
Court	High Court	<ul style="list-style-type: none">▪ Syariah Court▪ High Court
Other matters	<ul style="list-style-type: none">▪ Muslims have to settle all outstanding debts to Allah (Zakat, Haj) before final distribution of the estate.▪ Any other relevant	

Discussion Questions

Question 1

For non-Muslims:

- The estate of the deceased will be subject to a longer probate process.
- The administrators appointed by the next of kin must apply for the Letter of Administration and the court may/will require 2 sureties/guarantors.
- The distribution will be in accordance with the Distribution Act 1958 not according to the deceased's wishes.
- For immovable assets less than RM2,000,000, next of kin need to apply to District Land Administration for summary administration.
- No administration bond is required if the estate is less than RM 50,000 and the administrator is the sole beneficiary of the estate.



For Muslims

- Not able to allocate 1/3 of the estate to non-Faraid heirs.
- Administers of the estate would need to be appointed.
- Distribution will be in accordance with the Faraid law.

Question 2

	Power of Attorney	Will
Governing act	Power of Attorney Act 1949	Wills Act 1959
Application	During the lifetime of the donor only	After the death of the testator
Purpose	Donee acts on behalf of the Donor for cases where Donor is not able to execute the transaction him/herself e.g. <ul style="list-style-type: none"> ▪ Donor is overseas. ▪ Donor is disabled or becomes mentally unsound. ▪ Donor lacks the technical knowledge and/or expertise on the transaction. 	Wills are prepared by the testator to: <ul style="list-style-type: none"> ▪ Appoint the executor of the estate. ▪ Appoint the guardian for minors. ▪ Appointment of trustees (if applicable)
Scope of duties	Donees duties involve. <ul style="list-style-type: none"> ▪ Specific purpose or series of transactions in real estate, investments, banking, insurance, claims and litigation, taxation, personal relationships, and affairs. ▪ Duties of the donee ceases upon the death of the donor. 	Executors have the duties to <ul style="list-style-type: none"> • Make funeral arrangements. • Prepare the list of the testators' assets. • Apply for the Grant of Probate • Collecting any money due and paying off debts (including income tax and creditors) • Prepare a final Statement of Account • Distributing the assets of the testator according to the will
Other	<ul style="list-style-type: none"> ▪ Donors can issue more than one POA issue to different persons for different purposes/transactions. ▪ All POA must be registered with Attorney Registration Office, High Court of Malaya, Kuala Lumpur or at any Registration Office of the High Court of Malaya in West Malaysia. 	<ul style="list-style-type: none"> ▪ Only one will be allowed at any onetime. ▪ A new will revoke the older one. ▪ Wills need not be registered by law.

Question 3

Estate planning ideally addresses:

- issues of wealth accumulation, wealth protection and wealth distribution
- appointment of executors of estates and guardians of minors via the will
- setting up trusts for protection of assets and appointment of relevant trustee(s)
- identification and naming of beneficiaries
- Any other relevant answer

However, it may not address:

- The equity or fairness of the distribution to the beneficiaries
- Unanticipated changes in regulation affecting distributions.
- Issues that could arise make wills contentious.
- The actual integrity of actions of executors and guardians in practice.
- Any other relevant answer

Question 4

	Direct transfer	Nominations	Will	Trust
Probate process applicable	No but applicable before the individual's death.	No	Yes	No
Type of assets covered	Specific assets only	<ul style="list-style-type: none"> ▪ Insurance cash values ▪ Employee Provident Fund ▪ Unit trust 	<ul style="list-style-type: none"> ▪ Specific assets ▪ Residual / future assets 	Specific assets only
Revocability	No once transfer is finalized	Can change nominations anytime while an individual is alive	Yes – within one's lifetime	Depending on type of trust
Charges	<ul style="list-style-type: none"> ▪ Stamp duties may apply 	None	Legal charges on probate	<ul style="list-style-type: none"> ▪ Trustee fees ▪ Legal cost upon set up – high for irrevocable trust
Restrictions on naming of beneficiaries	None	Yes – Different treatments for trust and non-trust beneficiaries	None unless the deceased is intestate or a Muslim	Generally, none unless the trust is irrevocable
Distribution	During lifetime	Upon death	Upon death	Depending on trust deed- could be during lifetime or upon death.
Tax	Stamp duties on transfers	None	Currently no inheritance taxes in Malaysia	Income is subject to Income Tax Act 1967
Probate process applicable	<ul style="list-style-type: none"> ▪ Asset transferred immediately before bankruptcy maybe void. 	<ul style="list-style-type: none"> ▪ Part of assets of the individual during one's lifetime ▪ Not generally protected 	Not shielded from claims of third parties	<ul style="list-style-type: none"> ▪ Yes – for non-bankruptcy cases. ▪ There is a separation of legal ownership between trust and individual assets. ▪ None for revocable trusting cases of bankruptcy ▪ For irrevocable trusts – Subject to 2- and 5-year rule per Insolvency Act 2017

Case Study 1

Betty, Charles, and Muthu are clearly the surviving beneficiaries of Ah Meng's Will. They would like to know what happens to the gifts made to Derek and Homeless for KL because there is no residuary clause in Ah Meng's Will. Betty would seek to determine the validity of gift relating to money in Ah Meng's EPF account to Ah Kau. All beneficiaries would attempt to resist the challenge made to Ah Kau's second Will. They would also want to find out if there is any claim they could make in the event, the Will Ah Kau wants to propound for probate is valid.

Firstly, a will only take effect after death (*Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin*). As such, the beneficiary must exist at the time of the testator's death. Because Homeless for KL ceased to exist and Derek dies before Ah Meng, both gifts lapse. In *Tay Seck Loong @ Tay Seck Long v The Chor Chen*, the court found three gifts to have lapsed. The first gift to a school in China lapsed because the school ceased to exist at the time the will was due for distribution. Two other gifts to the testatrix's grandsons also lapsed because they died before the testatrix's death. These gifts were held to fall under the residuary estate. However, Ah Meng's Will does not have a residuary clause. Therefore, there is no clause in Ah Meng's Will to manage these properties, namely the house in Bangsar and the three paintings in Ah Meng's house in Damansara. These properties would then fall under the rules of intestacy for distribution.

Betty, Charles, Ernie, Muthu, or Ah Kau could apply to the court for letters of administration to ensure the property is distributed in accordance with the rules of intestacy. If the value of the house is below RM 2 million, then an applicant could apply to the District Land Administrator for Bangsar for the letters of administration to affect the distribution of the property under *section 4(2) Small Estates (Distribution) Act 1955*. A petition can be made to the Land Administrator in the District where the property is located (*Section 8 and 9 Small Estates (Distribution) Act 1958*). The Land Administrator can then decide on distribution if such an order will tend to the general convenience of the parties or to meet the needs of justice. The Land Administrator is also empowered by the provision to grant letters of administration. However, this option is subject to the existence of a will. On facts, the Land Administration would be hesitant since the first Will has been challenged by Ah Kau by showing there is another Will. Hence until this issue has been resolved, the Land Administrator may not exercise his powers to issue letters of administration which would be set aside later by the High Court.

However, if the property is valued at more than RM 2 million, then letters of administration should be obtained from the High Court. Letters of administration can be obtained for both the House in Bangsar as well as the paintings in the House in Damansara.

To obtain letters of administration, the applicant must show they are the fittest person (*section 30 Probate and Administration Act 1959*). In the *Estate of Ngau Ken Lock (Deceased) (Ngau Voon Kiat, Petitioner)*, the court held that the applicant was not the fittest person because the applicant was previously not co-operative with matters relating to the estate. The applicant also had not responded to beneficiaries' attempt to reach him. Further, the applicant had failed to explain the instances of non-cooperation in his affidavit. The court was of the view the petitioner was the right candidate because the petitioner had the support and confidence of the beneficiaries. If Dharma, acting for Betty, Charles, Ernie, and Muthu, can show that Ah Kau's will is fraudulent or made under suspicious circumstances it would preclude Ah Kau from obtaining letters of administration for the Will that he has in his possession.

In challenging Ah Kau's Will, Dharma could argue that the Will was made under suspicious circumstances. Suspicious circumstances are circumstances which are abnormal and not typically expected in any ordinary situation or from a normal person raises doubt on the validity of the will (*Dr Shanmuganathan v Periasamy S/O Sithambaram Pillai*). Suspicious circumstances may arise where a person writing the Will for the testator takes a substantial benefit under the will or where a person suggests the terms of the will to the testator (*Catherine Rendell, p. 41*). On the facts, the argument against Ah Kau's will be the fact that he is the executor and beneficiary of the entirety of Ah Meng's estate. This would be abnormal because Ah Meng's wife and children have been ignored under the second Will.

A further abnormality is the absence of Ah Meng's lawyer, Dharma, when making the second Will. As such, it is highly likely that the second Will could be set aside. If so, probate will be granted to Dharma to distribute the property in accordance with the first Will. It is suggested that Betty is the fittest person, being the matriarch of the family, assuming she is physically able and of sound mind. She could be assisted by Dharma, Ah Meng's lawyer, to assist in obtaining letters of administration for the House in Bangsar and the paintings in the house in Damansara.

However, grant of letters of administration for these properties is subject to the contentious probate hearing between Ah Kau challenging the validity of the will held propounded by Dharma. Under the *Distribution Act 1958, section 6(1)(a)*, the spouse is entitled to the entirety of the estate if the deceased does not leave behind any parent(s) or children. On the facts, Ah Meng is survived by his wife, Betty and three sons, Charles, Ernie, and Muthu. Therefore *section 6(1)(e)* provides that Betty will only be entitled to one-third share in the property left behind and 2 third share will be shared by the children in equal value. This means Charles and Ernie and Muthu would have the two-thirds share. However, assuming Muthu was not adopted under the *Adoption Act 1952*, he would not be entitled.

If Ah Kau's Will is deemed valid, it would have the effect of revoking the first (earlier) Will made by Ah Meng. In which case, Betty, Charles, Ernie, and Muthu could apply for reasonable provision under *Inheritance (Family Provision) Act 1971, section 3(1)*. However, whether Charles, Ernie and Muthu are eligible would depend on whether they are dependents who are physically or mentally incapable of looking after themselves. If they are of the age of majority and working adults (which most likely is the case on the facts), they would not be eligible. Therefore, only Betty would be able to claim.

Betty must persuade the court that the Will propounded by Ah Kau (Ah Meng's supposed second Will) does not make reasonable provision (*Section 3(2) Inheritance (Family Provision) Act 1971*). Betty must make the application within six months from the time Ah Kau obtains probate to administer Ah Meng's estate (*section 4(1) Inheritance (Family Provision) Act 1971*).

With regards to the EPF Fund, the gift would have no effect under the first or the second Will. This is because the nomination made does not come within the context of the Will or the law of intestacy (*Krishnaveni a/p Munusamy v Bawaneswary a/p R Chinniah*). The nomination takes effect immediately after death where a Will only takes effect after probate has been granted. Therefore, Ah Meng's nomination of his wife, Betty, to the RM600,000 in his EPF account would not be affected by the Wills.

In conclusion, it is highly likely that the Will held by Ah Kau would be set aside under suspicious circumstances. Ah Meng's first will would be granted probate. However, since there is no residuary clause, the paintings, and the House in Bangsar would fall under the rules of intestacy. Betty will receive one-third of the value while Charles, Ernie and Muthu will receive two-thirds share. If Muthu is not adopted in accordance with the *Adoption Act 1952*, then he would be excluded. Betty will still receive the amount in Ah Meng's EPF Account because she is the nominated beneficiary.

Case Study 2

Based on the *wasiat*, Kamarul is entitled to leave 1/3 to non-Faraid heirs. As such, theoretically he would be able to bequeath 10% as per his wishes to Bala Subramaniam's charity amounting to RM122,800. However, his intention to bequest to his daughter Siti Nurdiana would be denied as she is a Faraid heir.

The distribution to the Faraid heirs would be as follows:

Assets					
EPF	150,000				
Bungalow	580,000				
Plantation land	550,000				
Fixed deposit	56,000				
Unit Trust	67,000				
Less : Expenses/Liabilities					
Funeral expenses	(6,500)				
Zakat	(10,000)				
Mortgage loan	(150,000)				
Credit card	(8,500)				
Value of net estate	1,228,000				
Less : 10% to charity	122,800				
Available for distribution	1,105,200				
		Total share			
		384	384	Category	Per person
Two wives - with children	1/8	48	48	138,150	69,075
Mother - with child and sibling	1/6	64	64	184,200	184,200
Three sons	Residual	3 x 2X	204	587,138	195,713
Two daughters	Residual	2 x 1 X	68	195,713	97,856
Three germane brothers	Excluded due to son	0	0	-	-
Two germane sisters	Excluded due to son	0	0	-	-
		384	384	1,105,200	
Residual shares (8X)	272				

Working:

$$\text{Residual shares: } 48 + 64 + 8X = 384 \rightarrow 8X = 272 \rightarrow X = 34$$

$$3 \text{ Sons share} = 3 \times 2(34) = 204$$

$$2 \text{ Daughters share} = 2 \times 24 = 68$$

$$\text{Each wife gets} = 138,150/2 = \text{RM}69,075$$

$$\text{Each son gets} = 204/384 \times 1,105,200 \times 1/3 = 195,713$$

$$\text{Each daughter gets} = 68/384 \times 1,105,200 \times 1/2 = 97,856$$

Case Study 3

Based on the wasiat:

Since Baharom had a *Harta Sepencarian* agreement with Zarinah, this takes precedent over the will. Since Zarinah will get $\frac{1}{2}$ of Baharom's estate based on this agreement, the balance to be distributed would be RM 1,750,000.

Baharom's desire to give RM100,000 (5.71%) to the Cancer Society is within the $\frac{1}{3}$ allowed for distribution to non-Faraid heirs. However, his intention to leave 20% to Nurlida is not in accordance with Faraid law as she is his wife (Faraid heir) under the Syariah law.

The distribution based on rights of Faraid heirs are as follows:

		Percentage							
Baharom's total estate	3,500,000								
Less : Zarinah's Harta Sepencarian	1,750,000	50.00%							
Balance of assets to Faraid Heirs	1,750,000								
Less: Distribution by wasiat (Cancer Society)	100,000	5.71%							
	1,650,000								
			Total Share						
			8	88	176	Total (RM)	No of pax	Each person gets:	
Two Wives	1/8	1	11	22	206,250	2	11/176	103125	
Four Sons	Residual (2X)	7	56	112	1,050,000	4	28/176	262,500	
Three Daughters	Residual (X)		21	42	393,750	3	14/176	98,438	
Three germane brothers	Excluded by sons	0	0	0	-				
Two uterine sisters	Excluded by sons	0	0	0	-				
		8	88	176	1,650,000				

Working:

Residual share: $22 + (4 \times 2X) + (3 \times 1X) = 154 \rightarrow 11X = 154 \rightarrow X = 14$

Zarinah gets = $103125 + 1,750,000$ (*Harta Sepencarian*) = RM1,853,125

Nurlida gets = RM 103,125

Each son gets = RM262,500

Each daughter gets = 94,438

Checked with MAIS on the distribution:

efaraid.mais.gov.my/EFARAID/faraidCalc.do

K-FARAID MAIS Senarai Waris Carta Waris Harta Pusaka **Pengiraan** Pokok Waris

Save as image

Waris	Bahagian	8	176	176
2 ISTERI	1/8	1	22	11
4 ANAK LELAKI	Asobah	7	112	28
3 ANAK PEREMPUAN	Asobah		42	14

Waris	Bahagian	Jumlah (RM)
ISTERI	1/8	11/176
ISTERI	1/8	11/176
ANAK LELAKI	Asobah	28/176
ANAK LELAKI	Asobah	28/176
ANAK LELAKI	Asobah	28/176
ANAK LELAKI	Asobah	28/176
ANAK PEREMPUAN	Asobah	14/176
ANAK PEREMPUAN	Asobah	14/176
ANAK PEREMPUAN	Asobah	14/176