DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO.: 02(f)-82-10/2019(B)

ANTARA

1. TAN KAH FATT
(NO. K/P: 800203-10-5319)

2. TAN SIN YEE
(NO. K/P: 021005-10-1600)
(dengan pembelaan oleh
Wakil Litigasi, Lu YanLiu) … PERAYU-PERAYU

AND

TAN YING
(NO. PASSPORT CHINA: G36857658) … RESPONDEN

[Dalam Mahkamah Rayuan Malaysia di Putrajaya
Bidang Kuasa Rayuan
Rayuan Sivil No: B-02(NCVC)(W)-1091-05/2018

Antara

1. Tan Kah Fatt
   (No. K/P: 800203-10-5319)
2. Tan Sin Yee
   (No. K/P: 021008-10-1600)
   (dengan pembelaan oleh
   Wakil Litigasi, Lu YanLiu) … Perayu-Perayu

Dan

Tan Ying
(No. Passport China: G36857658) … Responden

Dalam Mahkamah Tinggi Malaya di Shah Alam
Dalam Negeri Selangor Darul Ehsan, Malaysia
Guaman Sivil No: 22NCVC-297-06/2015

Antara

Tan Ying
(No. Passport China: G36857658) … Plaintif

And

1. Tan Kah Fatt
   (No. K.P: 800203-10-5319)
2. Tan Sin Yee
   (NRIC No.: 021008-10-1600
   (dengan pembelaan oleh
   Wakil Litigasi, Lu YanLiu) … Defendan-Defendan

Dalam Mahkamah Tinggi Malaya di Shah Alam
Dalam Negeri Selangor Darul Ehsan, Malaysia
Guaman Sivil No: BA-22NCVC-571-10/2016
(Dahulu Didaftarkan Di Bawah Saman Pemula
No. 24-667-06/2015)

Dalam perkara berkenaan dengan Harta Pusaka Tan Kah Yong [No. K/P: 780731-10-5181] (Simati) dalam Petisyen Mahkamah Tinggi Malaya di Shah Alam Petisyen No. 31-518-12/2012

Dan

Dalam Perkara berkenaan dengan Seksyen Akta Probet dan Pentadbiran 1959

Dan

Dalam perkara berkenaan dengan Aturan 80, Kaedah-Kaedah Mahkamah 2012

Dan

Dalam Perkara berkenaan dengan Seksyen 9 dan 53 Akta Relif Spesifik 1950

Antara

1. Y-Teq Auto Parts (M) Sdn Bhd
   [No. Syarikat: 736211-P]

2. Y E Motorcycles (M) Sdn Bhd
   [No. Syarikat: 664541-P] … Plaintif-Plaintif

Dan

1. Tan Kah Fatt
   [No. K/P: 800203-10-5319]

2. Tan Ying
   [No. Passport China: G36857658]
   (sebagai pentadbir bersama
   Harta Pusaka Tan Kah Yong, Simati) … Defendan
   Defendan

CORAM:

ABDUL RAHMAN BIN SEBLI, CJSS

HASNAH BINTI MOHAMMED HASHIM, FCJ

MARY LIM THIAM SUAN, FCJ

JUDGMENT OF THE COURT

My learned brother, Abdul Rahman bin Sebli, CJSS and my learned sister, Hasnah binti Mohammed Hashim, FCJ have read this judgment in draft and have agreed that this judgment forms the unanimous judgment of this Court.

[1] While there are two central issues for this Court's consideration, the real issue here concerns the right of illegitimate children to inherit under the laws of intestacy in this country. This question vexes the non-Muslim community due to the interplay of two key legislations in this respect – the Distribution Act 1958 [Act 300] and the Law Reform (Marriage & Divorce) Act 1976 [Act 164]. The claim to this right sometimes, unfortunately, strains relationships with the innocent child caught in nether land. Often, the existence of the illegitimate child is not known until one of the parents has demised, and there is no provision for such children, *inter vivos*. The circumstances in the present appeal are a clear illustration although the existence of the so-called 'illegitimate' child was well-known. She was and is very much part of the larger extended family.

[2] These are the four amended questions posed for our determination-

i. Whether the term 'child' as defined in section 3 of the Distribution Act 1958 includes a child born of a Chinese customary marriage?

ii. Whether the term 'child' in section 3 of the Distribution Act 1958 read with section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 includes a child born of a Chinese customary marriage as a legitimate child for succession purposes?

iii. Whether the term 'child' and 'issue' in the Distribution Act 1958 should be read in a non-discriminatory way in the light of Article 8 of the Federal Constitution to include all the natural born children of the deceased?

iv. Whether the removal of the appointment of co-administrator by letter of administration duly granted by the High Court can be undertaken other than under the grounds applicable for the revocation of a grant or removal of administrator under section 34 of the Probate and Administration Act 1959 which relates to the interest of the beneficiaries of the estate?

An additional question, "Whether the term 'child' in Section 6(1)(g) of the Distribution Act 1958 applies to all the natural born children of a deceased for succession purposes?" was allowed on 25th January 2021.

Underlying facts

[3] Two suits, namely Civil Suit No. 22NcVC-297-06/2015 [Suit 1] and Civil Suit No. BA-22NcVC-571-10/2016 [Suit 2] consolidated at the High Court *vide* order of Court dated 15th March 2016, were heard together at the High Court.

[4] Suit 1 is an action taken by Tan Ying, a joint-administrator, to remove Tan Kah Fatt, the other administrator of the estate of Tan Kah Yong, deceased, leaving Tan Ying as the sole administrator. Suit 2 is initiated by Y Teq Motors Sdn Bhd and YE Motorcycles Sdn Bhd, two companies where the deceased was a director, shareholder and co-owner. The deceased was also the registered owner of three cars. He had also taken out a life insurance policy with AIA where the pay-out upon his death was a sum of RM6,689,542.01. The two companies sought to recover from the

administrators of the estate of the deceased, monies paid under the insurance policy, return of the three cars used by the deceased as well as a loan allegedly taken by the deceased that remained unpaid. According to the two companies, the insurance policy was for the protection of the business of the companies and with the demise of the deceased, the monies paid out under the policy belong to the companies.

[5] Both suits arose following the death of Tan Kah Yong who passed away on 7th October 2012 due to a motor-vehicle accident. He died intestate. He left behind a wife, Tan Ying whom he married on 18th January 2005 and a daughter, Tan Sin Lin born on 2nd January 2009. He also left behind another daughter named Tan Sin Yee, the 2nd appellant who was born earlier on 8th October 2002 from his relationship with Lu YanLiu. Both Tan Ying and Lu YanLiu are Chinese nationals. Tan Ying and her daughter have since returned to China and they now reside there. The deceased was also survived by his parents and his younger brother, Tan Kah Fatt, the co-administrator mentioned earlier.

[6] The marriage between the deceased and Tan Ying was registered under the Law Reform (Marriage & Divorce) Act 1976 [Act 164] while the deceased and Lu YanLiu only underwent a Chinese customary marriage. The existence of this customary marriage is under challenge. Lu YanLiu has since remarried and is a permanent resident here. The birth of the 2nd appellant was registered under section 13 of the Births and Deaths Registration Act 1957 [Act 299], a provision governing the registration of illegitimate children.

[7] On 7th October 2013, Tan Kah Fatt together with Tan Ying applied for and were granted the letters of administration to manage the estate of the

deceased. The beneficiaries identified were the two daughters, Tan Ying, and the parents of the deceased.

[8] In Suit 1, Tan Ying asked for Tan Kah Fatt to be removed as co-administrator on the ground of conflict of interest as he is also one of the directors in the companies in Suit 2; that he had misrepresented to her that despite being illegitimate, Tan Sin Yee was entitled to inherit under the laws of intestacy thereby inducing Tan Ying to include Tan Sin Yee as one of the beneficiaries of the estate of the deceased. Tan Ying claimed that it was only after the assets had been distributed that she learnt otherwise to be the correct position in law. Tan Ying thus sought a declaration to the effect that Tan Sin Yee, as an illegitimate child, does not have a legal right to claim an interest in the estate of the deceased and was consequentially obliged to return monies already received.

[9] Tan Kah Fatt and Tan Sin Yee who are the appellants before us, counterclaimed in Suit 1, seeking expenses for Tan Sin Yee's education and upbringing, and a declaration that she was entitled to 25% of the estate of the deceased on the basis of a purported trust set up for her benefit.

Decision of the High Court

[10] The learned Judge decided that Tan Sin Yee, the 2nd appellant, is an illegitimate child by virtue of the fact that the customary marriage which her parents underwent was not a valid marriage under the Law Reform (Marriage & Divorce) Act 1976 [Act 164]. As an illegitimate child, she was thus not entitled to inherit under the Distribution Act 1958 [Act 300].

[11] On the issue of removal of Tan Kah Fatt, the 1st appellant, as co-administrator, the learned Judge found various actions of Tan Kah Fatt were "self-serving and conflicts with his duty as co-administrator". Consequently, the High Court held that in the circumstances of the case, it was just to remove him immediately as joint administrator of the estate of the deceased; that his conduct and position of conflict to be most unsuitable to hold such a position. Aside from removing Tan Kah Fatt, the High Court also barred him from making any further application and/or to be appointed as a joint administrator of the estate of the deceased. Because Tan Ying is a foreigner, a Chinese National and her daughter still a minor, the High Court decided to enjoin Amanah Raya Berhad as the joint administrator. Other orders issued included:

i. an account detailing and setting out all movable and immovable assets of the deceased held and/or in the possession of and/or utilised by Tan Kah Fatt and/or in the hands and/or possession of or being utilised by other third parties;
ii. Tan Kah Fatt to give full and frank disclosure of all information, details and matters pertaining to the above;
iii. damages for misrepresentation of facts to Tan Ying;
iv. sale of certain property.

[12] The claim of the companies in Suit 2 was, however, dismissed for want of proof.

Decision of the Court of Appeal

[13] Both decisions of the High Court were upheld by the Court of Appeal.

[14] Principally, in relation to the appeal from Suit 1, the Court of Appeal found the High Court had adopted the correct approach as applied in ***Ligar Fernandez v Eric Claude Cooke*** [2002] 5 MLJ 177; [2002] 6 CLJ 152 for the removal of a co-administrator. The Court of Appeal further agreed with the High Court that the respondent had discharged the burden of proving sufficient cause as there was more than a reasonable or strong suspicion that Tan Kah Fatt had acted in conflict of interest as an administrator which warranted his removal as administrator. Consequently, the Court of Appeal declined to interfere in the findings of fact by the High Court as there were no substantial or compelling reasons to do so.

[15] Similarly, the Court of Appeal agreed with the High Court's findings that Tan Sin Yee is an illegitimate child and that as an illegitimate child, she was not entitled to inherit from the deceased's estate under sections 3 and 6 of the Distribution Act 1958 [Act 300]. The Court of Appeal also agreed that the existence of a trust had not been established.

[16] Dissatisfied, both Tan Kah Fatt and Tan Sin Yee sought leave to appeal to the Federal Court and on 15th October 2019, leave was granted to refer four questions of law which were subsequently amended to the questions as set out earlier.

Summary of submissions

[17] The parties have addressed the questions posed in two parts – the issue of the right of an illegitimate child to inherit under the laws of intestacy and, the issue of removal of administrators.

[18] On the first issue, the appellants make the principal argument that Tan Sin Yee, the 2nd appellant, is entitled to inherit under section 6 of the Distribution Act 1958 [Act 300] as she falls within the meaning of "child", defined in section 3 of Act 300. Section 3 is said to carry two enabling limbs – a child means a legitimate child and also a child of a Chinese customary marriage where the personal law of the deceased recognises a plurality of wives.

[19] The 2nd appellant is said to qualify for inheritance under the first limb of section 3 of Act 300 by reason of section 75(2) read with section 3 of the Law Reform (Marriage & Divorce) Act 1976 [Act 164].

[20] Learned counsel argued that even if her parents' marriage is void, section 75(2) of Act 164, as considered by Shankar J (as His Lordship then was) in ***T v O*** [1994] 4 CLJ 593; [1993] 1 MLJ 168; [1994] 3 AMR 2402, saves the 2nd appellant from the stigmatisation of illegitimacy if both her parents reasonably believed the marriage to be valid at the time of marriage. As decided in *T v O* and followed in ***Khor Liang Keow v Tee Ming Kook*** [1995] 4 MLJ 629; [1996] 2 CLJ 631, the conduct of the parties after the marriage was a good indicator of that reasonable belief. On the facts, the deceased and Lu YanLiu had undergone a Chinese customary marriage; lived together for three years as a couple; both before and after the birth of the 2nd appellant and had registered themselves as the father and mother of the 2nd appellant; and that the parents of the deceased had accepted the 2nd appellant as their lawful grandchild. On the facts too, the High Court is said to have found the existence of a customary or traditional marriage but had held it to be invalid because it was not registered, as required under the provisions of Act 164. In addition, the 2nd appellant's late father, a Malaysian citizen, was domiciled and residing in Malaysia at

the time of the marriage. He also carried on business in Klang, thus meeting the conditions in section 75(3) of Act 164.

[21] Learned counsel for the appellants pointed out that section 75(2) of Act 164 was unfortunately not drawn to the High Court's attention; hence it was not addressed by the High Court. As such, the conclusion of the High Court that the 2nd appellant "is therefore an illegitimate child for all legal purposes" is said to be erroneous and *per incuriam*.

[22] It was further argued that the 2nd appellant would also qualify for inheritance under the enlarged definition of 'child' in section 3. According to learned counsel, Act 164 does not abolish the personal law of non-Muslims; all it does is to de-recognise polygamy as a feature of Chinese and Hindu personal law, and it does so for the succession purposes as seen in section 6(2) of Act 300. Through sections 5(1) and (2), pre-existing and, to a limited extent, post-Act customary marriages are recognised whilst a child of any post-Act customary marriage which marriage is void under section 5(4) is specifically preserved under section 75(2).

[23] The appellants find support for their propositions from both the Royal Commission Report on Non-Muslim Marriage and Divorce Laws published in 1971 and from case laws.

[24] First, the Royal Commission Report made the following observations about Chinese customary marriages – that the personal law of the Chinese is based on race; that the Courts have recognised polygamous unions among the Chinese for the purposes of succession; and all wives of plural unions have equal rights. As for case law, the Privy Council in ***Khoo Hooi Leong v Khoo Hean Kwee*** (1926) AC 529 and ***Cheang Thye Pin & Ors***

v Tan Ah Loy (1920) AC 369 have held that under Chinese personal law, the children of secondary wives are regarded as legitimate and '*entitled to inherit equally with his children'*; that no particular form of marriage ceremony was necessary for a Chinese customary marriage to be recognised; that "*the only essential legal requirement of a Chinese customary marriage is that the marriage must be consensual. The ingredients of a ceremony, formal contract, repute of marriage and so on are treated as being evidential only and not essential*." These rights are said to be retained and "embodied" in Act 300 in the earlier mentioned enlarged definition of "child" in section 3 and by the declaration in section 6(2) of an equal succession rights of plural wives.

[25] An alternative argument under Article 8 of the Federal Constitution was also raised, the suggestion being that drawing a distinction between all-natural born children of the deceased on ground of legitimacy offends the guarantee of equality in Article 8. Since the succession provision in section 6 of Act 300 speaks only of "issue" when referring to child or children and their descendants for succession purposes, the definition of "issue" in section 3 which refers to children of the deceased without making a distinction between legitimate and illegitimate child or children, is pertinent. A constitutional reading of Act 300 was urged upon us, that is, to interpret the statute in such a way as to preserve constitutionality. See ***Tejkumar v AK Menon*** AIR 1997 SC 442; ***Minister of Home Affairs v Fisher*** (1980) AC 319; ***Hariharan v Reserve Bank of India*** (2000) 3 LRC 71; ***Reed v Reed*** 404 US 71; ***Indira Gandhi v Pengarah Jabatan Agama Islam Perak*** [2018] 1 MLJ 545; [2018] 3 CLJ 145; [2018] 2 AMR 313.

[26] On the second issue which relates to the matter of removal of administrators and executors, section 34 of the Probate and Administration

Act 1959 requires the establishment of 'sufficient cause' before any probate or letters of administration may be revoked. In this regard, the Privy Council in ***Letterstedt v Broers*** (1884) 9 AC 371 [followed in ***Damayanti Kantilal Doshi v Jigarlal Kantilal Doshi*** [1998] 4 MLJ 268; [1998] 4 CLJ 81, opined that the "*main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate*".

[27] The 1st appellant pointed out that the High Court failed to adequately consider this test in that while the 1st appellant was removed and replaced by Amanah Raya Berhad, the respondent remained as administrator. This was unjustified and breaches the rules for good administration of the estate of the deceased as the position taken by the respondent was that only her daughter was entitled to the whole of the children's share. Together with the respondent's share as the wife of the deceased, the respondent and her daughter would be entitled to 75% of the insurance monies. In monetary terms, this works out to RM5.017 million of the insurance pay-out of RM6.689 million. To promote objectivity and an impartial administration of the estate, only the Amanah Raya Berhad should have been appointed as the sole administrator to ensure proper distribution of the insurance proceeds in the portions as finally decreed by this Court.

[28] These were the responses of the respondent.

[29] First, a preliminary objection was raised to the effect that the first set of questions are academic and hypothetical as the existence of the Chinese customary marriage between the deceased and the mother of the 2nd appellant was not established at the High Court. The traditions which are generally relied on to prove the existence of such a marriage were simply not present. The birth certificate of the 2nd appellant further invited an

inference that there was no valid marriage at the time of her birth – the registration of birth was pursuant to section 13 of the Births and Deaths Registration Act 1957 [Act 299]. As a result of this finding, there were no submissions by the appellants at the Court of Appeal and consequently, no deliberations by the Court of Appeal on this point. This Court was thus invited to disallow these questions.

[30] In any case, the respondent argued that the answers to these questions were clearly in her favour. Section 3 of Act 300 is clear on its face, unambiguous, uncontroversial and there is no *lacuna*. For the purpose of Act 300, the term "child" only includes legitimate child and child adopted under the provisions of the Adoption Act 1952 [Act 257] in which case the 2nd appellant is excluded as a beneficiary under section 6 of Act 300. It was also submitted that if the Court was to give an interpretation which was against the clear express terms of the provision, that would run contrary to the function and role of the Court; that had Parliament intended to allow for an illegitimate child to inherit under the laws of intestacy, there would have been express provisions to that effect.

[31] Learned counsel for the respondent maintained that amendments to Act 300 in 1997 did not make any provision "to improve the legal rights of illegitimate child" to the estate of their intestate parents. In other words, the position of no right to inherit under intestacy laws remained the same.

[32] The intention of Parliament to exclude the illegitimate child from the term child under section 3 of the Distribution Act 1958 is said to be "crystal clear", as further evident from the debates in Parliament during the tabling of amendments to Act 300 – see Hansard on Parliament Debate dated 5th August 1997.

[33] As for the interplay of the Law Reform (Marriage & Divorce) Act 1976 [Act 164] with Act 300, the respondent submitted that registration of marriages is a "blanket requirement applicable to all persons who fall within the ambit of the Act regardless of their customs". Otherwise, again, the intention of Parliament in enacting Act 164 in order to provide for monogamous marriages and the solemnisation and registration of such marriages, would be defeated. Consequently, it would be wrong to consider a child of a Chinese customary marriage which is not registered under Act 164 as, legitimate, would 'go against the legislature's intention'.

[34] Insofar as section 34 of Act 164 is concerned, that it 'validates any unregistered customary marriage after the coming into force' of Act 164, has been settled by the Federal Court in ***Chai Siew Yin v Leong Wee Shing*** when it overturned the Court of Appeal's decision in Civil Appeal No.2-10-2003(W). This was pointed out by the Court of Appeal in ***Tan Siew Sen & Ors v Nick Abu Dusuki bin Haji Abu Hassan & Anor*** [2016] 4 MLJ 602; [2016] 6 CLJ 18; [2016] 3 AMR 787, citing the brief unreported oral judgment of the Federal Court as follows–

> "Having heard the detailed arguments and having considered the relevant provisions of the Law Reform (Marriage and Divorce) Act 1976 and in the circumstances of this case, we are unanimous in our decision that this appeal be allowed.
>
> We are not in agreement with the reasoning of the judgments both in the High Court and the Court of Appeal.
>
> Section 34 of the said Act should not be read in isolation, but in harmony with the other provisions of the Act which encapsulate the overall intention of the Legislature in enacting the Act. To do otherwise would defeat the purpose and

intention of the Act which was enacted to 'provide for monogamous marriages and the solemnisation and registration of such marriages'".

[35] Since it is undisputed that the 'alleged customary marriage' was never registered, then Lu YanLiu was never legally married to the deceased at the material time under Act 164. Consequently, the 2nd appellant is illegitimate and is not entitled to the estate of the deceased under Act 300.

[36] According to the respondent, illegitimate children may only inherit from the estate of the intestate mother – see section 11(1) of the Legitimacy Act 1961 [Act 60]. The fact that there is specific law governing the rights of illegitimate children to inherit property from the mother indicates the intention of Parliament not to include illegitimate child/children in Act 300.

[37] On the contentions of unconstitutionality, the respondent makes the argument that although section 3 discriminates against illegitimate children, it does not violate Article 8 of the Federal Constitution. Following ***Letitia Bosman v Public Prosecutor & Other Appeals (No.1)*** [2020] 5 MLJ 277; [2020] 8 CLJ 147; [2020] 6 AMR 801, there is a clear nexus between the classification of legitimate and illegitimate children with the objective of regulating the distribution of the intestate estate amongst the rightful beneficiaries.

[38] Learned counsel for the respondent submitted that the fundamental rights provided under the Federal Constitution must be balanced with the greater interests of society; and that holding otherwise would "open the floodgate for illegitimate child to claim from the estate of their intestate parents as of right". The Malaysian society is said to still hold a core value in preserving the value of family structure as monogamous and to protect

the interests of rightful heirs under legally recognised marriages; and that the social norm in Malaysia does not regard the status of an illegitimate child to be the same as that of a legitimate child. Learned counsel added that "the policy of this country is that the institution of marriage which acts as the bedrock of the family unit should be protected, strengthened and safeguarded as an institution. Should there be any shift in the consensus of society, the legislature shall be the appropriate and right forum to cause such change in the law instead of the Judiciary".

[39] Finally, the issue of removal of the co-administrator. The respondent submitted that the High Court had found on the facts, sufficient cause for the 1st appellant's removal and this was affirmed on appeal. This was an exercise of discretion which ought not to be disturbed, that the test applied objectively was met on the facts and circumstances of the case.

Decision

[40] The first set of questions, in essence, seek to establish that the 2nd appellant is not an illegitimate but a natural born child of a deceased father and as such is entitled to inherit under the Distribution Act 1958 [Act 300]. The last question deals with the matter of removal of a co-administrator.

i. Succession under the Distribution Act 1958 [Act 300]

[41] The Distribution Act 1958 [Act 300] regulates the distribution of the estate of any person who has died intestate, that is, a person who died without leaving any will prescribing on or for the distribution of the intestate's estate. This is an important aspect of this Act which seems to have been overlooked by many, and it is an aspect which I will return to

shortly. Act 300 also applies to cases of partial intestacy, where a person dies testate but has for some reason or other, made no provision in the will as to the beneficial interest of any property in the estate.

[42] Act 300 applies only in West Malaysia and pursuant to Modification of Laws (Distribution Act 1958) (Extension to the State of Sarawak) Order 1986 [P.U. (A) 446/86] applies too, in the State of Sarawak, with effect from 28th February 1986. Sabah has its own specific law on distribution of intestate estates under the Intestate Succession Ordinance 1960 (Sabah No. 1 of 1960).

[43] Another material feature of Act 300 is the fact that it does not apply to any person professing the Muslim religion, whether in West Malaysia or Sarawak. It also does not apply to any estate where the distribution is governed by the Parsee Intestate Succession Ordinance of the Straits Settlement [SS Cap 54] – see section 2. In the case of Sarawak, Act 300 further does not apply to the distribution of the estate of any natives of Sarawak, "native" as defined in paragraph 161A(6)(a) of the Federal Constitution.

[44] In its application to non-Muslims, Act 300 recognises and anticipates the role of the personal law of non-Muslims. This is when dealing with the matter of "child", where the personal law of the deceased permits a plurality of wives. I shall deal with this too, in greater detail later.

[45] Act 300 has only 10 sections, each no less important than the other. Typical of almost all legislation, the interpretation provision in section 3 seeks to define six terms used in the Act but the meaning assigned in section 3 is caveated with the words "unless the context otherwise

requires". This reminds that the meanings provided in section 3 to the specific terms may need to be reconsidered depending on the context such terms are used in the Act. This interpretative tool is frequently deployed in legislation and care must be exercised when attempting to discern the appropriate meaning to be accorded to any particular term.

[46] There is a plethora of cases dealing with the principles of statutory interpretation, the latest being this Court's decision in **Bursa Malaysia Securities Bhd v Mohd Afrizan Husain** [2022] 4 CLJ 657; [2022] MLJU 502; [2022] 4 AMR 641. There, the Federal Court was invited to rule on the proper construction of rule 16.11(2) of the ACE (Access, Certainty, Efficiency) Market Listing Requirements, issued pursuant to section 378 of the Capital Markets and Services Act 2007 [Act 671]. Rule 16.11(2) set out the circumstances when a corporation "shall" be delisted. A plain and grammatical *in vacuo* reading of rule 16.11(2), without thought or consideration to the other Listing Requirements and provisions of the parent Act 671, would have meant that a corporation had to be delisted the moment it was wound-up; a conclusion reached by the Court of Appeal.

[47] Just prior to this decision, the majority of the Federal Court in **AJS v JMH & Another Appeal** [2022] 1 CLJ 331; [2022] 1 MLJ 778; [2022] 1 AMR 617, had held that the standard canon of construction has always been that the Courts should, in usual cases, begin with the literal rule and that the purposive rule only ought to be relied on where there is ambiguity. In this, the latest of our decisions, the Federal Court has taken a markedly different approach when it disagreed with the Court of Appeal and concluded that the word "shall" used in rule 16.11(2) did not carry the meaning assigned by the Court of Appeal and as generally understood.

[48] What this Court did in **Bursa Malaysia Securities Bhd v Mohd Afrizan Husain** was to examine, amongst others, the functions and duties of Bursa Malaysia. This Court then opined that a contextual construction with the purposive rule of construction as statutorily enunciated in section 17A of the Interpretation Acts 1948 and 1967 [Act 388] must be conducted:

> **[48]** The question or issue that then follows is whether it is correct to construe a provision like r. 16.11(2) such that the text is read or interpreted grammatically, and *in vacuo*, without consideration of the surrounding words and purpose and object of the AMLR and the CMSA? Namely with no consideration for context?
>
> **[49]** We have previously concluded that the AMLR has statutory force. As such the provisions of the AMLR should be construed within the purview of, and in accordance with the principles and objectives of the CMSA. This is particularly so given that the CMSA comprises the source of the AMLR. In order to do so, it is necessary to first, construe the CMSA, the statutory interpretation of which is governed by s. 17A into the Interpretation Acts 1948 and 1967.
>
> **[50]** Malaysian law requires that the interpretation of an Act be undertaken with the purpose and object of the Act in mind. Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:
>
> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> Please see also *Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561* ("*Tebin* 's case").
>
> **[51]** It is clear from the wording of s. 17A that any reading which is purely textual, as opposed to contextual, is to be rejected.

[49] Having undertaken that exercise, this Court found that the approach adopted by the Court of Appeal was clearly erroneous. In short, with the introduction of section 17A of Act 388, the purposive rule of construction prevails over the literal rule of construction when one is construing statute. The literal rule of construction must give way to the purposive rule and in discerning the meaning borne in the terms used in any particular legislation, the Courts must favour a construction which promotes the purpose, object or intent of the legislation over a construction which does not. I would add that such an approach does not wait for the state of ambiguity to present before the purposive approach is adopted and applied.

[50] Consonant with that approach which surely makes cogent sense, I turn then to the purpose of Act 300. As mentioned earlier, this aspect was not regarded at all by the Courts below.

[51] First, the purpose of Act 300 as discerned from its long title is that it is "An Act relating to the law of distribution of intestate estates". That is the long and short of the clear purpose and intent of this Act - it contains the laws dealing with the distribution of the estate of a person who died intestate. It does not deal with matters of legitimacy of a child or the validity of a marriage unless of course, it is specifically spelt out in the provisions of the Act itself; or there is a direction that any particular term in the Act bears the meaning as ascribed under any other specific law. For instance, section 3 provides that the term "native" has "the same meaning assigned to it in paragraph 161A(6)(a) of the Federal Constitution".

[52] This aspect of Act 300 is critical to the proper understanding of what is obviously a rather old piece of legislation, enacted shortly after Independence in 1957. When it was first enacted in 1958, it repealed four

other pieces of similar legislation – see section 10. Since its enactment, the Act has been amended twice, once in 1975 *vide* Distribution (Amendment) Act 1975 [Act A281] with effect from 28th February 1975; the second time *vide* Act A1004 with effect from 31st August 1997. As correctly pointed out by the respondent, none of these amendments sought to deal with the question of legitimacy of a child. This is hardly surprising given that the Act is not enacted for such purpose; it has the sole purpose of providing the law for distribution of intestate estate.

[53] Next, there are three distinct features in Act 300. First, the Act applies to regulate the distribution of all immovable and movable property of the deceased if they are domiciled in West Malaysia and Sarawak. This is by necessary inference from the terms of section 4. This is not an issue of concern in this appeal since the deceased was domiciled in West Malaysia at the time of his death.

[54] The second feature is the recognition and provision in section 5 that "for the purpose of distribution under this Act, there shall be no distinction between those who are related to the deceased through his father and those who are related to him through his mother"; and whether the relation to the deceased is by full or half blood. Section 5 further provides that there is also no distinction between those who are actually born in the lifetime of the deceased or who at the time of his death, were only conceived in the womb but who were born alive after the deceased's passing. Again, these significant provisions appear to have escaped the attention of the Courts below when determining the issues. In short, distribution under the Act adopts the principle of parity and a person is potentially a beneficiary so long as some lineal blood connection with the deceased can be established.

[55] The third feature of the Act is that in the distribution of the estate of the intestate, the intent is to distribute the whole or entire estate "except insofar as the same consists of land". This is evident from the terms of section 6(1)(j) where the default position after exhausting the scheme or order of distribution as provided in section 6(1) is, the estate will fall to the Government, following the concept of *bona vacantia*.

[56] With all those principles at the forefront of this determination, I turn then to section 6 of Act 300 which is central in this appeal. Section 6 provides for the order of succession to intestate estates:

> 6. (1) After the commencement of this Act, if any person shall die intestate as to any property to which he is beneficially entitled for an interest which does not cease on his death, such property 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 dies 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 dies 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 dies 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 dies 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 dies 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 dies 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 dies 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 dies 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 survive 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 such person takes an absolutely vested interest under such trusts; then

Fourthly, for the great grandparents of the intestate and if more than one survive the intestate in equal shares absolutely; but of 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 insofar as the same consists of land.

[**emphasis added**]

[57] These are my observations on section 6.

[58] The order of statutory succession is structured. The distribution is in order of priority for the deceased's own immediate family first before radiating to the extended family and those connected with him by bloodline, whether on the matriarchal or patriarchal side of the deceased. The

distribution starts with the spouse of the deceased who stands to inherit or be distributed the entire or whole estate if there is no issue or parent(s). Where there is present either spouse, issue or parent, then the distribution will follow the order set out in sections 6(1)(a) to (h), depending on who survives the deceased. Where there are neither spouse, issue or parent(s) or even granduncles or grandaunts surviving the deceased, the default position is one of *bona vacantia*, the Government is entitled to the whole estate except insofar as the estate consists of land – see section 6(j).

[59] The second observation concerns the proportion of the estate that is distributed amongst the surviving family of the deceased. Where a spouse and a parent(s) survive the deceased with no issue, section 6(1)(b) provides for an equal distribution between the spouse and the parent(s). However, the moment the deceased is survived by issue, then the issue always takes the substantial share – see sections 6(1)(e), (f) and (g).

[60] The third observation is the use of the term, "issue" in section 6(1) as opposed to the word, "child". And, this takes me right into the heart of the appeal before us.

[61] There is no reference to the term "child" in section 6 at all. The only term used is "issue". The argument of the respondent is that this definition when read with the definition for "child", leaves no room for the inclusion of illegitimate children such as the 2nd appellant; an argument seemingly adopted wholesale by both the High Court and the Court of Appeal.

[62] With respect, I disagree for several reasons.

[63] First, as pointed out at the outset, the object or purpose of Act 300 is to provide for the distribution of the deceased's estate amongst those who survive the deceased. That distribution must further follow the order of succession as set out in section 6. This is clear from the use of the term 'shall' in section 6(1). Abiding by the order prescribed in section 6 does not in the least, detract from the primary purpose of the Act. All it means is there is an ordered or organised distribution according to succession.

[64] Second, Act 300 does not, whether expressly or by implication, state that only legitimate children may inherit in the case of intestacy. On the contrary, nowhere in section 6 is the term "child" used. What is used is the term "issue". The term "child" is actually used elsewhere in Act 300, for instance in sections 7 and 9 but certainly, not in section 6, the relevant provision under consideration. Yet, the decisions of the Court of Appeal and the High Court turned on the definition of the term "child" as opposed to the term "issue", seeming to treat both terms as one and the same, that the definition of "issue" is to be found in the definition of "child", and that section 6 provides for "child".

[65] With respect, this cannot be the correct interpretative exercise or construction to either of the terms. Such course in effect, renders the definition of "issue" otiose and redundant. Although it was held in **Ipoh Garden Sdn Bhd v Ismail Mahyuddin Enterprise Sdn Bhd** [1975] 2 MLJ 241; [1975] 1 LNS 66, that associated words explain and limit each other, care must be taken to read the words, their use and context holistically:

> It is a fundamental rule in the construction of statutes that associated words (*noscitur a sociis*) explain and limit each other. The meaning of doubtful word or phrase in a statute may be ascertained by a consideration of the company in

which it is found and the meaning of the words which are associated with it. The rule *noscitur a sociis* is frequently applied to ascertain the meaning of a word and consequently the intention of the legislature by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, ejusdem generis, and referable to the same subject matter. Especially must it be remembered that the sense and meaning of the law can be collected only by comparing one part with another and by viewing all the parts together as one whole, and not one part only by itself.

[66] It is improper and wrong to ascribe the definition of "child" to the term "issue" without more, particularly when both terms are separately defined in section 3; more so when the term "child" does not even appear in section 6. Since the term "issue" is used in section 6, we should strive to understand its meaning; and not so much the meaning of "child" used elsewhere in Act 300.

[67] These are the definitions of the two terms as found in section 3:

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 under the provisions of the Adoption Act 1952 [*Act 257*] or the Adoption Ordinance of the State of Sarawak [*Swk. Cap. 91*];

"**issue**" includes the children and the descendants of deceased children;

[68] It is immediately apparent that both terms deploy different interpretation features. The term "issue" utilises the word "includes" while "child" is defined in more definitive language with the word "means". Generally, the presence of the word "includes" in the definition of a term suggests an enlarging or non-exhaustive definition as opposed to the use

of the more definitive or comprehensive word “means”, found in the definition of “child”.

[69] Several decisions explain the significance of the word “includes” when used in the definition of a term, and how it differs from the word “means”. See for instance **Rex v Latip bin Haidin** [1935] 1 MLJ 84; [1935] 1 LNS 72; **Public Prosecutor v Gan Boon Aun** [2017] 3 MLJ 12; [2017] 4 CLJ 41; [2013] 5 AMR 929; **Tenaga Nasional Bhd v Majlis Daerah Segamat** [2022] 2 MLJ 119; [2022] 2 CLJ 497; [2022] 3 AMR 1; **Corporation of Portsmouth v Smith** 13 QBD 184; **Dilworth v Commissioner of Stamps** (1899) AC 99.

[70] In **Public Prosecutor v Gan Boon Aun** [2017] 3 MLJ 12; [2017] 4 CLJ 41; [2013] 5 AMR 929, the Federal Court ruled that Article 160(2) is a non-exhaustive definition due to use of the word ‘includes’, whilst in **Tenaga Nasional Bhd v Majlis Daerah Segamat** [2022] 2 MLJ 119; [2022] 2 CLJ 497; [2022] 3 AMR 1 the apex Court observed that “the word “includes” will generally have an expansive, illustrative and or explanatory meaning, unless the statutory context in which it appears indicates that it must have an exhaustive meaning. The Court needs to look at the statute in its full context to see what the statute in its entirety provided for”.

[71] Similarly, Erett MR in **Corporation of Portsmouth v Smith** *supra*, 195 opined that the intention for using the word “includes” is that in construing the Act, “the word in addition to its ordinary meaning shall bear the meanings mentioned in the section”. Further, the presence of such a word generally enlarges the meaning of the word or phrase occurring in the body of the statute; that “when it is so used these words or phrases must be construed as comprehending, not only such things as they signify

according to their natural import, but also those things which the interpretation clause declares that they shall include", as per Lord Watson in **Dilworth v Commissioner of Stamps** (*supra*) 105.

[72] In discerning the meaning of "issue" in Act 300, it is noticed that the definition in section 3 actually does not explain what the term itself means. The definition instead provides for the scope or prescription of meanings that may fall within its group of meanings [*sui generis*], enlarging the primary meaning, in which case its ordinary or natural meaning must first be discerned.

[73] These are the definitions of the term "issue" in several dictionaries:

> **Oxford Dictionary of English**
>
> 5 [mass noun] formal or Law children of one's own…
>
> **Oxford English Dictionary**
>
> 1) n. a person's children or other lineal descendants such as grandchildren and great-grandchildren. It does not mean all heirs, but only the direct bloodline.
>
> **Anandan Krishnan (Anandan Krishnan, Words, Phrases & Maxims – Legally & Judicially Defined, Vol 91**
>
> In the law of descent, issue means descendants, lineal descendants; offspring; legitimate offspring. This word has a peculiar meaning, being often used in the sense of 'children' and legal or technical meaning, being used in the sense of 'descendant'. It is a term of flexible meaning (per Jesel JM in *Morgan v Thomas* (1882) 9 QBD 645). The word 'issues' includes offspring of both sexes… An adopted son does not fall within the meaning of the term 'issue'… 'Issue' is a general name, including all, even to the remotest, descendants. The word 'issue' is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children. A devise to 'issue' means, prima facie, legitimate issue, and an intention to include illegitimate must be deduced from the language itself, without resort to extrinsic evidence.

The Longman Dictionary of Law

1. Offspring, a person's issue comprises his children, grandchildren and other lineal descendants. See *Re Hammond* [1924] 2 Ch 276 (gift of personalty 'to A and his issue'); *Re Manley's WT* [1976] 1 All ER 673; *Re Drummond* [1988] 1 WLR 234.

Black's Law Dictionary [Eleventh Edition, Thomson Reuters 2019]

3. Wills & estates. Lineal descendants; offspring.

Jowitt's Dictionary of English Law

Issue (Lat. Exitus). Event, consequence, sending forth; the legitimate offspring of parents.

(1) The issue of a person consists of his children, grandchildren and all other lineal descendants. "Issue", however, is sometimes used by testators in the sense of "children" (Re Warren (1884) 26 Ch. D. 208). Illegitimate descendants are presumed to be included in all instruments and legislation made since 1987: Family Law Reform Act 1987 s. 1…Historically the word "issue" in a will was either a word of purchase or of limitation as would best answer to the intention of the testator, but the abolition of the rule in *Shelley's Case* (1581) 1 Co Rep 93b (q.v.), by the Law of Property Act 1925 s 13 means "issue" is now always construed as a word of purchase…

Stroud's Judicial Dictionary of Words and Phrases

Issue (OFFSPRING). This is a word of flexible meaning:

(a) Its legal meaning is "descendants" *in infinitum* (*Holland v Fisher*, Orl. Bridg, 214; *Warman v Seaman*, Poll. 117; *Davenport v Hanbury* 3 Ves. 259; per Lord Watson, *Hickling v Fair* [1899] AC 15)

(b) Its popular meaning is "children" (per Jessel MR, *Morgan v Thomas* 9 QBD 643; and per James and Brett LJJ, *Ralph v Carrick* 11 CH D 873);…

In its popular meaning it is a designation of persons; whilst in its technical import it is generally a word of limitation…

"issue" means primarily descendants in succession unless limited by context to "children"…

Osborn's Concise Law Dictionary [8th Edition, Swee & Maxwell]

> Issue, (1) The issue of a person consists of his children, grandchildren, and all other lineal descendants. At common law, a gift "to A and his issue" conferred a life estate only because of the failure to use the appropriate word "heirs"…

[74] It is apparent from the above that the term "issue" in relation to the deceased suggests descendants by blood lineage, not dependent on the matter of legitimacy of the descendant. The word "issue" is used as a word of purchase, to describe how long an interest will last. Here, the right to inherit lasts so long as there is established some genetical or blood lineage connection between the person claiming succession in the distribution with the deceased. The definition of "issue" in section 3 seeks to statutorily extend the generational lineage to beyond the immediate persons who may properly be counted as issue, to the offspring or grandchildren, even if the immediate parents of such grandchildren are themselves deceased.

[75] The presence of the word "children" in the definition of "issue" does not alter or affect the above conclusions. The intent in using the word "issue" as opposed to "children" in section 6 is obviously to expand or enlarge the category of persons who may succeed or inherit, consonant with the purpose of Act 300. Otherwise, as mentioned earlier, the presence of the specific word "issue" would be bereft of meaning and purpose.

[76] In **Harrison v Harrison** [1951] 2 All ER 346, Barnard J of the Probate, Divorce and Admiralty Division opined that "*prima facie* the term child or children in a statute means legitimate child or children, but a wider meaning may be given, where that meaning is more consonant with the object of the statute: see *Fulham Parish v Woolwich Union* [1907] AC 255. Following this decision MacKinnon J in *Morris v Britannic Assurance Co Ltd* [1931] 2 KB 125 held that the term "child" used in the Industrial Insurance Act, 1923,

included illegitimate children because the nature of the obligation as to which insurance was desired was the same whether the child was legitimate or illegitimate". In **Galloway v Galloway (Ex parte)** [1955] All ER 429, the House of Lords was also of the view that although the word "children" in a statute *prima facie* meant legitimate children, that meaning was displaced if the context in which the word "children" appeared required it, to embrace a wider category than that of legitimate children.

[77] Similarly, in asking what is the object of Act 300, that it is all about distributing the estate of the intestate; that it does not deal with legitimacy of the child, offspring or issue of the deceased, the *prima facie* meaning of child is displaced by the presence of the word "issue". The added presence of the two separate defined terms of "child" and "issue" and deliberate use of the term "child" elsewhere in Act 300 and not in section 6, the provision under consideration, supports and reinforces this conclusion.

[78] In the facts of the appeal, it is not in dispute that the 2nd appellant is an issue of the deceased. Her birth certificate attests to that lineage. Consistent with the intent and purpose of Act 300, it cannot be denied that the 2nd appellant falls within the meaning and scope of the term "issue" in which case she is indeed, entitled to succeed and inherit under section 6. As an issue and descendent of her deceased father, her alleged lack of legitimacy does not deprive of her succession under section 6.

[79] The respondent has urged for a stricter reading of sections 3 and 6, citing **Minister of Home Affairs & Anor v Collins Macdonald Fisher & Anor** [1980] AC 319 where *Sydall v Castings Ltd* [1966] 3 All ER 770 was referred to, that clear words are needed before the 2nd appellant can inherit. Amendments to Act 300 are said to have not "improved the legal rights of

illegitimate children", and Parliamentary debates of 5th August 1997 were cited in support. In contrast, examples of legislation using clear words to include illegitimate children were given. For instance, the Civil Defence Act 1951, Malay Regiment and the Federation Regiment (Retired Pay, Pensions, Gratuities and other Grants) Regulations 1952, Workmen's Compensation Act 1952, Civil Law Act 1956, Maintenance Ordinance 1959, Legitimacy Act 1961, Armed Forces Act 1972, Members of Parliament (Remuneration) Act 1980, Pensions Act 1980. Some of these legislations were discussed in **Pang Chuan Cheong & Ors v Oh Kwong Foi & Ors** [2007] 8 MLJ 354; [2007] 5 AMR 107.

[80] In this regard, I refer to the comments of Lord Denning in **Sydall v Castings Ltd** [*supra*] as to whether an illegitimate daughter was a descendant who could benefit under an insurance policy of her late father. Though rendered in a dissenting judgment and there has since been legislative changes in the English scene, the comments are nevertheless relevant to this appeal:

> "We were pressed by counsel, however, to give the words an extraordinary meaning. "Relations", it is said, includes only legitimate relations; and "descendant" means only a legitimate descendant. For this purpose reliance is placed on a passage in *Jarman on Wills* (8th Edn.) p 1783. If this contention be correct, it means that because Yvette is illegitimate, she is to be excluded from any benefit. She is on this view no "relation" to her father: nor is she "descended" from him. In the eye of the law she is the daughter of nobody. She is related to nobody. She is an outcast and is to be shut out from any part of her father's insurance benefit.
>
> I have no doubt that such an argument would have been acceptable in the nineteenth century. The judges in those days used to think that, if they allowed

> illegitimate children to take a benefit, they were encouraging immorality. They laid down narrow pedantic rules such as that stated by Lord Chelmsford in Hill v Crook…In laying down such rules, they acted in accordance with the then contemporary morality. Even the Victorian fathers thought they were doing right when they turned their erring daughters out of the house. They visited the sins of the fathers on the children – with a vengeance. I think that we should throw over those harsh rules of the past. They are not rules of law. They are only guides to the construction of documents. They are quite out of date. We no longer penalise the illegitimate child. We should replace those old rules by a more rational approach. If they are wide enough to include an illegitimate child, we should so interpret them..."

[81] The rational interpretation and meaning of 'issue' as explained above is clear from the terms of section 6 and, it accords with the purpose and intent of Act 300. Such a reading complies with the equality guarantees in Article 8 of the Federal Constitution as there is no logical or rational differentiation to discriminate between all offspring of the deceased. Furthermore, such a reading undeniably promotes the welfare of the 2nd appellant. As expounded in the *les celebre* decision of **Indira Gandhi v Pengarah Jabatan Agama Islam Perak** [2018] 1 MLJ 545; [2018] 3 CLJ 145; [2018] 2 AMR 313, a literal construction which would give rise to consequences which the Legislature could not possibly have intended should be avoided. Instead, a "purpose reading of art. 12(4) that promotes the welfare of the child and is consistent with good sense would require the consent of both parents (if both are living) for the conversion of a minor child".

[82] I must add that to succumb to the respondent's arguments would be to give Act 300, in particular its section 6, an interpretation and construct which will strain the intent and meaning of the provisions including that of

the definition of "child" in section 3. More so when, as alluded to earlier, section 5 has clearly provided that "for the purpose of distribution under this Act, there shall be no distinction between those … actually born in the lifetime of the deceased or who at the time of his death, were only conceived in the womb but who were born alive after the deceased's passing". There cannot be any more emphatic or clearer language on the intent of Act 300.

[83] On this reason alone, the appeal must be allowed and the decisions of the Courts below set aside.

ii. The customary marriage

[84] For completeness, I shall deal with the matter of the validity of the marriage between the deceased and the mother of the 2nd appellant, Lu YanLiu. This was a Chinese customary marriage. From the grounds of decision of the High Court, there is no affirmative finding that there was no such marriage. The High Court was in fact more concerned with the issue of registration of a customary marriage; that post 1st March 1982, all customary marriages must be registered. Otherwise, such marriages are invalid. Section 4 of the Law Reform (Marriage & Divorce) Act 1976 [Act 164] provides that any marriage solemnised under any law, religion, custom or usage after Act 164 came into force must be registered to be valid – see paragraphs 37 and 38 of the grounds of decision at the High Court. This was affirmed on appeal – see paragraph 69 of the grounds of decision at the Court of Appeal.

[85] At paragraph 37, the learned High Court Judge acknowledged that the "traditional wedding and dinner held by the said deceased and DW2 at

Lan Hwa Hotel/Restaurant in Klang was at the end of 2002 and therefore for the marriage to be valid it has to be registered which the deceased and DW2 in the present case failed to do". Consequently, the High Court proceeded to hold at paragraph 38 that "the deceased and DW2 was [sic] never legally married at any material time under LRA".

[86] Two observations on the existence and validity of a customary marriage.

[87] First, Act 164 came into force only on 1st March 1982, the appointed date, almost six years after it was passed by Parliament – see section 1. As explained at the outset of this judgment and also discussed by the Court of Appeal in **Tan Siew Sen & Ors v Nick Abu Dusuki bin Haji Abu Hassan & Anor** [2016] 4 MLJ 602; [1998] 4 CLJ 81; [2016] 3 AMR 787, Act 164 applies to all non-Muslims in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia, that it seeks to provide for monogamous marriages and the solemnisation and registration of such marriages. Act 164 now forms the personal law of such persons. Consequently, while the deceased may belong, follow or practice some religion, custom or usage, Act 164 is the law which will apply to him and his person.

[88] Next, from the provisions of Act 164 there are two material aspects to a marriage process: the solemnisation and the registration. Of the two, it is the solemnisation that "maketh" the marriage, or forms the formal part of the marriage where vows or oaths are made and exchanged, witnessed and performed by properly authorised persons. This is evident from the terms of sections 5(4), 6, 22 to 26, and 34. Under section 6, marriages which do not abide by these requirements "shall be void"; and as provided

in section 34, registration or lack of registration does not affect the validity or invalidity of a marriage:

Disability to contract marriages otherwise than under this Act

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

Avoidance of marriage by subsisting prior marriage

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

Solemnization of marriages

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 Registrars 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 orover, 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 previouslymarried 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.

Solemnization of a civil marriage performed in office of a Registrar or elsewhere

23. The Registrar acting under paragraph 22(1)*(a)* or *(b)* shall, after delivery to him of a certificate for the marriage issued by the Registrar or Registrars concerned or a licence authorizing the marriage, address the parties in the following words, either directly or through an interpreter:

> "Do I understand that you A.B. and you C.D. are here of your own free will for the purpose of becoming man and wife?".

Upon their answering in the affirmative he shall proceed thus:

> "Take notice then that, by this solemnization of your marriage before these witnesses here present according to law, you consent to be legally married for life to each other, and that this marriage cannot be dissolved during your lifetime except by a valid judgment of the court and if either of you shall, during the lifetime of the other, contract another marriage, howsoever and wheresoever solemnized, while this marriage subsists, you will thereby be committing an offence against the law.".

Next, the Registrar shall enquire of the parties, directly or through an interpreter, whether they know of any lawful impediment why they should not be joined together in matrimony. Upon their answering in the negative he shall enquire, directly or through an interpreter, of each of the parties whether he or she will take her or him to be his or her lawful wedded wife or husband. Upon their answering

in the affirmative, the Registrar, the parties and the witnesses shall comply with section 25.

Solemnization of a marriage through religious ceremony, custom or usage

24. (1) Where any clergyman or minister or priest of any church or temple is appointed by the Minister to act as Assistant Registrar of Marriages for any marriage district, such clergyman or minister or priest may after delivery to him of a statutory declaration under subsection 22(3) solemnize any marriage, if the parties to the marriage or either of them profess the religion to which the church or temple belong, in accordance with the rites and ceremonies of that religion.

(2) Where any person is appointed by the Minister to act as Assistant Registrar of Marriages for any marriage district such person may after delivery to him a statutory declaration under subsection 22(3) solemnize any marriage in accordance with the custom or usage which the parties to the marriage or either of them practise.

(3) An Assistant Registrar solemnizing a marriage under this section shall in some part of the ceremony remind the parties that either of them shall be incapable during the continuance of the marriage of contracting a valid marriage with any other person and if either of them shall marry during the continuance of the marriage he or she shall commit an offence.

(4) In this section—

"priest of a temple" includes any member of a committee of management or governing body of that temple and any committee member of any religious association;

"priest of a church" includes any officer or elder of the church.

Entry in marriage register

25. (1) Immediately after the solemnization under section 23 or 24 is performed the Registrar shall enter the prescribed particulars in the marriage register.

(2) Such entry shall be attested by the parties to the marriage and by two witnesses other than the Registrar present at the solemnization of the marriage.

(3) Such entry shall then be signed by the Registrar solemnizing the marriage.

Solemnization of marriages in Malaysian Embassies, *etc*., abroad

26. (1) A marriage may be solemnized by the Registrar appointed under subsection 28(4) at the Malaysian Embassy, High Commission or Consulate in any country which has not notified the Government of Malaysia of its objection to solemnization of marriages at such Malaysian Embassy, High Commission or Consulate:

Provided that the Registrar shall be satisfied—

(a) that one or both of the parties to the marriage is a citizen of Malaysia;

(b) that each party has the capacity to marry according to this Act;

(c) that, where either party is not domiciled in Malaysia, the proposed marriage, if solemnized, will be regarded as valid in the country where such party is domiciled; and

(d) that notice of the proposed marriage has been given at least twenty-one days and not more than three months previously, which notice has been published both at the office of the Registrar in the Embassy, High Commission or Consulate where the marriage is to be solemnized and at the Registry of the marriage district in Malaysia where each party to the marriage was last ordinarily resident and no caveat or notice of objection has been received.

(2) The procedure for solemnization and registration of marriages at a Malaysian Embassy, High Commission or Consulate shall be similar in all respects to that which applies to marriages solemnized and registered in Malaysia under this Act as if the Registrar appointed for a foreign country were a Registrar in Malaysia.

(3) A marriage solemnized under this section shall, for the purposes of this Act, be deemed to be a marriage solemnized in Malaysia, and subsection 7(2) shall apply *mutatis mutandis* in relation to any offence under this Act, in respect of such marriage.

Legal effect of registration

34. Nothing in this Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

[89] While section 5(3) permits a person, who is unmarried and who after the appointed date marries under any law, religion, custom or usage, that person cannot or is incapable, during the continuance of this earlier marriage, contract a valid marriage with another person under any law,

religion, custom or usage. That first marriage however, must nevertheless be solemnised in accordance with the provisions in Part III – see section 5 (4) and as just mentioned, a failure to comply with section 5, including section 5(4) renders the marriage, void under section 6.

[90] The importance and significance of the solemnisation process is borne out by the detailed requirements of the contracting parties, the registrar, clergyman, minister or priest who is solemnising the marriage and what particular words such persons have to use to address the parties when performing the solemnisation, and the need for a statutory declaration affirming the matters set out in section 22(3) – see sections 22 to 24 as set out above.

[91] The solemnisation of the marriage may be conducted at the civil registry or office by the Registrar of Marriages or "elsewhere"; the latter being "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 "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" [see section 22(1) of Act 164]. Regardless the location of the solemnisation, the marriage must be immediately registered – see section 25(1). Registration records the fact of the marriage brought into existence through the solemnisation. Hence, the terms of section 34.

[92] Consequently, although section 5(3) of Act 164 permits the deceased and Lu YanLiu to marry under any law, religion, custom or usage, section 5(4) nevertheless requires such marriage to be solemnised in the manner as provided in Part III, namely sections 22 to 26 of Act 164. These

requirements under Act 164, with effect from 1st March 1982, the appointed date, now forms part of the personal law of the deceased. Although the position in Singapore under the Women's Charter 1961 differs slightly from the provisions of Act 164, the observations of Choor Singh J in **Re Estate of Liu Sinn Min, deceased** [1974-1976] SLR(R) 143 at page 34 aptly sums up my thoughts on this aspect of a valid customary marriage, post appointed date:

> "… Whatever may have been the position in Singapore before the coming into force of the Women's Charter on 15 September 1961 it is clear that after this date, persons of the Chinese race, indeed persons of all races with the exception of those professing the Muslim faith, are no longer governed by their personal law. All questions relating to their marital status and the legal consequences which flow from that status are now governed by the Women's Charter. It is no longer possible for Chinese or Hindus to contract in Singapore polygamous marriages which they could under their personal law.…"

This decision was cited with approval in **Soniya Chataram Aswani v Haresh Jaikishin Buxani** [1995] SGHC 169 by G P Selvam J, where His Lordship at paragraph 10 said:

> "That is a succinct statement of the true legal position. It is, of course, permitted to have a customary marriage ceremony after and in addition to observing the requirements of the Act for a valid marriage but such a ceremony could not take place before solemnisation of marriage as prescribed by the Act…"

I agree and adopt the same.

[93] There is no evidence that the marriage between the deceased and Lu YanLiu was solemnised in accordance with Part III. In fact, this aspect was not addressed. What instead was led in evidence was a conduct of a

customary marriage involving a traditional dinner with family and friends. No photographs were produced to support this. The deceased and Lu YanLiu then proceeded to live together for around three years during which time the 2nd appellant was born and the 2nd appellant was accepted into the deceased's family as a grandchild. Testimonies to this effect were given by Lu YanLiu and the deceased's parents.

[94] Insofar as the existence of a customary marriage is concerned, it is not necessary that photographs or even a traditional tea ceremony is required to prove or establish its existence. A Chinese customary marriage does not only involve a dinner nor must there even be one to begin with. Other traditions may be led to establish its existence. In **Cheang Thye Pin v Tan Ah Loy** [1920] AC 369, and later in **Khoo Hooi Leng v Khoo Hean Kwee** [1926] AC 529, the Privy Council held that no particular form of ceremony was required to recognise a Chinese customary marriage; this is still good law which however, must be read with the changes introduced by Act 164.

[95] As pointed out in the report of the Royal Commission on Non-Muslim Marriages and Divorce, "the only essential legal requirement of a Chinese customary marriage is that the marriage must be consensual. The ingredients of a ceremony, formal contract, repute of marriage and so on are treated as being evidential only and not essential". Given that Act 164 still allows for contracting and conducting of marriages according to law, religion, custom or usage, it can only be concluded that such marriages may still take place, especially in cosmopolitan, multi-religious and multi-racial Malaysia. And, from all the evidence adduced, it may be satisfactorily deduced that there was indeed, a Chinese customary marriage between the deceased and Lu YanLiu.

[96] Such a customary marriage must nevertheless be solemnised in the manner provided in Part III in order to be valid. That would be the clear intention of sections 5(3) and (4), that the personal law on marriage here has been tempered by statute. Aside from the fact that the customary marriage between the deceased and Lu YanLiu was never registered, there was no evidence on whether the solemnisation process in the statutory terms as explained was actually complied with. Pursuant to section 75(2) read with section 75(7) of Act 164, such a marriage which is in contravention of section 6 is a void marriage. I must add that the issue of plurality of wives under Act 300 thus becomes irrelevant. Had the Chinese customary marriage between the deceased and Lu YanLiu been in accordance with Act 164, the validity of the subsequent marriage between the deceased and the respondent would then become questionable.

[97] That, however, is in respect of the validity of the marriage between the deceased and Lu YanLiu. As far as the 2nd appellant is concerned, and this is the real focus of the appeal and also the claims at the High Court, section 75(2) provides that 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. Section 75(2) applies even if there was no petition to declare the Chinese customary marriage a nullity as section 75(7) defines "void marriage" to mean a marriage declared to be void under sections 6, 10, 11, subsection 22(4) or section 72. These circumstances for declaring a marriage void are in effect wider than the grounds on which a marriage may be declared void under section 69. Section 69 does not include a ground to avoid a marriage by reason of lack of solemnisation, a requirement under section 5(4) and which would render the marriage void under section 6.

[98] Evidence was led to the effect that Lu YanLiu had this reasonable belief. As opined by Shanker J [as His Lordship then was] in **T v O** [1994] 4 CLJ 593; [1993] 1 MLJ 168; [1994] 3 AMR 2402, reasonable belief "is a question of fact. The emphasis is on the word 'reasonable'. This imports an element of objectivity into what is otherwise a highly subjective matter. Whether a person reasonably believed something must therefore depend on the facts of the case". The testimonies of Lu YanLiu and the parents of the deceased as well as the conduct of the parties attests to the existence of such belief.

[99] It can be appreciated why section 75(2) aims to de-characterise the status of illegitimacy which would otherwise visit on the 2nd appellant. Although this provision was not addressed in the Courts below, this is a point of law, and an important one at that, which must be addressed at any time, in the name of and for the sake of doing justice.

[100] For this added reason, the 2nd appellant is actually a legitimate child entitled to inherit under her late father's estate.

[101] As for the related questions posed for the determination of this Court, it is apparent that the focus of these questions should have been on the term "issue" and not the term "child". Even the additional question of "Whether the term 'child' in Section 6(1)(g) of the Distribution Act 1958 applies to all the natural born children of a deceased for succession purpose?" suffers the same fate. Although Chinese customary marriages may still be contracted, such must marriages comply with Act 164 in respect of solemnisation and registration. This Court must thus decline to answer these related questions.

iii. Removal of joint administrators

[102] The 1st appellant was removed as joint administrator on the ground that he had misled the respondent on the legal position of the 2nd appellant. This left the respondent as co-administrator with Amanah Raya Berhad appointed in place of the 1st appellant. Consequential orders to the effect of displacing the beneficiaries of the deceased's estate, namely his parents, and the 2nd appellant, were made.

[103] Section 34 of the Probate and Administration Act 1959 under which the Court was moved for the removal of the 1st appellant reads as follows:

> Any probate or letters of administration may be revoked for sufficient cause.

[104] With the reasons as explained above, there was no basis or cause for the removal of the 1st appellant.

[105] In any event, in the consideration of whether there was proof of sufficient cause, the welfare, interests and benefit of all the beneficiaries of the estate of the deceased must always be given proper regard. The sufficiency of cause for any removal of an appointment by the Court must be taken carefully, weighing the grounds of complaint against the welfare and interests of all beneficiaries. This was explained in **Letterstedt v Broers** (1884) 9 AC 371 and also in **Damayanti Kantilal Doshi v Jigarlal Kantilal Doshi** [1998] 4 MLJ 268; [1998] 4 CLJ 81.

[106] There was no such consideration, with the High Court taking the view that since the 1st appellant had misled the respondent on the 2nd appellant's entitlement, he was conflicted. The welfare of the other beneficiaries was

not weighed especially when the High Court made the consequential orders for a sale of the family home. This is clearly erroneous.

[107] The fourth question posed must thus be answered in the negative.

[108] In the upshot, the order for the removal of the 1st appellant is in error and must be set aside.

Conclusion

[109] For all the reasons explained above, the appeal is allowed with costs and the decisions of the High Court and the Court of Appeal are set aside. For clarity, the decision of the High Court in respect of the counterclaim stands dismissed as leave to refer questions in respect of the counterclaim was disallowed.

Dated: 18 January 2023

Signed

(MARY LIM THIAM SUAN)
Federal Court Judge
Malaysia

Counsel/Solicitors

For the appellant:

Cyrus Das, AG Kalidas & Jasmin Raj
K. Nadarajah & Partners
Wisma KLS, 1st Floor
No. 26, Jalan Tengku Diauddin
41000 Klang
Selangor

For the respondent:

Loh Chang Woo & Nurul Hafeeza binti Mohd Zaidi
C W Loh & Associates
Suite 1, No. 31-3
Jalan Ambong 2, Kepong Baru
52100 Kuala Lumpur