

RE-DISTRIBUTING A DECEASED'S ESTATE BY WAY OF A DEED OF FAMILY ARRANGEMENT

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Introduction

Distribution of a deceased's estate in accordance with the terms of his will or in accordance with intestacy law (in the event the deceased died without leaving a valid will) may cause discord within the family. Such a situation may arise when a group of beneficiaries perceives the distribution to be unfair or when one member of the family has been inadvertently left out of the will or omitted by operation of intestacy law. Under the Intestate Succession Act (Cap. 146) ("**the Intestate Succession Act**"), step-children who are not legally adopted and illegitimate children are excluded from the distribution of the estate.

The law recognises that when there is a dispute within the family, the members of the family can enter into an agreement in order to resolve the disputed rights and to preserve peace of the family by avoiding litigation. It is an agreement intended to be generally and reasonably for the benefit of the family. This agreement entered into by members of the same family is known as a "family arrangement". Often, such family arrangements involve one or more parties to the agreement putting the greater interest of the family before their own so as to confer some benefit upon the family.

An illustration of how a Deed of Family Arrangement is used to re-distribute a deceased's estate

In the Singapore High Court case of *Pek Nam Kee and another v Peh Lam Kong and another*, a father died intestate leaving a substantial estate to be shared among his widow and thirteen children. Seven of the children were children of the deceased's first wife and the remaining six children were children of the widow. Under section 7 of the Intestate Succession Act, the widow was entitled to a half share of the deceased's estate and each of the children was entitled to a one-thirteenth share of the remaining half share of the deceased's estate (i.e. a one twenty-sixth share). However before the deceased's estate was administered completely, the widow passed away. The widow had made a will under which she bequeathed her estate to her six children in equal shares. This had a significant impact on the rights of the two sets of siblings to share in their father's estate. After the widow's death, each of the seven children of the first wife was entitled to a 6/156 shares in the estate while each of the widow's six children was entitled to 19/156 shares in the estate (i.e. about three times more than their half-siblings because they were each entitled to one-sixth of the widow's half share in the father's estate).

The thirteen children signed a Deed of Family Arrangement and agreed to distribute the deceased's and widow's estate in a different way. All parties agreed that the widow's estate would be paid \$510,000 in settlement of her share in the father's estate and that the balance of the father's estate would be divided equally among each of the children. The Deed of Family Arrangement also provided that all thirteen

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children would pay their inheritance into one of the family-owned companies resulting in each of the children having an equal shareholding in the company.

Such redistribution of the estate can also be achieved when the deceased passed away leaving a will.

Formalities for Family Arrangement

The necessary formalities of a family arrangement are the same as those of a general contract.

When the family arrangement deals with the disposition of land, it is required to be evidenced in writing. When the family arrangement does not concern the disposition of land, it need not be in writing. The Singapore Court has recognised that a family arrangement may be implied from a long course of dealings among family members. However, it is nonetheless prudent and recommended to embody the family arrangement in writing and to execute it formally as a deed.

It is necessary that all the beneficiaries of the estate (whether under the will or under the law of intestacy) give their consent to re-distribute the assets in accordance with the family arrangement.

The beneficiaries have to be above the age of 21 years in order to give their consent.

Grounds on which a Deed of Family Arrangement can be set aside

The most recent case on the setting aside of a Deed of Family Arrangement is the Court of Appeal case of *Kuek Siang Wei and another v Kuek Siew Chew*. The Court of Appeal held that a family arrangement will generally be upheld provided it has been entered into fairly, without concealment or imposition on either side, with no suppression of what is true or suggestion of what is false. This article focuses on two grounds for setting aside a Deed of Family Arrangement which have been addressed by the Singapore Courts: failure of honest disclosure of material facts and undue influence.

Failure of honest disclosure of material facts

In any family arrangement, there must be honest disclosure by each party to the other (or all of the others if there are more than two parties to the arrangement) of all material facts known to him, relative to the rights and title of either, as are calculated to influence the other's judgment in the adoption of the arrangement. An advantage taken by either of the parties of the other's known ignorance of such facts will render the Deed of Family Arrangement liable to be set aside. It is not required for the intention to be dishonest; there only has to be a material non-disclosure by one or more parties.

In *Kuek Siang Wei and another v Kuek Siew Chew*, the Court of Appeal upheld the High Court's decision to set aside the Deed of Family Arrangement, amongst others, on the ground that some of the beneficiaries were not apprised of the true value of the deceased's estate and their entitlement under section 7 of the Intestate Succession Act prior to the signing of the Deed of Family Arrangement.

In this case, the parties had signed a Deed of Family Arrangement where the deceased's first wife and their

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two daughters were entitled to receive \$200,000 each. The High Court found on the evidence that the deceased's first wife and their two daughters' were not informed of their potential entitlements under the Intestate Succession Act. Under the Act, the first wife could potentially obtain about \$6.7 million and each daughter could potentially obtain about \$2.1 million. The Court of Appeal affirmed the High Court's holding that the full extent of the deceased's estate is a material fact that must be disclosed to all parties prior to the signing of the Deed of Family Arrangement. In signing the Deed of Family Arrangement, the deceased's first wife and their two daughters were effectively forgoing any entitlement that they had under the Intestate Succession Act.

Undue Influence

There are two distinct categories of cases in which the Court will set aside a transaction on the basis of undue influence. The first category is actual undue influence and the second category is presumed undue influence. Where the court is being invited to draw a presumption of undue influence, the plaintiff must show that the parties had a particular relationship such as parent and child or solicitor and client, which enabled one of them to influence the decisions of the other.

In *Pek Nam Kee and another v Peh Lam Kong and another*, one of the grounds on which the High Court set aside the Deed of Family Arrangement was that the defendant (who was an administrator of the deceased's estate) had exerted actual undue influence over the plaintiffs (who were beneficiaries of the estate).

Vis-à-vis the second plaintiff, the High Court found on the evidence that the defendant had the capacity to influence the second plaintiff as he was substantially older than her, more educated and considerably more experienced and successful in his business. The Court also found on evidence that the defendant had pressured the second plaintiff to sign the Deed of Family Arrangement – (i) the defendant promised to buy the second plaintiff's share of the estate if she signed the Deed of Family Arrangement and he knew that she was keen to receive some money; and (ii) the defendant threatened to hold up the distribution of the estate indefinitely if the second plaintiff did not sign the Deed of Family Arrangement.

Facts which are not sufficient to set aside a Deed of Family Arrangement

Lack of independent legal advice

Generally, the mere lack of independent legal advice, in itself, does not invalidate the Deed of Family Arrangement. While the Courts may take into account the lack of independent legal advice, the party seeking to set aside the Deed of Family Arrangement has to establish some other factor such as an inequality or bargaining power, misrepresentation, undue influence or unconscionability. It is nonetheless recommended for all parties signing the Deed of Family Arrangement to seek independent legal advice on the document in the interests of deflecting later challenges to the Deed of Family Arrangement.

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Ignorance of the true state of his rights or the true nature of the arrangement

The Courts have recognised that the fact that a party is ignorant of the true state of his rights or is ignorant of the true nature of the arrangement is not fatal to a Deed of Family Arrangement as long as the transaction has been effected in good faith, the ignorant party has not been misled by anyone else and the ignorant party has an intention which is not widely different from that expressed by the Deed of Family Arrangement.

Stamp Duty Implications

The Deed of Family Arrangement is subject to stamp duty when properties and shares of the deceased's estate are not transferred in accordance with the will or to intestacy law. Take for example, in a situation where the deceased passed away leaving a will and the will provided for half of the house to be bequeathed to his wife and the remaining half of the house to be bequeathed to his three children in equal shares. The four parties (i.e., wife and three children) signed a Deed of Family Arrangement for the three children to transfer their respective shares to the wife. As the distribution is not in accordance with the will, ad valorem stamp duty is payable by the wife on the transfer of the half share of the house originally meant for the deceased's three children in equal shares.

Conclusion

The Deed of Family Arrangement gives the beneficiaries the flexibility to redistribute the estate and to structure the manner in which the distribution will be affected. However, care should be taken during the negotiation process amongst the beneficiaries to prevent the Deed of Family Arrangement from being challenged in court subsequently.

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