

075 Personal Representatives cum Trustee in Estate Administration: Conflict of Duties and Obligations

## PERSONAL REPRESENTATIVE *CUM* TRUSTEE IN ESTATE ADMINISTRATION: CONFLICT OF DUTIES AND OBLIGATIONS

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### ABSTRACT

The office of personal representative in the administration of a deceased's estate requires a personal representative who must at the utmost ensure himself to have a solemn understanding of his duties and obligations. The personal representative must act with the highest degree of trustworthiness and good faith in discharging his office. However, in the process of estate administration, one question that has nagged the office of personal representative is that what should be the two distinct capacities of personal representative and trustee since the expression of trustee under the Malaysian Trustee Act 1949 includes the duties incidental to the office of a personal representative. The question is relevant because the role of a personal representative is quite distinct from that of a trustee and is subject to different legal framework and liability. Hence, this paper seeks to examine the legal position of a personal representative and to identify the line separating the duties of a personal representative from his duties as a trustee. For this purpose, the paper analyses relevant statutory provisions as provided by the Probate and Administration Act 1959 and the Trustee Act 1949. An analysis of the decided cases is also made to identify the distinction between the offices of a personal representative to that of a trustee in the administration of the deceased's estate. The paper concludes that there is no objective test as to when and how a personal representative becomes a trustee since a person may be a personal representative in respects of certain assets and trustee in respect of others. What matter most is that they must carry out their job diligently and reasonably in which failure to do so will result in their facing legal action by the beneficiary or other interested parties.

Keywords: Estate Administration; Personal Representatives; Trustee; Duties & Obligations.

### INTRODUCTION

When a person dies, his estate needs to be administered. In the context of estate administration, it is important to determine whether the deceased dies testate or intestate. The deceased is said to have died testate if he died leaving a will appointing one or more executors who would be responsible for the management of the deceased's estate. Where there is no will to be executed, the deceased is said to have died intestate<sup>3</sup> and it is essential for the court to appoint an administrator to carry out the similar function of an executor<sup>4</sup>.

The governing law on the administration of estates in Malaysia mandated the appointment of personal representatives either executor or administrator before the deceased's estate can be dealt with. The office of personal representative in the administration of a deceased's estate requires a personal representative who must at the utmost ensure himself to have a solemn understanding of his duties and obligations. However, in the process of estate administration, one question that has nagged the office of personal representative is that what should be the two distinct capacities of personal representative and trustee since the element of trust is part and parcel of the duties and obligation imposed on the personal

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<sup>3</sup> The phrase 'intestate' includes a person who leaves a will but dies intestate as to some beneficial interest in his movable or immovable property. See Probate and Administration Act 1959 (Act No97 of 1959), section 2.

<sup>4</sup> Probate and Administration Act 1959, sections 7 and 16

representative. In addition, the expression of trustee under the Malaysian Trustee Act 1949 includes the duties incidental to the office of a personal representative. As the role of a personal representative is quite distinct from that of a trustee and is subject to different legal framework and liability, this paper aims to examine the legal position of a personal representative and to identify the line separating the duties of a personal representative from his duties as a trustee. The discussion includes an analysis of the relevant statutory provisions and also the decided cases in order to identify the distinction between the offices of a personal representative to that of a trustee in the administration of the deceased's estate.

## PERSONAL REPRESENTATIVE AND TRUSTEE

The phrase 'personal representatives' essentially covers both executors and administrators. In academic writing, executors and administrators in many occasions have been collectively described as the personal representatives of a deceased's estate<sup>5</sup>. It is so as both parties play the same role in the administration of the deceased estate and owed duties to the estate beneficiaries<sup>6</sup>. However, in spite of the prefix 'personal', the personal representatives do in fact deal with all assets of deceased, real and personal to which the deceased entitled for an interest not ceasing on his death<sup>7</sup>.

The appointment of personal representative in Malaysia is governed by Probate and Administration Act 1959. Once the letter of representation is granted to the personal representative either in common form or solemn form, he may proceed with the duties for the administration of the deceased's estate<sup>8</sup>. Personal representative has duties to uphold the rights and beneficial interest of beneficiaries in the deceased estate by collecting, transmitting, converting, paying debt and liabilities and last but not least distributing the remainder to the legal beneficiaries. In carrying out all those duties, certain powers are granted to the personal representatives. They are comprised of power to dispose of property<sup>9</sup>, power to enter into a contract<sup>10</sup>, power to assent and conveyance<sup>11</sup>, power to appropriate<sup>12</sup>, power to appoint trustees to minor's property<sup>13</sup> and power to postpone distribution<sup>14</sup>. Mahinder Singh Sindhu (2005) in his book, *The Law of Wills, Probate and Administration and Succession in Malaysia and Singapore* has clearly stated the main duties of personal representatives which are to collect all debts due to the estate, to pay all the debts and satisfy all the liabilities of the estate, to convert unauthorized investments into authorized ones (if need be) and to distribute the remainder of the estate according to deceased's will or rules of intestacy<sup>15</sup>.

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<sup>5</sup> United Asian Bank Bhd v Personal representatives of Roshammah (decd) (1994) 3 MLJ 327

<sup>6</sup> David Hayton and Charles Mitchell, *Hayton & Marshall Commentary and Cases on the Law of Trusts and Equitable Remedies* (London: Thomson Sweet & Maxwell, 2005); J.E. Penner, *The Law of Trusts* (Oxford University Press, Incorporated, 2006).

<sup>7</sup> M. Sladen and T. Sherring, *Ranking, Spicer and Pegler's Executorship Law, Trusts and Accounts* (Butterworths, 1996).

<sup>8</sup> Akmal Hidayah Halim, *Administration of Estate in Malaysia: Law and Procedure* (Kuala Lumpur: Sweet & Maxwell Asia, 2012).

<sup>9</sup> Probate and Administration Act 1959 (Act No 97 of 1959), Section 60

<sup>10</sup> Probate and Administration Act 1959 (Act No 97 of 1959), Section 71

<sup>11</sup> Probate and Administration Act 1959 (Act No 97 of 1959), Section 72

<sup>12</sup> Probate and Administration Act 1959 (Act No 97 of 1959), Section 74

<sup>13</sup> Probate and Administration Act 1959 (Act No 97 of 1959), Section 75

<sup>14</sup> Probate and Administration Act 1959 (Act No 97 of 1959), Section 77

<sup>15</sup> Mahinder Singh Sindhu, *The Law of Wills Probate Administration & Succession in Malaysia and Singapore (with Cases and Commentaries)*, 2 ed. (Kuala Lumpur: International Law Book Services, 2005).

With regards to trustee, a reference to the meaning of trust in Halsbury's Law of Malaysia<sup>16</sup> would provide a useful starting point in an attempt to examine the nature of a trustee. A person become a trustee, where that person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or purposes, he is said to hold property or rights in trust for the other or those other or for the purpose or those purpose. A trust relationship is a classic example of a relationship, fiduciary in character, which in case of a breach of duty by the holder, would entitle the person in favour of whom the trust is created to consequential remedies, which could be personal or proprietary in nature<sup>17</sup>.

#### **PERSONAL REPRESENTATIVE *CUM* TRUSTEE**

Properties of the estate before distribution and conveyance are undoubtedly being held on trust by the personal representative for the legal beneficiaries of the estate. In *Loh Cheng Leong & Ors v. Tan Beng Kheng & Ors*<sup>18</sup>, the court agreed that being the administrator and trustee of the properties of the estate, the defendant owed a fiduciary duty to the Plaintiffs as the legal beneficiaries to the said estate that is the administrator/trustee - legal beneficiaries' relationship. The court further emphasized that the fundamental and primary role of an administrator cum personal representative is faithfully to administer the estate of the deceased by paying the just debts of the deceased and distributing the residue of his property according to law and to render a just and true account of the administration whenever lawfully required. This is what an administrator has sworn that he will do *vide* the Grant of Letters of Administration. His duty is to use the estate to pay the debt and to distribute the surplus to the lawful beneficiaries.

Any failure to pay the just debts and to distribute the nett value or residue of the property for which an administrator has sworn to perform is a breach of his fundamental and primary role as an administrator giving rise to an irresistible and reasonable inference that his failure will deprive the legal beneficiaries of their rights to their shares of the estate which they are entitled to. Only the administrator as the legal representative of the estate of the deceased could lay his hands on all the properties in the estate. If the estate is not distributed, whatever benefits derived from the estate will be in his hands alone for which he must account. Personal representative who is appointed through testamentary document derive their authority from the will, and the deceased usually wish to confer on them a wide range of powers, which would facilitate an efficient estate administration not only during the administration but also at the time of creation of trust to the beneficiaries, during which time the economic climate or the needs of the beneficiaries are liable to change. The powers conferred on the personal representative as a trustee in the testamentary document are supplemented by the statutory power in the Civil Law Act 1956 and the Trustee Act 1949.

By virtue of section 21 of Civil Law Act 1956 law, an executor is deemed to be trustee for person who is entitled to the residue of deceased's estate on intestacy. The section provides that:

When any person dies or has died, having by his will, appointed any person to be his executor, the executor shall be deemed to be a trustee for the person, if any, who would be entitled to the estate in case the person died intestate in respect of any residue not expressly disposed of, unless it appears by the will that the person so appointed executor was intended to take the residue beneficially.

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<sup>16</sup> Malayan Law Journal, *Halsbury's Laws of Malaysia*, Wills, Probate, Administration and Succession, vol. 4 (Kuala Lumpur: Malayan Law Journal Sdn. Bhd, 2004).

<sup>17</sup> Wan Azlan Ahmad and P.L. Andrews, *Equity and Trusts in Malaysia* (Sweet & Maxwell Asia, 2005).

<sup>18</sup> [2012] 1 LNS 582

The position of the personal representative as trustee in cases of partial intestacy has been reiterated in Section 8 of Distribution Act 1958 which provides as follows;

Where any person dies leaving a will beneficially disposing of part of his property, the provisions of this Act shall have effect as respects the part of his property not so disposed of, subject to the provisions contained in the will,

Provided that the personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is entitled to take such part beneficially.

In relation to Trustee Act 1949, the statute gives general powers to the trustee and personal representatives. The statutory power includes the power for sale to sell by auction<sup>19</sup><sup>19</sup>, power to sell subject to depreciable conditions<sup>20</sup><sup>20</sup>, power to give receipt<sup>21</sup><sup>21</sup>, power to compound liability<sup>22</sup><sup>22</sup>, power of renewable leaseholds to renew and raise money for the purposes<sup>23</sup><sup>23</sup>, power to raise money by sale or charge<sup>24</sup><sup>24</sup>, power to insure<sup>25</sup><sup>25</sup>, power to employ agent<sup>26</sup><sup>26</sup>, power to concur with others<sup>27</sup><sup>27</sup>, power to delegate trust during absence abroad<sup>28</sup><sup>28</sup>, power to apply income for maintenance and to accumulate surplus income during a minority<sup>29</sup><sup>29</sup> and power of advancement<sup>30</sup><sup>30</sup>.

## **CONFLICT OF DUTIES AND OBLIGATIONS OF PERSONAL REPRESENTATIVE AND TRUSTEE**

Certainly, a personal representative can be liable in law and equity for breach of his duties in much the same way that trustees can be liable. However, in the process of estate administration, the issue of distinction capacities between personal representative and trustee needed the office of personal representative since the expression of trustee under the Malaysian Trustee Act 1949 includes the duties incidental to the office of a personal representative.

The problem of distinguishing a personal representative and trustee arises under section 3 of the Trustee Act 1949 that defines “trust” as follows:

“trust” does not include the duties of chargee, but with this exception the expressions “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative and “trustee”, where the context admits, includes a personal representative, and “new trustee” includes an additional trustee.

The expression “trustee” therefore includes the duties incidental to the office of a personal representative. One question that has nagged personal representatives is at what stage they

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<sup>19</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 16

<sup>20</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 17

<sup>21</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 18

<sup>22</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 19

<sup>23</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 20

<sup>24</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 21

<sup>25</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 24

<sup>26</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 28

<sup>27</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 29

<sup>28</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 30

<sup>29</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 36

<sup>30</sup> Trustee Act 1949 ( Act No 208 of 1949), Section 37

switch from the role of personal representatives and become trustees. The question is relevant because the role of a personal representative is quite distinct from that of a trustee.

Historically, the origins of the personal representative and trustee are quite different<sup>31</sup>. The historical development of the law can be traced to the English law which has been marked by the existence of a series of different judicial institutions. Personal representation legal framework is developed from the jurisdiction exercised by the ecclesiastical courts or common law court, whereas law governing trustee emerged from the court of chancery or court of equity<sup>32</sup>. The Court of Common Law developed the basic rules and principles whereas Court of Chancery generates its own rules and principles which as a body of law are collectively known as 'equity'.

In Malaysia, a personal representative is governed by Probate and Administration Act 1959 while trustee is subject to Trustee Act 1949. However, although both personal representative and trustee are governed by two different statutes, there is a conflict regarding to what should be their two distinct capacities. This is because the powers, duties and obligations of the personal representative under the Act are quite similar to that of the trustee under the Trustees Act 1949 creating a grey area in the line separating the duties of a personal representative from his duties as a trustee.

In the book entitled *Probate and Administration in Singapore and Malaysia: Law and Practice*, the learned author<sup>33</sup>, on the appointment of executors and trustees observed the following:

"A will provides for the disposition of a testator's property. He does so through his representatives named in the will as executors and trustees. Though the same persons may be appointed as executors and trustees, their functions are quite distinct. An executor calls in the estate, converts the assets into cash and distributes the same amongst the beneficiaries if this is what the will directs. The act of the executor in calling in the estate and attending to all predistribution formalities is the act of an executor *per se*. The act of distributing the estate amongst the different beneficiaries is the act of trustee. These are distinct duties and it is a slender line which divides the duties of an executor from that of a trustee."

The distinction between the offices of the personal representative with the trustee was also discussed in the case of *Re Ponder*<sup>34</sup>. In this case, it has been held that a personal representative who has paid all expenses and debts, cleared the estate and completed his duties in a proper way holds the residue not as a personal representative, but as a trustee.

However, even though he thus becomes a trustee, his capacity as executor still remains, in so far as he may be called upon at any future time to deal in his capacity as executor with any assets that may subsequently be discovered in the estate.

Although according to section 3 of the Trustee Act the personal representative is also a trustee, the former is not subject to the Act if he exercises to the power confers on him by the Probate and Administration Act 1959 in the course of distributing the estate. In *Re Estate of Tambi bin Osman deceased*<sup>35</sup>, a single administrator who had paid the debts of the deceased applied to the Court for direction as to whether the administrator could give a valid

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<sup>31</sup> D.J. Hayton, C.C.J. Mitchell, and O.R. Marshall, *Hayton and Marshall : Commentary and Cases on the Law of Trusts and Equitable Remedies* (Sweet & Maxwell, 2005), at p.59.

<sup>32</sup> John Ross Martyn and Nicholas Caddick, *Williams, Mortimer and Sunnucks on Executor, Administrator and Probate* (London: Sweet & Maxwell, 2008), at p.807.

<sup>33</sup> G Raman, *Probate and Administration in Singapore and Malaysia* (Kuala Lumpur: Malayan law Journal, 2005). pp. 15, 16.

<sup>34</sup> [1921] 2 Ch 59.

<sup>35</sup> [1929] SSLR 186.

receipt for the proceeds of the sale of land having regard to the provisions of section 15(2) of the Trustees Ordinance (now section 18(2) of the Trustees Act)<sup>36</sup> and the provisions of section 2(1) and the definition of 'trust' in section 3 of the Trustees Ordinance. It was held that, although an administrator was a trustee within the meaning of the Trustees Ordinance, he was not a trustee for sale. It was further held that although an administrator was a trustee for the purpose of the Trustees Ordinance, he was nevertheless a personal representative and had power to sell the land for the purpose of distribution even though there were no debts, without being subject to the provisions 15(2) of the Trustees Ordinance. Hence, as sole personal representative, he was able to give good receipt for the proceeds of sale.

The decision of the House of Lords in *Attenborough v Solomon*<sup>37</sup> is a classic instance that opined that when a personal representative assents in his own favour as trustee, he changes his capacity from personal representative to trustee. If the deceased died leaving a will, the executor so appointed by the will becomes a trustee of the will upon completion of his/her executorial duty such as paying the debts and the funeral and testamentary expenses of his testator<sup>38</sup>. Hence, the executor can then perform the trusts and exercise the powers conferred on the trustee. But that does not mean that he has ceased to be a personal representative. Therefore if an executor applied for registration, it would be no concern of the registrar to inquire whether he had become a trustee, however much time may have elapsed between the grant of probate and the application.

In *William, Mortimer and Sunnucks on Executors, Administrators and Probate*<sup>39</sup> the learned author had stated that,

A personal representative as trustees ...Where property is bequeathed to executors, as trustees, if they prove the will, this is, in itself, an acceptance of the particular trusts.

In spite of these basic differences in function, the office of personal representative resembles that of the trustees in many aspect .There is still a similarity between the office of personal representative and that of trustee. However it is a mistake to treat the two as identical<sup>40</sup>.

In theory, it is possible for one of several trustees to be nominated and confirmed as executor, and then he after realizing the estate and paying the debts, can transfer the residuary estate of trust to the whole body of trustees, including him to be administered by them for the purposes of the trust. Lord President Inglis in ***Gordon v City of Glasgow Bank (1879) 7 R 55 at p.56*** said that the persons who were appointed as trustees and executors were clothed with a double character, firstly the character of executors for the purposes of realizing and converting the estate and secondly, the character of trustees under a trust which was contemplated to endure for a very considerable period. The executor's title is a factorial one in that he acts in a sense as a representative of the deceased estate and the trustee' title is proprietary in character.

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<sup>36</sup> This section does not enable a sole trustee to give a valid receipt for the proceeds of sale or other capital money arising under a trust for sale of land. Section 3(1) of the Trustees Act 1959 defines 'trust for sale' in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; 'trustees for sale' means the person (including a personal representative) holding land on trust for sale.

<sup>37</sup> [1913] AC 76

<sup>38</sup> Re Timmis [1902] 1 Ch 176; George Attenborough & Son v Solomon & Anor [1913] AC 76; Wanchee Incheh Thyboo v Golam Kader [1883] 1 Ky 611 and Stubbs & Ors v Loh Hoh Seng & Ors [1888] 4 Ky 409

<sup>39</sup> John Ross Martyn and Nicholas Caddick, *Williams, Mortimer and Sunnucks on Executor, Administrator and Probate* (London: Sweet & Maxwell, 2008).

<sup>40</sup> R Kerridge, *Parry and Clark the Law of Succession* (London: Sweet & Maxwell, 2002).

There were a few cases, where the court held that personal representative regardless they are executors or administrator to be a trustee. For instance in the case of *Re Estate Of Yong Wai Man; Ex Parte Yong Khai Min*<sup>41</sup> held that the administrator who is also a guardian holding the property of an infant is a trustee holding the property under an implied trust for the infant. Since he is a trustee he should be guided by the Trustee Act 1949, subject to whatever terms the Court or Judge may have imposed. The Trustee Act 1949 applies to an implied trust which arises as soon as the guardian comes into possession of property belonging to an infant and in the circumstances; the guardian of the property of an infant can be regarded as a trustee within the meaning of the Act and attracts the application of the Act. In *Ong Thye Peng v Loo Choo Teng & Ors*<sup>42</sup>, the Federal Court held that the trustees of the estate, just like the administrators, must act in the interest of all the beneficiaries. Their duty is to ensure that the estate of which they are trustee's, benefits as much as possible when they deal with trust property.

Furthermore, in the case of *Tay Choo Foo @ Tay Chiew Foo v. Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors*<sup>43</sup>, the court has held that an administrator of the estate is a constructive trustee under the eyes of law which impliedly shows that administrator or personal representative has trusteeship role<sup>44</sup>. However the contention is not conclusive as in the case of *Koh Siew Keng & Anor v. Koh Heng Jin*<sup>45</sup> the Court of Appeal held that even though a person is neither a constructive trustee, nor a trustee under a resulting trust, as an executive and personal representative of the testator's estate he still fell within the broader definition of "trustee" given by the Trustee Act 1949.

## CONCLUSION

Based on the discussion, it is established that whenever there is a conflict between the role of a personal representative and a trustee, the former would always prevail. Nevertheless, there is no objective test as to when and how a personal representative becomes a trustee since a person may be a personal representative in respects of certain assets and trustee in respect of others. As the line separating the duties of a personal representative from his duties as a trustee is rather blurred, each and every case would be decided based on the individual facts and circumstances. Hence, any person entrusted with the duties as personal representative or trustee must carry out his job diligently and reasonably as failure to do so would probably result in legal action instituted against him by the beneficiary or other interested parties to the estate concerned.

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<sup>41</sup> [1994] 4 CLJ 880

<sup>42</sup> [2008] 1 CLJ 571

<sup>43</sup> [2005] 1 LNS 202; [2009] 1 MLJ 289

<sup>44</sup> [Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming Philip](#) [1996] 2 CLJ 380; [1995] 3 MLJ 74

<sup>45</sup> [2008] 3 CLJ 450

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