IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(A) 7

Civil Appeal No 55 of 2022

Between

WDT

… *Appellant*

And

WDS

… *Respondent*

Summons No 38 of 2022

Between

WDT

… *Applicant*

And

WDS

… *Respondent*

Summons No 47 of 2022

Between

WDT

… *Applicant*

And

WDS

… *Respondent*

In the matter of Originating Summons No 9 of 2021

Between

WDS

… *Plaintiff*

And

WDT

… *Defendant*

EX TEMPORE **JUDGMENT**

[Gifts — Incomplete]
[Civil Procedure — Appeals — Adducing fresh evidence on appeal]

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[2023] SGHC(A) 7

Appellate Division of the High Court — Civil Appeal No 55 of 2022 and Summonses Nos 38 and 47 of 2022
Woo Bih Li JAD, Kannan Ramesh JAD and Debbie Ong Siew Ling JAD
6 February 2023

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Kannan Ramesh JAD (delivering the judgment of the court *ex tempore*):

1 This is an appeal from the decision of a judge of the General Division of the High Court (the "Judge") in *WDS v WDT* [2022] SGHCF 12 (the "Oral Judgment"). We have also heard two applications by the appellant for permission to adduce further evidence on appeal. The applications for permission to adduce further evidence in AD/SUM 38/2022 ("SUM 38") and AD/SUM 47/2022 ("SUM 47") (collectively the "applications") are dismissed. The appeal in AD/CA 55/2022 ("the appeal") is also dismissed. These are our reasons.

Background facts

2 The deceased had four children, all of whom are beneficiaries under her will. The appellant was the Deceased's youngest daughter. Until the deceased's passing in 2016, the appellant lived with her in Toronto, Canada. In January

2015, the deceased suffered a serious stroke. For around a year after her discharge from hospital, the appellant took care of the deceased at home with hired help. Thereafter, the deceased moved into a private senior care home in Toronto with the appellant as her co-occupant.

3 WongPartnership LLP ("WongPartnership") was the law firm that assisted the deceased with the preparation of her will in 2013. At that time, they also assisted the deceased with the making of a gift of S$2.5m to the appellant. Before taking instructions from the deceased in 2013, WongPartnership arranged for her mental capacity to be assessed by a psychiatrist in New York. This psychiatrist was present at the execution of the will and a deed of gift for the S$2.5m gift to the appellant. In March 2014, the deceased reviewed and confirmed the contents of these documents before a psychiatrist in Singapore. B was a close long-time friend of the deceased, and assisted her through this process.

4 On 25 June 2016, B wrote to WongPartnership to inform them that the deceased intended to make a gift of another US$1.5m to the appellant (the "Gift"). She mentioned that the deceased wanted to express her gratitude to the appellant for her hard work and sacrifice as her caregiver after her stroke. WongPartnership advised that they would arrange a video call to confirm the deceased's instructions, following which they would prepare a deed of gift for her review and execution. They also advised that it would be prudent for the deceased to undergo a mental capacity assessment before executing the deed of gift, so that the Gift could not be challenged by the appellant's siblings in the future.

5 WongPartnership confirmed the deceased's instructions via video call on 25 August 2016. On or about 7 September 2016, during a phone conversation

with B, the deceased asked whether the appellant had received the Gift. When B told her that the appellant had not, she urged B to make sure that the appellant received the Gift as soon as possible. This prompted B to suggest the preparing a letter of instruction to the deceased's lawyers and bankers that was to be signed by the deceased. B prepared the letter and it was signed by the deceased on 14 September 2016. The letter (the "14 September Letter") stated that the deceased gave instruction to her lawyers and bankers to execute all necessary funds transfers "now" for the Gift to the appellant. The next day, on 15 September 2016, WongPartnership sent a draft deed of gift to B for the deceased's approval. They again advised that it would be prudent for the deceased to undergo a mental capacity assessment before executing the deed of gift. B did not hand the 14 September Letter to the deceased's bankers and lawyers. She kept the 14 September Letter with her and only passed it to the appellant after the deceased passed away.

6 Thereafter, WongPartnership and B tried to make arrangements for the assessment of the deceased's mental capacity before executing the deed of gift. Unfortunately, before the assessment could be done, the deceased passed away in New York.

7 There were disagreements between the respondent who is the executor of the will, and the appellant regarding whether the Gift should be recognised as a debt of the deceased's estate. In the proceedings below, the respondent sought, amongst other things, a declaration that the appellant did not have a valid claim for the sum of US$1.5m as a creditor of the deceased's estate.

The decision below

8 The Judge granted the declaration sought. The Judge's finding that is relevant to this appeal is her rejection of the appellant's argument that the rule

in *In re Rose; Rose v Inland Revenue Commissioners* [1952] 1 Ch 499 ("*Re Rose*") was applicable. The rule in *Re Rose* is that a gift will be regarded as complete if the donor has done all that is necessary and in her power to effect the gift. The Judge found that the deceased had not done all that was within her power to procure the transfer of US$1.5m to the appellant. She had not signed the deed of gift, provided it to the relevant bank, and given the relevant bank instructions to effect the Gift. While she had prepared the 14 September Letter, it was not given to B with instructions to convey it to WongPartnership or one of her banks. It also did not contain information as to the specific bank account from which the Gift was supposed to come – the deceased's bankers or lawyers would have required this information in order to effect the Gift.

Issues to be determined

9 In the appeal, the appellant argues that there is new evidence which shows that the Judge's finding above was incorrect. She seeks permission to admit this evidence in the applications. There are therefore two issues to be determined:

(a) Should the new evidence be admitted?

(b) Did the deceased do all that was necessary and in her power to effect the Gift?

SUM 38 and SUM 47

10 We are of the view that the new evidence sought to be admitted by the applications is ultimately not relevant to the appeal. Thus, it does not fulfill the requirement set out in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") that the evidence must be likely to have an important influence on the case, though it need not be decisive.

11 The new evidence comes in two categories: (a) evidence of the appellant's knowledge of the deceased's intention to gift the appellant US$1.5m; and (b) evidence that the appellant held a power of attorney over one of the deceased's bank account with a bank (the "POA" and the "Bank Account" respectively). For the following reasons, the new evidence does not have any bearing on the key issue in the appeal.

12 In the appeal, the only relevant inquiry is whether the deceased had done all that was necessary to perfect the Gift or, as a corollary, whether the appellant, as the donee, had under her control everything necessary to perfect her title to the Gift. If the conclusion is that the deceased had not, it must follow that the appellant did not have such control. Whether or not the appellant knew about the deceased's intentions to make the Gift is inconsequential to this inquiry. This makes the evidence in the first category not relevant.

13 Nor does the POA assist the appellant. The POA at best allowed the appellant to stand in the deceased's shoes to undertake transactions *on the deceased's behalf* involving the Bank Account. It did not allow her to *unilaterally* exercise her authority to disburse funds from the Bank Account to herself. Crucially, the POA was not given by the deceased to the appellant for the purpose of effecting the Gift. It was given in April 2015, more than a year prior to when the deceased decided to make the Gift, and appears to be in response to the deceased's health situation at that time. Thus, the POA would only be of potential relevance if the deceased had acted on her intention to make the Gift by giving specific instructions to the appellant to effect the transfer of US$1.5m from the Bank Account to the appellant pursuant to the POA. If the deceased wanted to make the Gift in this manner, she could have given instructions to the appellant either directly or in the 14 September Letter. There is no evidence that either of this was done. The appellant's knowledge of the

deceased's intention does not change this analysis because until the deceased acted on her intention in the manner described above, it was open to her to change her mind about making the Gift.

14 Even assuming the deceased had acted on her intention and given the appellant specific instructions (which we reiterate is not supported by the evidence), the fact remains that the appellant did not act on such instructions prior to the deceased's death. The appellant would at least have had to sign a cheque (in favour of herself) or a withdrawal form for the sum in question. She did neither. Whether she *could* have done so is, as the respondent submits, not good enough. In this regard, the appellant's argument that she was in a position to perfect the Gift does not assist her. Pursuant to the POA, the appellant was authorised to act as the deceased's agent. The authorities establish that instructing an agent is not in and of itself sufficient. The donor's agent must have acted on the instructions. The fact is the appellant did not act on the POA, even assuming she could do so unilaterally. The authorities she relies on are distinguishable as the positions of the donees there are different from her circumstances. Accordingly, the evidence in the second category, the POA, is also not relevant.

15 Thus, the existence of the POA coupled with the appellant's knowledge of the deceased's intention to make the Gift does not affect the analysis of whether the deceased had done all within her power that was necessary to effect the Gift. As the new evidence is not relevant, it will not have an important influence on the appeal. We therefore do not see a need to consider the other two limbs of the test in *Ladd v Marshall*. The applications are dismissed, save to observe that it seems correct to conclude that the appellant does not also satisfy the first limb of the test which requires that the evidence could not have

been obtained with reasonable diligence for use at the trial or hearing. However, we do not decide the applications on this basis.

The appeal

16 The appellant has put the appeal on the basis of the new evidence. She does not challenge the legal principles articulated by the Judge, or the Judge's application of those principles to the facts that were before her. It therefore follows from our dismissal of the applications that the appeal is dismissed as well.

17 Nevertheless, we explain why we agree with the Judge's conclusion. In her submissions, the appellant focuses on the effect of the 14 September Letter. The 14 September Letter does not help the appellant because even if she had knowledge of the deceased's intention to make the Gift, the Judge's reasons at [11] and [33] of the Oral Judgment are not displaced. Further, even if B was clothed as the deceased's agent to pass the 14 September Letter on to the deceased's bankers and lawyers or indeed the appellant (which does not appear to be the case as the evidence does not suggest that the deceased gave those instructions), the fact is that B did not do so.

18 We accept that the absence of naming a specific bank account by itself may not necessarily be critical. However, in this case, it illustrates that the deceased had to do something more than simply have the 14 September Letter prepared and requesting B's assistance on the Gift.

19 On the facts, it is readily apparent that the plan all along was for the deceased to have her mental capacity assessed and cleared so that she could execute a deed of gift in order to make the Gift. Indeed, the plan remained unchanged even after the 14 September Letter. On 18 September 2016, B wrote

to WongPartnership on the deceased's behalf conveying the deceased's desire for the funds transfer to occur without delay upon providing deceased's bank with the deed of gift, the deceased's spoken instructions and a signed bank transfer form. The plan was consistent with the process that was undertaken in 2013 when the deceased made the earlier gift of S$2.5m to the appellant, and in 2014 when she subsequently affirmed that gift. It is apparent that WongPartnership, who was involved in the process in 2013 and 2014, was planning to do the same in 2016. It is clear that the deceased wanted to make the Gift. However, she (and we would suggest B as well) did not want the Gift to be challenged by the appellant's siblings, whose relationship with the deceased and the appellant appeared to be somewhat fraught as the letter dated 6 December 2013 that the deceased wrote to her children suggests. A failure to have deceased's mental capacity certified prior to effecting the Gift, particularly given her health, could have opened the door to such a challenge. Unfortunately, before that assessment and the consequential steps could be taken, she passed away. The law is clear (and the appellant does not dispute) that the donor's intention alone is not good enough. That intention must have been acted on by the donor, taking all the steps necessary within the donor's power to effect the gift.

20 We therefore dismiss the appeal.

Costs

21 We note that in the proceedings below, despite the appellant being the losing party, the respondent's costs were borne by the deceased's estate. We note that the Judge was minded to order costs against the appellant but did not do so because that was not sought by the respondent (see [64] of the Oral Judgment). On appeal, the respondent is no longer making this concession. We

see no reason why the respondent, as the successful party, is not entitled to seek costs against the appellant. After all, the appellant's position is adverse to the deceased's estate and some of the beneficiaries. The appellant has already had one chance to succeed at no cost in the proceedings below.

22 On the appropriate quantum, we note that this was not an appeal from a trial and the volume of information involved was fairly compact. Both the applications and the appeal have a narrow scope and do not raise complex issues. As such, we order costs of $25,000, inclusive of disbursements, for the appeal and applications. The usual consequential orders will apply.

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

Lee Sien Liang Joseph, Muk Chen Yeen Jonathan and Wong Xiao Wei (LVM Law Chambers LLC) for the appellant;
Wah Hsien-Wen Terence and Mok Zi Cong (Dentons Rodyk & Davidson LLP) for the respondent.