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Original Article

## An Analysis on the *Wasiyyah* Muslim Property in Malaysia

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### ABSTRACT

When a person dies, all assets under his name will be frozen and cannot be transacted. The consequences are that, from legal perspective, the deceased assets can only be transacted when his personal representative applies to a letter of representation from the Civil High Court. In Malaysia, a person may die testate or intestate. The former means that the person who died leaving a will and the latter means that the person who died without leaving any testamentary document resulted to the operation of law of intestacy to Non-Muslim and law of Faraid to the Muslim. This article will deliberate on the current law Muslim testate succession in Malaysia. This article adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources including statutory, and case law. This article concludes that there is still lacuna in the law regarding Muslim testate estate. This article acknowledges that the law relating to inheritance in Malaysia is divided into two namely substantive law according to the religion of deceased and procedural law which under the purview of federal statutes. If the Syariah High Court is serious to regulate the Muslim testate matters, each and every state legislature in West Malaysia must legislate a written law on Muslim testate succession.

**Keywords:** Succession, Muslim, Testate Estate, Malaysia, Syariah High Court, Civil High Court

### Introduction

When a person dies, all assets under his name will be frozen and cannot be transacted. The consequences are that, from legal perspective, the deceased assets can only be transacted when his personal representative applies to a letter of representations from the Civil High Court.<sup>1</sup> In Malaysia, a person may die testate or intestate. The former means that the person died leaving a will and the latter means that the person died without leaving any testamentary document

<sup>1</sup> Amir Bahari. (2014). *Islamic Estate Retirement and Waqf Planning*: Kuala Lumpur: IBFIM.7; Azman Ismail. (2013).101.

resulted to the operation of law of intestacy to Non-Muslim and law of Faraid to the Muslim. This article will deliberate on the law of testacy by Muslim only.

*Wasiyyah* or testamentary disposition basically means will or bequeath. It is a gratuitous gift of property by its owner to another, contingent on the giver's death and it takes place after the owner's death.<sup>2</sup> It cannot be executed without the element of trust or amanah. The word amanah means reliability, trustworthiness, loyalty, faithfulness, fidelity, fealty, integrity, honesty, confidence, trust, good faith, deposit, trust, and charge. *Wasiyyah* is applicable in exceptional cases where there is minor involved or in the event where the beneficiaries is incapable of inheriting because of legal impediment such as adopted child, step child or illegitimate child. In this situation, in case for minor, this instrument will serve to protect the child's interest by appointment of guardian, appointment of trustee to manage the child's asset and for their monthly expenses.<sup>3</sup> Muslim law imposes two principle restrictions upon testamentary power. The first rule is that the testator cannot make a will in favour of any of his legal heirs and the second rule is that the testament is invalid if the testator purports to bequeath more than a third of his estate.<sup>4</sup>

### **Problem Statement**

Due to the parallel legal system enforced to the personal law, the operation of law of inheritance in Malaysia is governed by both court namely Syariah High Court and Civil High Court. The former has jurisdiction to hear matters concerning on the substantive law, whilst the latter has jurisdiction to hear matters concerning on procedural law. Many scholars argued that the jurisdiction of Muslim testate estate should be given to the Syariah Court. Therefore, this article aims to analyse on current legal position of Muslim testate estate and identify relevant issues that post encumbrance to the enforcement of the said matters.

### **Research Questions**

This article will deliberate on what is the current law Muslim testate succession in Malaysia.

### **Purpose of the Study**

This article intended to analyse the current law on Muslim testate estate in Malaysia

### **Research Methods**

Targeting to examine the current law on Muslim testate estate, this article employed a qualitative doctrinal legal research as the article intends to discuss in-depth and detailed on the particular matters.

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<sup>2</sup> Pawancheek Marican. (2008). *Islamic Inheritance Laws in Malaysia* (2 ed.). Kuala Lumpur: Lexis Nexis. 101.

<sup>3</sup> Amir Bahari. (2014). *op.cit.*, 23-24; Azman Ismail. (2013). *op.cit.*

<sup>4</sup> Pawancheek Marican. (2008). *op.cit.*

## Finding

### 1- Administration of Estates in Malaysia

Due to the parallel legal system enforced to the personal law, the operation of law of inheritance in Malaysia can be divided into two. Firstly the substantive law and secondly the procedural law. The segregation of law in the administration of estates is derived from the Federal Constitution. The substantive law is governed by state enactment under the jurisdiction of the Syariah High Court, in matters including the determination of the beneficiaries of the estate and their respective apportionments. Nevertheless, the power to make laws relating to the procedural matters for administration of justice of succession, testate and intestate, probate and letters of administration is vested on the federal government. The procedural law may include the appointment of executorship to manage the deceased estate.<sup>5</sup>Hence, Civil High Court by virtue of section 24(f) of the Courts of Judicature Act 1964 and Orders 71 and 72 of the Rules of Court 2012 has exclusive jurisdiction for the grant of letters of representation including to Muslim notwithstanding that Article 121(1A) of the Federal Constitution provides that all matters involving Muslims should be brought before the Syariah Court.

The principle has been used by the learned judge in the case of Abdul Kadir Abdul Rahman v. Norazian Abdul Rahman [2013] 1 CLJ (SYA) 73 to justify their decision in refraining themselves from hearing the main suit on account of lack of jurisdiction and that the case could only be disposed of by the Civil High Court. Civil High Court in Latifah Mat Zin v Rosmawati Sharibun [2006] 4 MLJ 705 acknowledges that the power of granting of a letter of administration and the order of distribution is a matter within the jurisdiction of the civil court but the determination of the Islamic Law issue arising in the petition is still within the jurisdiction of the Syariah High Court. Therefore, the matter of the administration of the deceased estate and its distribution, must be submitted to the law, rules and guidelines as provided by the civil law through the Probate and Administration Act 1959, Rules of the Court 2012 and other relevant subsidiary legislations.

### 2- Legal Analysis on the Muslim Testate Estate or Wasiyyah in West Malaysia

In the states of Peninsular Malaysia, wills made by Muslim must comply with Hukum Syara'. Thus while a Muslim has right to make will according to his wishes, the will must comply with Hukum Syara'. The Wills Act 1959 which applies only in States of West Malaysia, does not apply to the wills of persons professing the religion of Islam whose testamentary powers shall remain unaffected by anything contained in the statute.<sup>6</sup>

Under Islamic law, the *Qadi* has the jurisdiction to adjudicate any disputes relating to such a will. However in Malaysia, although the Syariah High Court is given mal (civil) jurisdiction to hear and determine all actions in which all parties are Muslims and which relate to wills, a controversy has arisen on the question whether it is the Syariah High Court or Civil High Court that should adjudicate such disputes.<sup>7</sup> However, in the process of estates administration, the role of the Syariah High Court varies from the role of the Civil High Court in a way that the

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<sup>5</sup> Nor Azlina Mohd Noor, & Akmal Hidayah Halim. (2015, 19-20 May 2015). Executorship in Muslim's Testate Estates in Malaysia: Law and Procedures. Paper presented at the Seminar Hibah dan Pengurusan Harta Islam 2015, Kompleks Pusat Islam UUM, Sintok.

<sup>6</sup> Mahmud Saedon Awang Othamn & Nik Ahmad Kamal Nik Mahmud. (1993). The Jurisdiction of the Syariah Court-A Comparative Study. *IJUM Law Journal*, 53.

<sup>7</sup> Pawancheek Marican. (2008). *op.cit.*

Syariah High Court is not empowered to directly distribute the deceased's estate.<sup>8</sup> The Syariah Court will be resorted to, only if, in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, an order from the Syariah Court is required for the purpose of determining any issue arising in the process of administration or distribution of the estate.<sup>9</sup>

There are two issues that should be addressed in the current, Muslim testate estate. Firstly, the written law is not comprehensive. To date, the written law relating to the Muslim testate can be found in three states only namely, Muslim Wills (Selangor) Enactment 1999, Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (Malacca) Enactment 2005, Muslim Wills (Kelantan) Enactment 2009, Muslim Wills (Pahang) Enactment 2017. Hence the law is not sufficient as there is not written law pertaining to the Muslim testate in other states of Malaysia. Many literatures suggested that the court jurisdiction should be amended to give the power to grant of letters of representation in cases of deceased Muslim to the Syariah Court.<sup>10</sup> However, the author opined that if the jurisdiction to be given to Syariah Court, there must be a written law governing the Muslim testate in all states in Malaysia to ensure the smooth running of the estate administration process. There must be a state enactment addressing that particular issue as without written law, there would be some difficulties in enforcing it.

Secondly, the current procedural law is limiting the power in case of execution of will to Wills Act 1959. This is so as some provision in the Rules of Court 2012 specifically make a reference to the Wills Act 1959 which is not applicable to the person professing the religion of Islam. Therefore, Civil High Court has no power to grant letter of probate to the Muslim and instead grant only letters of administration which will be annexed. This matters may cause injustice to the Muslim as the power granted by both documents are different. The letter of probate gives full power to the executor to manage the deceased estates whilst the letter of administration which will be annexed providing similar power with the condition that every decision made by the administrator must be accompanied by the permission from the Civil High Court by virtue of Section 60 of Probate and Administration Act 1959.

## Conclusion

This article concludes that there is still lacuna in the law regarding Muslim testate estate. This article acknowledges that the law relating to inheritance in Malaysia is divided into two namely substantive law according to the religion of deceased and procedural law which under the purview of federal statutes. If the Syariah High Court is serious to regulate the Muslim testate matters, each and every state legislatures in West Malaysia must legislate a written law on Muslim testate to ensure the smooth running of the process to address the case before the Syariah High Court.

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<sup>8</sup> Nor Azlina Mohd Noor, & Akmal Hidayah Halim. (2015). *op.cit.*

<sup>9</sup> Pawancheek Marican. (2008). *op.cit.*

<sup>10</sup> Pawancheek Marican. (2008). *Ibid*; Rusnadewi Abdul Rashid, Siti Asishah Hassan, and Noor Inayah Yaakub. "A Need for Legal Framework of Gift Inter Vivos (Hibah) in Malaysian Estate Planning." Paper presented at the International Business, Economics and Law Conference, Kuala Lumpur, 2013: 29-31; Siti Asishah Hassan, and Rusnadewi Abdul Rashid. "The Rights and Duties of Administrators and Executors of Deceased Muslim's Property in Malaysia." *The Social Sciences* 9, no. 2 (2014): 98-101.

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