

Constructions of Failure Ad Delay under Islamic Estate Management

¹Wan Kamal Mujani, ²Wan Mohd Hirwani Wan Hussain,

³Noor Inayah Yaakub and ⁴Rusnadewi Abdul Rashid

¹Department of Arabic Studies and Islamic Civilization,
Faculty of Islamic Studies, Institute of West Asian Studies (IKRAB),

²Department of Mechanical and Materials Engineering,
Faculty of Engineering and Built Environment, Graduate School of Business (GSB),

³Faculty of Economy and Management, School of Management,
Institute of West Asian Studies (IKRAB), Universiti Kebangsaan Malaysia,
43600 UKM Bangi, Selangor, Malaysia

⁴Faculty of Law, Universiti Teknologi MARA Cawangan Perlis, 02600 Arau, Perlis, Malaysia

Abstract: Delay and failure to complete applications for the distribution of inheritance estate is not an isolated phenomenon in the society. Factors contributing to this problem are due to the attitude of legal heirs and the weaknesses of the estate administration process in the country. The risk of failure of settlement of the estate may invite a variety of negative implications from the legal, economics, religious and social aspects. This study examines some of the negative consequences resulting from the failure and delay in distribution of inheritance estate and suggests that it is necessary to organize the community to plan ahead in property management. However, the findings show that people in this country lack the inclination to plan carefully the distribution of wealth, especially in planning ahead. As a result, they become fully dependent on the Inheritance System of division of property after death that is Faraid. Thus, the public perception that the property can be distributed through the Faraid System must be promptly corrected. Instead, planning the distribution of property during one's lifetime such as through gift inter vivos or gift mortis causa must be enhanced in order to avoid this problem because it is clearly detrimental to the Muslim community.

Key words: Faraid, inheritance, gift inter vivos, distribution of property, community, Malaysia

INTRODUCTION

Although, the concept of property management has been recognized in Islam with certain benefits and goals unfortunately, there are still many in the Muslim community in this country who are still less interested in making early planning, especially in terms of preparation for the distribution of wealth before they die. This is a problem as many are not aware of the need and importance of planning ahead for the distribution of property (Page, 2003, 2004). According to statistics in 2006, there was an estimated over a million cases in Malaysian estate claims valued at RM 38 billion still outstanding for not being managed by the beneficiaries. Most of the cases involve nearly 90% of Muslim-owned property. However, this amount has increased to a value of RM 40 billion in early 2007 and this involves >1 million cases. This amount comprised of 38 billion in real estate property, RM 1.5 billion in cash and RM 70 million in the

Employees Provident Fund (EPF) savings. Recent statistics in 2010 also show an estimated amount of 40 billion in assets owned by >500,000 beneficiaries of the Muslim community which have not yet been released. The fact has actually been proven that there is too much property, especially land whose owners have died without any claim for title by legitimate heirs to the extent that sometimes heirs are not even aware of the existence of the property involved. Neglect and inefficient probate and administration of the estate distribution (Poterba, 2001) has become a major problem that has attracted the attention of the state and top leaders and has been brought to discussion by members of parliament.

For example, Ismail bin Mohamed Said, a member of Parliament in Kuala Krau in his debate has touched on the issue of abandoned land involving a total of RM 900,000 worth of inheritance land titles that have yet to be resolved. He also expressed concern that Malay reserve land worth RM 38 billion in market value which has not

been resolved as a result of the failure and delay in distributing the land is definitely causing great loss to the Malays. Neglect of the distribution probate and estate administration can actually be regarded as a bad symptom because it can create some complicated problems (Palmer, 1951). Many problems arise as often seen in cases of mass possession, overlapping claims, property left unattended without proper management, difficulties in trials over division of the deceased's property and the risk of losing a document of title to land. In addition, some complicated and controversial cases of seizure of property among the heirs of subsequent generations such as grandchildren often arise, particularly when property values increase by more than double.

The failure of the settlement of estate distribution occurs due to the attitudes among people who often assume that early planning of the distribution of property is not needed at all, since it can be distributed according to law after death (Faraid). This is evidenced by a statement by the Chairman of Amanah Raya, Datuk Ahmad Dusuki, asserting that the notion among majority of Muslims that property management can be resolved through Faraid is the main cause of the delay in distribution of estate.

Accordingly, awareness of the importance of planning ahead on the distribution of wealth before death is very important in order that the beneficiaries do not have a problem in managing the division of inheritance. It is undeniable that the law of Faraid is already outlined in Islam as a way of distribution of the estate of the deceased but actually in practice, the law is not as easy. This is because the estate settlement process would normally be time-consuming as it involves the process in some particular body and requires a high commitment of beneficiaries to manage it. Thus, the management of inheritance properties is often beset with difficulty.

Reasons for negligence and delay in distribution of estate: Abandoned property distribution is seen increasingly serious, especially among the Malays. It is due to several factors namely because the attitudes of the concerned beneficiaries and their lack of knowledge in this subject. In addition, the researchers also find that there is a problem in terms of administrative process which particularly relates to the issue of delay and injustice.

The attitude and ignorance of beneficiaries: The attitude and ignorance of beneficiaries are amongst the reasons which are said to lead to the neglect of the estate. The omission is due to ignorance of the public or beneficiaries in terms of inheritance. The community does not concern itself with this matter and assumes that the duty to settle the estate is a trivial task. Sometimes, they serve only to hand over this duty to the eldest son who is said to have

the responsibility to make the application. In fact, the misconceived view of society that there should be no urgency to speed up the distribution of property to avoid misinterpretation and out of respect for the deceased also restrict the process of distribution of the estate from being made immediately.

Indeed, there is no doubt that some people, especially among the Malays who consider the issue of the estate as a very sensitive issue to talk about. Such a situation indirectly prevents the noble efforts of the heirs who have an understanding and awareness of the matter to perform their duties. It is unfortunate that they are labeled as being greedy and obsessed with the property of the deceased thus, resulting in disputes and conflicts among family members. The study conducted found that in fact, in many cases, applications for estate division have not been made and are long overdue since death. Indeed, there are cases of estate settlement which took decades to resolve. There are cases where the beneficiaries refused to make an application for some reason as explained by former Chief Judge of Tan Sri Abdul Hamid bin Haji Mohamad as follows:

This failure or neglect to take out letters of administration can be understood in the socio-economic context of the Malays. First, the land is too small and the beneficiaries too many. It is too troublesome, costly by their standards and not worth their while to assemble all the beneficiaries, get their consent make the application and go through the whole process when in the end each person may only get a small fraction of the land. Secondly, it is their inaptitude. So long as there is no dispute among them, nobody will take the initiative to do anything

In other situations, there are some cases that have been requested but were abandoned half way through when the applicants faced many problems to continue their application. As evidence to explain this phenomenon, Abdullah bin Mohammed, Director of Estate Distribution Section of the Department of Lands and Mines shared the experience of involvement in major projects by the government. According to him, in the number of cases of land acquisition by the government, an overall 10-20 % of the owners of the lots involved had died. This figure was more prominent in the agricultural land in rural areas compared to land available in the city. Studies made on the property involved showed that some landowners had died too long ago and some had even died before the era of Japanese rule. He also added that the statistics are based on the number of titles available in the country which is >6 million, out of which at least 1 million have been described as titles to the land for which there are no applications for estate distribution.

Thus, referring to the facts mentioned before, it is clear that the value of the estate which have not completed the process of distribution is very high. It is more than likely that the number will increase and continue to increase if there is no awareness of how the property is to be systematically distributed. Accordingly, the researchers would like to suggest the method of early estate planning to be made during the lifetime of a person in order to avoid problems.

Lack of understanding of the true concept of Inheritance

Law (Faraid): In the name of justice, the division of property in Faraid should not necessarily be interpreted too rigidly or too narrowly. The Malay community itself has narrowed the application of the division of property by the rules of Faraid resulting in its impractical implementation. In fact, it is clear that the public still does not understand the Islamic concept of division of property in Faraid. The literal interpretation of understanding in this rule has led to the division of small land that makes the land less valuable with less potential to be developed.

The rule of Faraid is actually to determine the rights of beneficiaries and their portions and not an order for division resulting in small fractions of land. In fact, the determination of the distribution set forth in the rule does not specify that the estate should be divided one by one among all family members or beneficiaries in accordance with their respective portions. For example, a parcel area of 1 acre of land need not be distributed to all ten of the heirs when there is other land. This is to ensure that the land portions that they get are larger, so as to be more valuable and carry more potential to be developed.

The situation is aggravated by the existence of legal provisions that allow state land to be registered to many nominees in Faraid, thereby dividing it to small fractions of land ownership which has led to a low value and difficulty to commercialize. According to Islam, family members or beneficiaries are entitled to compromise to ignore completely the distribution by placing names of all beneficiaries in all lands. Instead, they may agree to divide the inheritance in ways which is more appropriate to the circumstances of the property. In fact, according to al-takharuj or withdrawal from the estate, the beneficiary is allowed to withdraw either from getting all share in the estate or part thereof.

The withdrawal may be made without payment of compensation or with terms of consideration or other conditions. Thus, the split of the estate to smaller lots of less value can be avoided. However, the concept of al-takharuj is seen to be far less practised while people are still shackled by a narrow interpretation of distribution.

The existence of various jurisdictions in the administration of estate in Malaysia: Administration of the estate in Malaysia should be carried out in accordance with the requirements of Islam and the interests of society particularly the Muslims and the country. This need arises because the voices question the integrity of the estate administration system in Malaysia as being inefficient resulting in arrears of the estate, amounting to tens of billion dollars.

Islam has stipulated that the estate shall be distributed to the beneficiaries as entitled under the Law Faraid. However, al-Quran in the verses do not prescribe a particular manner or method of how the estate should be managed and administered. Therefore, the management and administration of the estate in the country which have been affected by the laws and customs applicable in Malaysia is divided into two stages. The first stage began before world war II in which the administration of the estate of Muslims in the Unfederated Malay states like Kelantan, Trengganu, Johor, Kedah and Perlis were placed under the responsibility of the Department of Islamic or Syariah Court of the respective states. The administration of the estate later came under the jurisdiction of the federal government for managing the distribution of testate and intestate estate and probate and letters of administration placed under the 9th schedule list 1 of the Federal register. However, the division of inheritance of Muslims and the determination of the beneficiaries' entitlement will be decided by the Syariah Court issued in the form of a Certificate of Faraid. In general, the estate can be categorized into large estate and small estate. Determination of the estate type is based on the value of the property left by the deceased and whether the deceased died testate or intestate. Similarly, the laws that apply in the administration of all these types of inheritance properties are different. The Small Estates (Distribution) Act, 1955 is applicable to all claims of movable and immovable property, the value of which does not exceed RM 2 million on the date of application. Application for distribution of the estate may be made before the estate officer liquidators in the district office in Malaysia. On the other hand, a large estate is an estate with a total value of >RM 2 million, whether it consists of movable or immovable property or a mixture of two or the amount of inheritance of a value which is <RM 2 million where the deceased person dies testate. The law relating to the administration of the estate is Probate and Administration Act, 1959. The act provides the means to obtain the Letter of Probate or Letters of Administration in which applications must be made to the Civil High Court. However, inheritance matters in determining the Faraid are handled by the Syariah Court which also has no power to enforce faraid. In the opinion of the researchers,

the existence of the various jurisdictions indirectly cause confusion to the public in dealing with the matter. Problems become more pronounced when it comes to those who live in remote areas and have limited knowledge and information due to lack of exposure, especially to the mass media. Therefore, estate management systems and distribution applications become less effective because people are sometimes confused about where they should start the application. These difficulties may result in loss of motivation for the distribution of the estate.

Delays in the process of estate management: In the case of a large estate, it should be administered before they can be distributed to eligible beneficiaries. In administration of a large estate, the debts and other liabilities of the deceased will be identified. In connection with this, various matters need to be resolved during the process of distribution and it is complex and time-consuming. Furthermore, in line with the times, the categorisation of the estate is now wider, covering assets other than land such as jewelry, savings, shares, takaful insurance policies and other types of property that did not exist before. In addition, among the factors that lead to delay in the distribution of estate in the Land Office are the absence of beneficiaries during the trial and the applicant or beneficiary can not be contacted at the address given on the application form.

Apart from these reasons, the information given in the application sometimes is not complete to enable the division of property order to be issued. In fact, there are also cases postponed because the applicant failed to submit a Certificate of Faraid from failure to make application to the Syariah Court. The distribution of wealth by way of Faraid also faces problems when the property claimed is not clear in terms of ownership or is mixed with another person's property. Other problems encountered in the application of inheritance is failure by the beneficiary to produce proof of death of the deceased. This occurs when a death is not registered in the National Registration Department. In addition, the phenomenon of multiple deaths due to complete neglect of the estate of their ancestors can be a problem for the property division. Such a situation will cause further hardship for the heirs to identify the right beneficiaries. This matter is said to have contributed to the delay in the process. In addition, the process of requiring court approval sometimes impede the distribution of wealth which in turn results in a loss to the community.

The weakness of the Administrative System of inheritance: The legal basis for achieving the purpose Faraid is justice and the facts speak for themselves. Therefore, the researchers do not intend to debate on the benefits of legal Faraid in Islam because the writers

are confident that the ruling of Faraid has its own wisdom. Instead, the discussion aims only to examine the weaknesses of the administrative processes undertaken by agencies responsible for managing the distribution of property in Faraid (Marican, 2004). In the researchers' opinion, the implementation and administration of the estate management in the country seem to have certain weaknesses. This opinion is consistent with the views of the former Chief Justice Abdul Hamid in his writings which reflect that even God's law if not properly administered will lead to injustice.

Faraid wealth management process is sometimes not an accurate settlement of property in certain circumstances because there is a possibility that the facts presented are not accurate (Mohamad, 2002). There may be a beneficiary who is not included in the list of beneficiaries. This follows a clear procedure for the examination of succession in the trial at the land and mines office which is also sometimes performed. In such a case, it certainly will lead to unfairness in the Faraid distribution determined by the judge. Thus, the Administrative System which implements Faraid incorrectly can cause problems in that only certain beneficiaries may gain the benefit while others continue to argue. Thus, the quarrels and struggles are prolonged beyond the time and that generation of the family. In relation to these phenomena there is criticism of the procedures for issuance of a Certificate of Faraid voiced by the Honourable Judge Dato Abdul Hamid Mohammad (former Chief Justice) in his opinion that the issuance of the Certificate of Faraid is not properly implemented. This is because he believes that the court is guided by the facts submitted by the applicant in determining the beneficiaries and their share. He has made the following statement:

Unfortunately, until now there is no proper procedure for such a reference. Requests are made by letter, stating the names of the beneficiaries and their relationship to the deceased, sometimes by the land administrator and sometimes by the solicitor acting for the beneficiary. The Syariah Court relies on the facts stated by the applicant which are not even under oath and calculates the share each beneficiary is entitled to. It is done administratively. He then issues the certificate. I think the procedure is not satisfactory. The facts submitted to him may not be true or only partly true. As I have said earlier, the claim by one male descendent whose family tree consists of one male descendent each generation for four generations was also backed by a Certificate of Faraid. Clearly, the beneficiary if he was really one was not telling the whole truth

The Certificate of Faraid (inheritance) is codified in the state enactments in this country. It is stated that:

Syariah Court may on application by any person claiming to be a beneficiary or his representative and upon payment by him of the prescribed fee, recommends that the facts available to him and his opinion of those entitled to share in the estate and which parts of their own right

If referred to the paragraph recommends that the facts available to him in this section shows that the facts presented by the heirs of the claimant taken blindly without investigation can be made truth. Thus, there is possibility that the facts presented are not true and accurate. There exists the possibility that the beneficiary is entitled to the property but did not put his name in the list of heirs. In addition, clear procedures for the inspection of such beneficiaries in the trial of land and mines office has not been carried out. This will result in unfairness in the distribution of property as determined by the judge and clearly establish the space and opportunity for conflict among siblings and relatives. Accordingly, Dato Abdul Hamid Mohammad has suggested that:

I am of the view that there should be procedure for a formal application, somewhat similar to the application made by land administrators in land acquisition cases to the High Court whether to deposit the award money into court or to get it paid out to the rightful person. The application should be supported by affidavits. Sufficient notice should be given to interested parties. Opportunity for them to intervene if they want to, should be made available. This is to ensure that no beneficiaries are excluded, intentionally or otherwise and that they get their rightful share. Even God's law if not properly administered will lead to injustice

This means that the procedure for making an application for a Certificate of Faraid in his opinion must be made through formal application as is made by the administrator in the case of land acquisition in the High Court and supported by an affidavit and notice. It aims to provide opportunities for beneficiaries who are not named but are entitled to the property to claim their rights. Ahmad Abd Majeed Abdul Majid and Habibah vs. another is good illustration for this point. In this case, the

Plaintiff who is the only son in the family has made an application to court to have his name included as one of the legitimate beneficiaries to be entitled to the distribution of land owned by his father, the deceased. According to the Plaintiff after searching the Gombak district land office he found that the defendants, his two sisters have made an application for division of property of the deceased property without his knowledge. Thus, the Plaintiff alleged that the order of the estate distribution of the deceased issued is invalid because the act violates the provisions of the small estates (Distribution) Act, 1955. The act provides inter alia that the applicant must list all the beneficiaries in the form of an estate if there is no agreement.

CONCLUSION

The responsibility of property management plans should be discharged wisely and carefully because property is one important aspect of life. It is one of the five pillars of Islamic law. Accordingly, the distribution of property planning is very important and problems should be addressed. The practice of property management planning is not just to collect, manage, develop and protect the property alone but the property and wealth must be ensured to be inherited in the best way without causing inconvenience and hardship to beneficiaries who are eligible. Hence, Estate Planning System will not only be beneficial for the beneficiaries but also to the country. In summary, the researchers believe that an estate management plan should be implemented to provide benefits for Muslims in Malaysia.

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