

The Legal Rights and Duties of Administrators and Executors of Deceased Muslims' Property in Malaysia

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Abstract: In Malaysia, the administration of property for the Muslim should be in accordance with Islamic law. However, if it is not properly administered to a certain degree, it will create harm to the well-being of the community. Recently, statistic reveals that some RM52 billion worth of assets and property left behind by the deceased remained unclaimed due to poor administrative procedures in the distribution of estates to the rightful Muslim heirs. Therefore, the appointment of administrators and executors could be an important part in the Islamic estate management because they are responsible for collecting, maintaining and protecting the deceased's estate pending on the final distribution. One of the problems is the confusion as to the legal rights and responsibilities of administrators and executors. There are possibilities that they may misuse their powers or misappropriate the property of the deceased. As a result, the property rights of the beneficiaries are violated and the distribution of the deceased's property could not be properly managed and resolved. In fact, it may lead to serious disputes or conflicts among family members over estates left by the deceased and consequently it may create disorder to the Muslim family institution and society. Thus, a legal study on the issues relating to the rights and duties of the administrators executors need to be conducted because it is clearly important to the benefits of Muslim community. In fact, the researchers opine that there is a real need to introduce a regulatory framework regarding the rights and liabilities of administrators and executors in Malaysia because it should be outlined to overcome some identified statutory, non-statutory, as well as the policy currently practices by related bodies and institutions in Malaysia. This study is based on a qualitative study and the approach to be applied is a content analysis methodology.

Key words: Executors, administrators, administration and distribution of property, inheritance, Malaysia

INTRODUCTION

In Malaysia, Islamic law of property is based on customary practice or adat and mixed with shariah principles. In this regards, the inheritance system or faraid still stands up as the cornerstone of Islamic estate management while the rest of the tools are meant for accommodating the estate planning process. According to section 25 of the Civil Law Act 1956, the administration of Muslim's estate shall be in accordance with the Islamic law. Thus, the section clearly provides that the english law principles relating with the property's administration do not apply to Muslims. However, Article 74 (1) of Malaysian Federal Constitution read with 9th Schedule Paragraph 4 (e) (i) stated that the high court has the jurisdiction over matters relating to succession, testate and intestate, probate and letters of administration. Therefore, civil courts hold jurisdiction in the administration of inheritance either to Muslim or non-Muslim. In fact, the civil courts hold the power of hearing while shariah courts cling to determine legal

heirs, as well as to ascertain their share under Islamic law as the prior practices (Sulong, 2013).

Based on Islamic law, the Quran and the hadith clearly mentioned the law and rules relating to the distribution of the property of a deceased person. The Islamic inheritance principles are intended to facilitate distinctive Islamic conception of property, family, community, empowerment and justice (Sait and Lim, 2006). It has to be appreciated and implemented to meet their divine objectives in faith-based societies (Sait and Lim, 2006). Furthermore, the ignorance of the true concept of faraid has caused many problems. However, there is some flexibility in disposal of a property whereby a Muslim can choose to make gift inter vivos (hibah) or by means of a will (wasiyyah) one-third of his property. A disposal must not be made in favour of one who is already in a position to inherit his estate except with the permission and consent of all others in a similar position (Marican, 2008). According to statistic in 2011, the estimated amount of 42 billion of assets owned by >500,000 beneficiaries of the Muslims community has not been distributed

(Mujani *et al.*, 2012). Recently, the amount has increased and statistic reveals that some RM52 billion worth of assets and property left behind by the deceased persons remained unclaimed due to poor administrative procedures in the distribution of estates to the rightful Muslim heirs. One of the factors that contribute to this problem is due to lack of awareness among the Muslims themselves on how to manage their properties. In addition, the weakness in the administration of the estate division management in Malaysia is another contributing factor (Mujani *et al.*, 2011). Besides that the judicial conflicts, the absence of concrete laws and other legal constraints in the implementation of matters related to wasiyyah, waqf and hibah had also caused the problem. In fact, the latest preventive measures introduced by the government and undertaken by various bodies seem to have failed (Azmi and Mohammad, 2011). Therefore, the reform of law and procedures is needed (Azmi and Mohammad, 2011) in order to solve the increasing number of cases of distributed estates of deceased Muslims in Malaysia. Thus, the researchers opine that there should be a legal study on the issues relating to the rights and duties of the administrators and executors because they play an important role and function in management and administration of a deceased estate.

ADMINISTRATOR, EXECUTOR AND TRUSTEE

According to Martin (2003), administrator is a person appointed by the court to collect and distribute a deceased person's estate when the deceased died intestate, his will did not appoint an executor or the executor refuses to act. Whereas an executor is a person appointed by will to administer the property of the testator and to carry into effect the provisions of the will. The difference between both is that an executor is required to obtain grant of probate while an administrator is required to obtain letter of administration. For Muslims, the issues arise when the administrator or executor misappropriates or misapplies the property and uses it for his own benefits. As a result, the property rights of the beneficiaries are violated and the distribution of the deceased's property could not be properly managed and resolved. In fact, it may lead to serious disputes or conflicts among family members over estates left by the deceased and consequently it may create disorder to the Muslim family institutions and society. Therefore, a legal study needs to be conducted in order to examine the status of Muslim executor and administrator whether they can be considered as trustees under civil law and Islamic law. A trustee is a person who receives assets from the settlor and who has the responsibility of administering

them for the benefit of the beneficiaries. Thus, the trustee becomes the legal owner of the assets but cannot use them for his own benefit. He is obliged to perform certain duties as laid down in the trust document or by the terms of the trust and in accordance with the law.

The functions of administrators and executors in muslims devolution of property: The appointment of administrators and executors could be an important part in the Islamic estate management because they are responsible for collecting, maintaining and protecting the deceased's estate pending on the final distribution. Their functions could be seen in several methods of disposal of a property, such as wasiyyah, hibah, waqf and others.

In wasiyyah, drawing up a proper designed wills and appointment of an executor could be seen as the essence product of the Islamic estate planning as it is the main procedure any Muslims should prepare with before proceeding with other means of estate planning (Alma'amun, 2010). In Malaysia, there are various wasiyyah writing service providers, such as Amanah Raya Berhad (ARB), As Salihin Trustee Berhad, Wasiyyah Shoppe and many others. Drawing up a wasiat with ARB does not give a client any other option to appoint other party to be the executor apart from ARB itself. Meanwhile, other wasiat writing providers give fully authority to the client to choose anybody or any trustee companies to be appointed as an executor (Alma'amun, 2010).

For non-Muslims, other than will nomination can be considered, as one of the easier methods for distribution of property in the event of death. In that case, a nominee will be considered, as the absolute beneficiary and will receive the benefits from the nominator's property upon his death. However, for Muslims, a nominee shall be regarded as mere executor and he is not an absolute beneficiary. He has the obligations to distribute the property among the beneficiaries according to the Islamic law of inheritance. Therefore, the issues arise when the nominee has breached his duty as an executor or administrator of the deceased's property.

As for the transfer of property by a hibah, the donor may make such a gift during his or her lifetime even to someone who will be amongst the donor's heirs under the Islamic principle of faraid. Now-a-days, there are various agencies that are involved in documenting hibah and therefore various hibah methods have emerged from these agencies in expanding the scope of hibah, such as trust hibah (Muda, 2008). Trust hibah or hibah amanah, however is the modification and combination between hibah and trust features (Yaacob, 2006). Trust hibah

procedure involves the assets to be entrusted to the administrator for a certain time frame according to the trust deed which is agreed between the donor and the beneficiary. Some agencies impose a condition that the trustee appointed is neither than the agency itself while other give flexibility to the clients to appoint any favoured individual according to their preferences or appointing someone from eligible heirs (Alma'amun, 2010).

Besides that Muslims may, also dispose of his property through waqf that is one of the most noble act in Islam because it benefits the society and can help the needy, such as the poor people, orphans and many more. The effect of waqf is not only to get the benefit in this world but also a continuous reward to the trustee till the netherworld (Harun *et al.*, 2012). In Islam, the appointment of a trustee normally exists in the form of wakalah or agency which arises when one person authorizes another to replace him in the exercise of his Civil rights (Halim, 2009). Besides that an appointment of a trustee may also be made by way of wasoyah which is known as a trust document. It involves the appointment of wasi or executor (trustee) for the administration of the appointer's estate and the property of his minor children after his death. For example, in cases of waqf, Islamic Religious Council of each state in West Malaysia is appointed as the sole trustee or Mutawalli of waqf property. The appointment is by operation of law, thus invalidate any other appointment of trustee other than the Council (Halim, 2009). However, there are some problems with the individual Mutawalli whereby most of the time the right to administer the waqf property was kept within the founder's or mutawalli's family. The right of the mutawalliship would be transferred along with other properties to the legal heirs and subsequently would devolve on their descendants. This effectively granted the family members the right to a perpetual lease and had the potential to convert a waqf property into a private property of the descendants (Hasan and Abdullah, 2008). There will be a great possibility to the mismanagement of waqf property and it may deny the real purpose of waqf whereby it is made for the general welfare of the poor and the needy. Further, as waqf is still be regarded by the civil courts as one type of trusts (amanah) which is subject to the Trustee Act 1949 and due to the fact that trusts, falls under the jurisdiction of the civil courts, this follows that waqf cases shall, likewise inevitably fall under their domain (Kader and Dahlan, 2011). Therefore, based on the earliar situations relating to wasiyyah (wills), hibah (gift *inter vivos*), nomination and waqf (religious endowment), several issues may arise on the rights, duties and

obligations of the administrators and executors in the administration and distribution of the Muslims' estate.

The law on rights and duties of administrators and executors:

Generally, there are no specific laws or legislations which govern the duties and obligations of Muslims executors and administrators who involve in the administration of estate pertaining to wasiyyah, hibah, nomination, waqf in Malaysia. Thus, many of them would not be aware of their rights either under Islamic law or civil law and in certain situation they may breach their duties as administrators or executors of the deceased's estate. If the administrators or executors could be considered as trustees, therefore their rights and duties of the trustees can be seen in the Trustee Act 1949 and the Trustees (Incorporation) Act 1952 (revised 1981). The trustee must act in accordance with the terms of the trustee deed and general law. Generally, there will be no issue on the breach of duties by trustees because the trustees in Malaysia are governed by the Trustee Act 1949 and the Trustees (Incorporation) Act 1952 (revised 1981). However, the problem will arise if a Muslim trustee fails to carry out his duties and obligations in the distribution of the deceased's estate, such as wasiyyah, hibah, nomination and waqf. Hence, a study is needed in order to determine the liabilities of administrators and executors and to identify the relevant laws applicable in Malaysia regarding that matter. In fact with the development of socio-economic status of Malaysian society and the increasing numbers of cases on criminal misappropriation of property and breach of trust lead to the fact that the law plays an important function in preventing such crimes or offences from getting more serious.

In Islam, the administrators or executors may be considered as trustees because they are charged with a great responsibility to manage and distribute a deceased person's estate either the deceased died testate or intestate. This is evident in the following Quranic verses:

Allah does command you to render back your trust to those to whom they are due (Al-Nisa' (4: 58))

And if one of you deposits in trust a thing with another, let the trustee (faithfully) discharge his trust and let him fear his Lord (Al-Baqarah (2: 83))

Thus, the researchers believe that there is a real need to introduce a regulatory framework regarding the rights and liabilities of administrators and executors in Malaysia and it should be outlined to overcome some identified statutory, non-statutory, as well as the policy currently practices by related bodies and institutions in Malaysia.

CONCLUSION

It is hoped that the findings of this research will provide an appropriate solution for the issues relating to rights and duties of administrators and executors, as well as trustees in the area of Malaysian's estate distribution. The solution will provide more protection to the legal heirs of deceased's estate that has not previously existed in Malaysia. The findings are expected to benefit the Muslims community in Malaysia and will be as comprehensive guidelines to the court in making the decision, regulatory bodies, legal practitioners and academicians. Hence with the specific rules and regulations relating to this matter, it will create awareness and understanding among the Muslim society in Malaysia on the importance of management and the distribution of Muslim's estate. It is because the concept of estate management in Islam is not just to collect, manage, develop and protect the property but also to ensure that the property should be passed to the beneficiaries without causing inconvenience and hardship to them (Muda *et al.*, 2006).

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