
ISLAMIC LAW OF INHERITANCE (FARA'ID): THE BEST WAY OF ESTATE PLANNING

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ABSTRACT

This is a doctrinal research which aims to look into Islamic estate planning, i.e. the paper utilizes descriptive approach of qualitative research methodology which relies on secondary data inform of text books, journals, newspapers, related websites etc. In Malaysia, there is an issue of accumulation of unclaimed property after deceased's death which made many writers to call for a better way of handling this issue. In following the path of these writers, the researchers discussed some ways of Islamic real estate planning and provided suggestions on how to solve the issue of accumulation of unclaimed assets particularly in Malaysia. Thus, it is suggested that in order to solve the issue of accumulation of unclaimed property particularly in Malaysia, wasiyyah (bequest) may be used for real estate planning if the conditions are fulfilled. Moreover, it is suggested that hibah may be used in estate planning only in situations where division based on fara'id after the owner's death is cumbersome e.g. complexity of law, long process etc. in order to avoid accumulation of unclaimed assets. However, if the gift (hibah) is made in favour of the donor's children, there shall be no discrimination between them as the Prophet (saw) requires equality when giving gift to children. But, in the absence of any valid reason, distribution based on Islamic law of inheritance (fara'id) shall be applied.

KEYWORDS: Islamic law of inheritance (fara'id), gift (hibah), bequest (wasiyyah), Islamic estate planning

INTRODUCTION

Islamic real estate management has been encouraged by many writers due to the complexity of distribution of real estate after dead. According to Ahmad Hidayat Buang (2008), as a result of the increase of wealthy Muslims in Malaysia and some other Muslim countries, family real estate management in relation to inheritance property is becoming very significant. This is because distribution of the property based on the Islamic law of inheritance (fara'id) in many cases is cumbersome, in addition to bitter relationship it creates between family members. Moreover, some writes believe that due to some problems that may likely occur after the death of the deceased, it is crucial to implement the estate planning done by the deceased during his life time. However, the

intention shall not be avoiding distribution of the property based on fara'id (Mujani et al., 2011). According to Kamaruddin and Al-Ma'amun (2015), the main objective of the estate planning is to ease the distribution of the estate. According to Yahya et al. (2012), Wasiyyah (bequest), Hibah (gift) and Waqf (charity) are the main estate planning tools which Muslim may use in estate planning based on the Islamic law of inheritance.

The perception of the Malaysian Muslims on Islamic estate planning is considered to have played a vital role in the issue of frozen assets (Muhammad Ridhwan Ab. Aziz and NurulIzzati Nordin, 2015). Afiqah (2011) believes that the causes of unclaimed estate of Muslim who passes away are complexity of law, lack of knowledge, long process, lack of cooperation between various parties, lack of cohesive mechanism and the attitude. Therefore, this issue, if not solved will continue to increase the number of frozen or unclaimed assets in Malaysia. Thus, it is extremely important to point out the negative effects that may occur as a result of lack of estate planning among Muslims in Malaysia (Mohd Khairy Kamarudin & Nasrul Hisyam Nor Muhamad, 2018). Furthermore, low awareness and knowledge have been identified as causes behind the narrow practice of Islamic estate planning in Malaysia (Omar, 2009; Mohyin, 2004). Muslims in Malaysia, particularly the Malays are very reluctant in writing wasiyyah (Islamic bequests) as they believe that fara'id is a sufficient mechanism for wealth distribution of a death person. Thus, according to them leaving a wasiyyah has no impact since the fara'id law allocates specific shares to the legal heirs (Omar, 2006). Furthermore, some Muslims feel that estate planning is limited to wealthy persons alone (Hassan, 2005; Hassan and Yusof, 2006; Fatin, 2011).

A statistic from the department in charge with the administration of small estate shows that there is a huge backlog and delay while processing estates' distribution. Various factors have been attributed to this delay. In spite of the fact that efforts were put to tackle the problem, there is no sign that it will end soon (Ahmad Hidayat Buang, 2008). In the year 2005, 900, 000 acres out of 6.2 million acres of unclaimed land were still recorded under the names of the landlords who passed away. According to the government, it loses income which is in the form of land tax estimated at RM200 million (Ahmad & Laluddin, 2010, Salam, 2006). Moreover, the number of the unclaimed property is increasing over the years which are a serious problem that needs to be addressed (BERNAMA, 2010; Dewan Rakyat Parlimen Kedua Belas Penggal Ketiga Mesyuarat Pertama Bil. 11, 2010; Rakyat Guides 3, 2010; Salam, 2006; Noordin et al., 2012). Moreover, a total of RM52 billion outstanding of the estate values owned by the majority Muslims are yet to be distributed to the people entitled (Berita Harian, 2012). And according to the Chief Marketing Officer of Amanah Raya Bhd. (ARB), in 2011 there were assets frozen valued at 42 billion Malaysian Ringgit as the legal-heirs were not found. Again, according to the Chairman of the Organizing Committee of Hibah National Seminar, the results of estimate of the estate planning in Malaysia has increased from RM40 billion in 2009 and is still growing due to rising property values and inheritance claims (Ariffin Sabirin, 2013).

From the foregoing, it is clear that many writers encouraged Islamic real estate planning in Malaysia as a result of many unclaimed properties due to the complexity associated with the distribution of the properties based on the Islamic law of inheritance (fara'id) after the owner's death. Therefore, in order to solve this issue, some writers suggested some ways for Islamic estate planning. However, there is a fear that some people may try to use some of the proposed ways in order to avoid distribution of deceased's estate based on the Islamic law of inheritance (fara'id). Thus, the researchers will discuss some of the proposed ways by the writers in solving the issue for example making a bequest (wasiyyah), gift (hibah) etc. and propose his opinion on the issue. Therefore, the research will look into the concepts of bequest (wasiyyah), gift (hibah) and Islamic law of inheritance (fara'id) and how they may be appropriately used in Islamic estate planning.

2. CONCEPT OF WASIYYAH (BEQUEST)

Based on the Islamic law of inheritance (fara'id), a person may make a will of up to 1/3 of his wealth/assets. A will means a declaration made by a person during his lifetime on his property for any purpose that is permitted by the Shariah. During the early days of Islam, Allah (swt) ordered writing a will in favour of parents and nearest kin based on a verse in Surah Baqarah (Nik Fadzrina and Shaikh Hamzah 2014, Harbi, 2013, Yahya et al. 2012; Nor Muhamad, 2017; Azhar et al., 2014): "It is prescribed for you, when death approaches any of you, if He leaves wealth, that He make a bequest. However, the Shariah does not allow making a Will for an inheritor (heir). It is narrated by Ibn Abbas (ra) that the Prophet of Allah (saw) has said, "Allah has Himself given everyone, who has a right, his right. The reason why a bequest in favour of an heir is not allowed is that it would amount to giving preference to some heirs over others, thus defeating

Moreover, the concept of obligatory wasiyyah permits grandchildren who are non-heirs the chance to inherit from the wealth left behind by a dead person. Various Muslim countries, such as Egypt, Morocco, Syria, Tunisia etc. apply this concept based on the view of Ibn Hazm. Ibn Hazm mentioned in his Book al-Muhalla: "one who leaves property it is his duty to make a will. It stands proved by the tradition narrated by Abdullah Ibn Umar that the Prophet (pbuh) said, "No Muslim who has something (by nature of property) has the right of passing even two nights without making a will. He must have written a will with him." Ibn Umar said: "Since I heard this from the Prophet (s.a.w), I have not passed a single night without having my will with me." This concept is based on the interpretation of Surah Baqarah verse 2:180 meaning of which states: "It is prescribed for you, when death approaches any of you, on inheritance, however, a minority amongst them, such as Imam Shafi'i and Ibn Hazm believe that the verse is still relevant and has not been abrogated. They feel that the verse has only been abrogated in respect of heirs who have share of inheritance but still relevant at least for bequest in favour of those close relative who cannot inherit, such as grandchildren (Nik Fadzrina and Shaikh Hamzah 2014).

The Muslim jurists are in consensus that wasiyyah has four main pillars, which are testator, beneficiary, subject matter and offer and acceptance (sighah) (Nor Muhamad, 2012; Mohamed, Jusoh, Mohd Burhan, & Awang, 2017; Muda, 2009). The testator is required to reach the age of puberty (mukallaf), owner of the subject matter, independent and has a free will. As for beneficiary, he must be known (save for charity wasiyyah), able to own and manage the property, alive after testator's death and non-legal heir. Regarding subject matter, it can be in the form of movable or immovable property or a valuable usufruct, transferrable after testator's death and in existence. As regards offer and acceptance (sighah), it may be explicit (sarih) or implied (kinayah). Wasiyyah may be completed verbally such as "I bequeath to you my property" or in writing (Hussain & Sulaiman, 2013; Kamaruddin & Ahmad, 2012).

Therefore, it is suggested that implementing wasiyyah in estate planning will solve the issue of unclaimed assets, particularly in Malaysia. Thus, it is suggested based on the aforementioned principles of wasiyyah that wasiyyah may be used for estate planning if the beneficiary of the wasiyyah is non-legal heir and it shall not be more than one-third of the property except if the remaining legal heirs agree to give more than one-third. Moreover, a legal heir may be a beneficiary of wasiyyah if it is made with the consent of other legal heirs. Furthermore, Muslims who accept obligatory wasiyyah may use it as a means of estate planning.

3. CONCEPT OF HIBAH (GIFT)

Hibah is an Islamic contract widely debated on its suitability to be applied in estate and financial planning (Mohd Yusof & Ahmad, 2013), risk management (Md Razak et al., 2015) and its application in financial institutions (Nor Muhamad, 2010). It is a contract of a gift done voluntarily by owner of wealth during his lifetime without any return or consideration (Nor Muhamad, 2011a). The legality of hibah is supported by verse 4 Surah an-Nisa meaning of which says: "And give the women (on marriage) their dower as a free gift; but if. It is encouraged in Islam to give hibah to the closest family in order to grow love and affection between family members (Buang, 2009; Nor Muhamad, 2009) for those who ask.... (2:177)". And Prophet Muhammad also said as narrated by Abu Hurayrah (Al-Bukhari, n.d.): "Give gifts and you will love one another."

In order to complete a valid hibah, three elements must be available, namely contracting parties, contract (aqd) and subject matters. The contracting parties are the donor and recipient. The donor must have intention of making the hibah, must have contractual capacity (puberty and prudence), donor must be the owner of the wealth, and must be done with a free will (devoid of coercion, undue influence etc.) etc. As for the other party who is the recipient he/she can be either a Muslim or non-Muslim, has the ability of managing the wealth and is present at the time of making the hibah etc. Regarding offer and acceptance (ijab and qabul), both donor and recipient must understand the contents of the contract, there

must be explicit declaration of hibah etc. (Abdul Rashid et al., 2014). With regards to subject matter, it must be lawful, in existence during the contract, valuable and legally owned by the donor (Abdul Rashid et al., 2014).

Hibah is of two kinds, which are Hibah al-‘umra and Hibah al-ruqba. Hibah al- ‘umra is a kind of hibah devoid of conditions where the property will be transferred to the donee upon the donor’s death. As for Hibah al-ruqba, the transfer of the property is dependent on certain conditions i.e. if the donor dies first, the property will be transferred to the donee. However, if the donee dies first, the property will not be transferred to donee’s legal heirs but it will be returned to the donor (Nik Fadzrina and Shaikh Hamzah 2014).

Hibah is one of the best alternatives in Islamic financial planning to address any inequalities in inheritances. Thus, if a valid hibah is made it will inevitably reduce the shares of legal heirs under fara’id as hibah properties will not be considered a part of property to be divided based on fara’id. Therefore, where a legally hibah is made, the subject matter does not form part of the property to be distributed under fara’id (Nik Fadzrina and Shaikh Hamzah 2014).

Thus, it is suggested that hibah may be used in estate planning only in situations where division based on fara’id after the owner’s death is cumbersome e.g. complexity of law, long process etc. in order to avoid accumulation of unclaimed assets. That means, the donor shall have good intention when making the gift (hibah), not intending to avoid distribution based on the Islamic law of inheritance as some writers claim that hibah is a tool that may address inequalities in inheritance. There is no inequality in distribution based on the Islamic law of inheritance. The division of property of a death person provided by the Shariah is perfect and shall be adhered to at all times. However, in certain situations for example fear of continuous accumulation of unclaimed assets in Malaysia, it is suggested that if there is no any other alternative to solve the issue, hibah may be applied.

However, if the gift (hibah) is made in favour of the donor’s children, there shall be no discrimination between them as the Prophet (saw) requires equality when giving gift to children. In a hadith reported by al-Bukhari and Muslim from al-Nu’mann ibn Basheer, who said that his father brought him to the Messenger of Allah He said: “No.” The Messenger of Allah (saw) said: “Then take your (gift back) back” (al-Bukahri, 2586; Muslim, 1623). In another version of the hadith from Bukhari and Muslim, al-Nu’maan ibn Basheer said: “My father gave me a gift of some of his wealth, but my mother. The Messenger of Allah (Peace and blessings of Allah be upon Him) said to him, ‘Have you done the same for all your children? He said, ‘No.’ He said: “Fear Allah and treat your children justly.’ So my father came back and took back that gift.” Moreover, according to another version of the hadith narrated by Muslim, the Messenger of Allah (Peace and blessings of Allah be upon Him) said: “O Basheer, do you

have any other children?" He said: "Yes."

4. CONCEPT OF FARA'ID (ISLAMIC LAW OF INHERITANCE)

Islam is a religion that covers all aspects of Muslim life through guidance sent by Allah (swt) thru his Messenger, Prophet Muhammad (saw). Thus, Islam is a complete code that covers private acts of worship and ways of dealings with the society. One of the aspects of the Shariah is the law of inheritance (fara'id), a special system provided by the Shariah for distribution of wealth left behind by a death person. It is a system that precisely determined the share of all legal heirs in order to prevent misappropriation of the estate of the death person (Abubakar et al. 2014; Nik Fadzrina and Shaikh Hamzah, 2014; Abubakar et al., 2015; Hamidi, 2008; Ab Aziz & Nordin, 2015; Kamarudin & Abdullah, 2016; Abubakar et al. 2013).

The Prophet (saw) urges the Muslims to study fara'id according to a hadith which means (Al-Hakim, 1998): "Learn the Qur'an and teach it to the people, acquire the knowledge." Additionally, the Prophet (saw) commands the distribution of property left behind by a dead person to the legal heirs based on the prescribed portion provided by the Shariah

Furthermore, distribution based on fara'id is obligatory as provided in Surah An-Nisa", verse 11 and 12 which means: "Allah (thus) directs you as regards your Children's (Inheritance)" They are spouse (husband or wife, parents (mother and father) and daughter. Abdullah, Mohd Radzi, Johari, & Dastgir, 2014; Nik Hussain & Abdul Razak, 2014).

Moreover, there is no difference between movable and immovable properties in distribution of properties based on fara'id. All properties are considered the same and each legal heir is entitled to his/her share as prescribed by the Shariah. Generally, distribution of movable properties, especially money is easier. However, distribution of immovable properties based on fractional shares mainly post a problem. According to record of the land office in Malaysia, some titles could not be transferred to the legal heirs due to difficulty of settling differences between heirs or locating a lost or unknown heir (Ismail Omar & Asiah Othman, 2012).

Thus, it is suggested that distribution of property left behind by a dead person based on fara'id in accordance with shares of each legal heir provided by the Shariah is the best means of estate planning. This is applicable in both movable and immovable properties. Allah (swt) is Merciful and knows what is beneficial to the mankind. Therefore, when He distributed the property of dead person by providing specific shares to legal heirs, it is because of a wisdom He knows which we do not know as human beings. Therefore, estate planning shall always follow fara'id principles except in certain situations e.g. solving the issue of unclaimed assets where we may need to apply hibah. And even in this situation, the

application shall be done with good intention, and not feeling that there is inequality in distribution based on fara'id.

5. CONCLUSION

The study reveals that particularly in Malaysia there are difficulties that normally arise in distribution of real estate left behind by a deceased Muslim which normally results in accumulation of unclaimed property. Accordingly, various writers suggested ways of Islamic estate planning in solving this issue. Thus, in this research it is suggested that in order to solve the issue of accumulation of unclaimed property particularly in Malaysia, wasiyyah may be used for estate planning if the beneficiary of the wasiyyah is non-legal heir and it shall not be more than one-third of the property except if the remaining legal heirs agree to give more than one-third. Moreover, a legal heir may be a beneficiary of wasiyyah if it is made with the consent of other legal heirs. Furthermore, Muslims who accept obligatory wasiyyah may use it as a means of estate planning.

Moreover, it is suggested that hibah may be used in estate planning only in situations where division based on fara'id after the owner's death is cumbersome e.g. complexity of law, long process etc. in order to avoid accumulation of unclaimed assets. That means, the donor shall have good intention when making the gift (hibah), not intending to avoid distribution based on the Islamic law of inheritance as some writers claim that hibah is a tool that may address inequalities in inheritance. There is no inequality in distribution based on the Islamic law of inheritance. The division of property of a death person provided by the Shariah is perfect and shall be adhered to at all times. However, in certain situations for example fear of continuous accumulation of unclaimed assets in Malaysia, it is suggested that if there is no any other alternative to solve the issue, hibah al-'umra may be applied. However, if the gift (hibah) is made in favour of the donor's children, there shall be no discrimination between them as the Prophet (saw) requires equality when giving gift to children.

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