



Towards Managing the Beneficiaries Rights Via Writing a Will

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Keywords: wasiyyah, as-salihin trustee, beneficiaries, islamic property management.

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Towards Managing the Beneficiaries Rights Via Writing a Will

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1. INTRODUCTION

Islamic inheritance system is comprised of a number of micro institutions: faraid (law of inheritance), wasiyyah (will) and hibah (gift). Therefore, this section presents a discussion on faraid, wasiyyah and hibah in detail. Briefly, faraid is defined as the Islamic law of succession or the Islamic law of inheritance, which is one of the most important branches of Islamic jurisprudence. Hibah according to Islamic law is an aqd (contract) that entails granting ownership of a property to someone else during his lifetime without any reprisal

(iwad). (Zamro, n.d). Meanwhile, wasiyyah is defined as a gift from a person to another for example; wealth, property or benefit after the death of the testator. However, the transfer of ownership will only be effective after the death of the testator to the beneficiaries. Wasiyyah and hibah are the two most common supplementary mechanisms available within the comprehensive Islamic inheritance system for the devolution of property.

Wide range of literature point out that wasiyyah is a declaration in the prescribed form of the intention of the person making it (testator) of the matter which he wishes to take effect on or after his death, until which time is revocable (Zulkifli n.d). This denotes that it is a legal document which enables us to determine how our property to be distributed upon our death. Furthermore, it is neither a contract nor an agreement, which will only take effect upon the death of the testator. Some scholars further stress that wasiyyah is the granting of a right by the testator which could be done verbally or otherwise. Even so, all of the four Sunni schools of law are unanimously agreed that the execution of wasiyyah of the deceased should be only be permissible after the fulfilment of the payment for the funeral expenses and upon the settlement of the deceased debts. To further strengthen this point, there is evidence from Quran and Hadith that shows Islam permits and encourages Muslim to do their wasiyyah. Prophet Muhammad PBUH says, "It is not befitting for a Muslim to abide for three nights without having his (her) 'Will' with him (her)." Abdullah bin Umar RA said, "Since I heard this from Allah's Messenger PBUH, I have always had my 'Will' with me." (Hadith No. 3648, Book of Wills, Sunan An-Nasa'i, Vol. 4).

In spite of the recognition of making wasiyyah, this permissible of writing wasiyyah is limited to only certain situation. It denotes that according to general Islamic principle wasiyyah will not be applicable to beneficiaries since these beneficiaries have their own portion as have already stated in the Quran, which will be distributed accordingly according to faraid. Faraid could be considered as one of the asset redistribution mechanism in Islamic law. This article will provide an overview of wasiyyah and its authorities according to al-Quran and hadith (prophetic tradition) as well as wasiyyah practice in Malaysia. It will then analyse the documentation of wasiyyah with special reference at As-

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Salihin Trustee and subsequently discuss the implication for non-practicing documentation of wasiyyah in Malaysia. This article then presents recommendations on how the aforementioned issues may be addressed by suggesting a proper wasiyyah documentation process that complies with both Shariah and Malaysian law. Finally, the outcome of this paper signifies the documentation of wasiyyah is among the vital part that need to be taken into consideration within Muslim's life as this practice could uphold and maintain the established principle in Islam in ensuring the family's welfare are protected.

II. DEFINITION OF WASIYYAH

Wasiyyah (will or bequest) is defined as the gift from a person to another; like material wealth, property or benefit to be owned after the death of the giver. Taking from its root word "wassa" it entails to order, advise, promise or give away property after death. Meanwhile, in a legal terminology, wasiyyah is a legal document that outlines how one's estate is to be distributed in the event of affairs after death. Shafii scholars on the other hand conclude that "wassa" as connecting or delivering (Zamro n.d) where it connects or delivers someone good deeds during his lifetime to be rewarded later after his demise. Similarly, it could be understand as a gratuitous gift of property by its owner to another, contingent on the giver's death (which gift takes effect on the giver's death).

Apart from that, a declaration in the prescribed form of the intention of the person making it of the matter which he wishes to take effect on or after his death, until which time it is revocable is another technical meaning of wasiyyah (Zulkifli n.d). As it undertakes as a legal document, it would enables us to determine how does our property shall to be distributed upon our demise. It is neither a contract nor an agreement and will only take effect upon the demise of the testator. According to some Muslim scholars, wasiyyah is the granting of a right that is implemented after the death of the testator, either verbally or otherwise. Based on explanation from Abdul Karim Zaydan (2013), wasiyyah is to grant ownership to someone voluntarily after the death of the testator in terms of possessions or benefits.

Islam encourages every Muslim do their wasiyyah before they are pass away. This is evidence based on various hadith Rasulullah SAW encouraging Muslims to make wasiyyah. In one hadith, Rasulullah SAW said, as narrated from Abdullah bin Umar RA that Rasulullah SAW said, "It is not befitting for a Muslim to abide for three nights without having his (her) 'Will' with him (her)." Abdullah bin Umar RA said, "Since I heard this from Allah's Messenger PBUH, I have always had my 'Will' with me." (Hadith No. 3648, Book of Wills, Sunan An-Nasa'i, Vol. 4). This respective hadith signifies

that wasiyyah is a gift to another party, either in the form goods, debts or benefits, to be owned by the recipient after the death of the testator dead.

a) Authorities of Wasiyyah from Quranic verse and Hadith

Most of companions including Abu Bakar, Ali Ibn Umar and the four mazhabs (schools of thought), including Shafie perceive that the obligatory (wajib) law was repealed by the verses of al-mawarith in al-Quran 4: 176. This respective verse specifically provides the provision of the heirs' portion that should be distributed accordingly upon the distribution of the inheritance. In this effect, Allah SWT already states to the effect that;

"It is prescribed for you, when death approaches any of you, if he leaves wealth, that he/she makes a bequest (a Will) to parents and next of kin, according to reasonable manners; a duty upon Al-Muttaqin." (Al-Quran 2: 180).

In addition to that it is encouraged (consider as a permissible act) to execute a proper documentation of a wasiyyah to the poor families and orphan or other person that are not entitle to receive any inheritance. To reflects on this points, Allah SWT further mentions in another verse,

"O you believed testimony (should be taken) among you when death approaches one of you at the time of bequest (that of) two just men among you or two others from outside. If you are travelling through the land and the disaster of death should strike you" (Al-Quran 5: 106).

The above verse has been supported by one hadith narrated by Ibn Majah where Prophet Muhammad SAW states that:

"The worst are those who do not have time to make a will". This hadith in line with another hadith when Prophet SAW further stresses "Anyone who dies leaving a will and he dies on the righteous road and follow the sunnah and he dies as a righteous and in Shahada and with his sin forgiven. (Narrated by Ibn Majah)

Another hadith narrated by Ibn Umar (R.A) reported Rasulullah SAW as saying: "It is the duty of a Muslim who has something which is to be given as a bequest not to have it for two nights without having his will written down regarding it" (Hadith No. 3987, Book of Bequests, Sahih Muslim, Vol. 13). Similarly, analysing to the above authority from Quranic verse and hadith, it implies that the act of documentation of wasiyyah is very encourage and permissible in Islam provided that such recognition be only recognized towards non-beneficiaries. As mentioned before, no wasiyyah is permissible to beneficiaries. This is the general principle that Muslims should adhered to. However, there is fiqh ruling that give an exception to certain cases. This denotes that in some circumstances only, the

documentation of wasiyyah to beneficiaries are allowed but the portion received should not more than 1/3 of the deceased property and asset and should have prior consent from other heirs. This exception to the general ruling is relatively not repugnant from the general principle of Islam under the Islamic law of property but rather to uphold the principle of masalih mursalah (betterment of society) which consider as one of the established principle in Islam. Imperatively, the documentation of wasiyyah for the beneficiaries are permissible in the event where there might be a possibility for the respective beneficiary to only entitled for a small portion of property through the distribution of faraid. As such for he or her maslahah, this act is permissible especially those who are in poor and needy. It is further proven by one hadith narrated from Abu Hurairah that Rasulullah SAW said: "Allah (SWT) has been charitable with you over the disposal of one third of your wealth at the time of your death, so that you may be able to add to the record of your good deeds". This hadith is considered as dhaif (weak) hadith. (Hadith No. 2700, Book of Wills, Sunan Ibn Majah, Vol. 3) (Hadith No. 26210, Musnad Ahmad)

III. WASIYYAH PRACTICE IN MALAYSIA

In general, Muslims in Malaysia are aware and familiar with the term wasiyyah and its functions as mechanism in managing the inheritance in Islam. However, the issues on abundance of wasiyyah property that are increasing year by year without proper distribution among the testator's beneficiary prove that the wasiyyah issues in Malaysia is not a straightforward assignment. The first hurdle lies in the rules and regulations that are related to estate administration and settlement. Interestingly, in Malaysia, dying intestate and testate is dealt under different legislations and authorized bodies. Even with the involvement of various authorized bodies and compliance with the provisions of legislations, it still does not assure that the process of estate administration and settlement will be smooth (Z.H Ghul et.al, 2015). Previous studies show that it is easier to administer and settle testate estate. It may take years to settle the case of dying intestate as it could lead to frozen estate problems and delays in the settlement period. Study conducted by Ahmad and Pyeman (2008) on the practice of making a wasiyyah among Malaysian Muslim found out that the respondent are aware and familiar with the term wasiyyah but they do not have a clear understanding about it. Most of the respondents agreed that wasiyyah is made to protect the welfare of those whom one wishes to give one's assets to but are not eligible under the faraid law such as adopted children. This is in line with the finding by Yaacob (2006) that the main reasons Malaysian Muslim community practises Wasiyyah is to protect adopted children, and

to get rewards for good deeds in the hereafter (Yaacob, 2006).

Other main influential factors that motivate a Muslim to make a wasiyyah are namely to ensure the transfer of the property as the testator intends, health factors, to rapidly carry out the process of property distribution, and to help the needy (Ahmad and Pyeman, 2008). Furthermore, a regression analysis which has been conducted shows that wasiyyah making among Muslims was influenced by three factors: knowledge about wasiyyah, objective of wasiyyah, and benefits of wasiyyah. The results revealed that these factors had a positive relationship with wasiyyah making. Muda et al. (2008) suggest four influential factors for wasiyyah writing practice in Malaysia namely demographic, religious, self-interest and awareness, and institutional factors. According to (Afiah et al., 2011), the law and the process of claiming estates is viewed by many people as a complex procedure because of the numerous regulations and involvements of several bodies in the distribution process. On top of this, the complexity has led to the overlapping powers and responsibilities of these entities. As a result of the complex law and procedures, heirs of the deceased may possibly be confused. This may affect their decision to claim the estate. (Afiah et al., 2011).

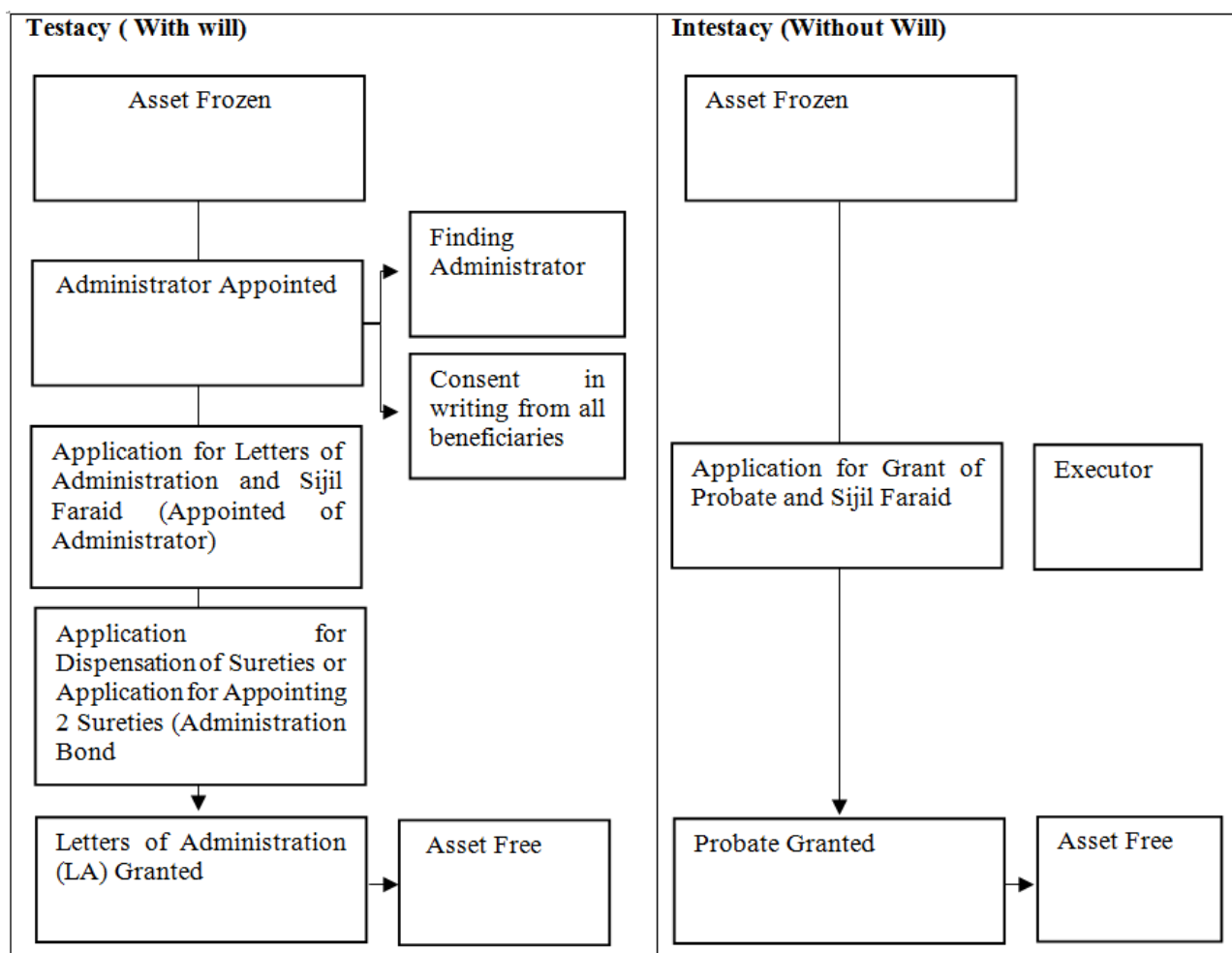
IV. DOCUMENTATION OF WASIYYAH: AN OVERVIEW AT AS-SALIHIN TRUSTEE

Drawing up a properly designed wasiyyah and appointing an executor could be seen as the essential product of Islamic estate planning as it is the main procedure a Muslims should prepare before proceeding with other means of estate planning. As-Salihin Trustee (As-Salihin) is a trust company incorporated under the Companies Act 1965 and registered under Trust Companies Act 1949. As-Salihin was established in 2005 to meet the needs of Muslims to preserve protect distribute their assets for the benefit of their heirs once they depart for the hereafter. As-Salihin aims to provide all its services relatives to estate planning in a manner based strictly on the shariah. It has its own mission and vision in strengthening their establishment; provide all its services, relative to estate planning, in a manner based strictly on the shariah. This indicates the principle of shariah is strictly adhered to in its operation, management and services. It is pertinent to further notes that few services provided by As-Salihin which include among others; wasiyyah writing services, declaration of hibah, golden age trust, business continuation plan and waqf documentation. In ensuring their operation are well manage, they also cooperate with some respective corporate alliance for example RHB Islamic Bank, Al-Rajhi Bank, Kuwait Finance House, United Overseas Bank and CIMB Wealth Advisor.

It is interesting to further points out that mutual confidence is the main element that should be greater emphasized by a Trustee company. In order to achieve this, As-Salihin has further developed their plan and laid down certain essential criteria, which could generate people's mutual trust and confidence in the process of documenting wasiyyah. The most important part is that this respective company guaranteed its perpetual existence and continuity, which means it, has a perpetual succession. With its team of full time legal staff, it will ensure continuity in the administration process until the final distribution. Apart from that, unlike individuals acting as trustee's accountability and impartiality is another crucial element is given greater care by this company. Since the company has been recognised as a regulated body, they are legally obliged to ensure that the moneys bequeathed are properly managed, accounted for and distributed to. On top of that, as a corporate body, As-Salihin will be independent and impartial towards all beneficiaries compared to individual trustees who may have emotional ties or other personal relationship with the beneficiaries. Professionalism and competence are also pertinent in order to gauge customer's perception and expectation. It provides reasonable cost for the overall administration and in this company has been supported and supervised by a respective Shariah Advisory Board. Meanwhile it is a norms practice that an executor will be appointed to carry out the testator's wishes and wasiyyah where in this situation, an administration bond is required in which case an administrator will be appointed and granted a letter of administration with wasiyyah annexed. In fact, this administration bond is required where the gross value of the estate exceeds RM50,000 unless a trust corporation is appointed as the administrator. Unlike this well know practice, as a trust company, As-Salihin is statutorily exempt from this requirement. In addition to that, the legal process to administer testator's estate after the demise is appreciably shortened since no contention among the beneficiaries arises on who should administer the estate. Therefore, these positives criteria's clearly indicates the seriousness of As-Salihin to carry out such responsibility and provide the best services for Muslims. As such in order to gain demand from the client, an active promotion is done via their Facebook, website and by organising certain event related to waqf and management of inheritance in Islam. Apart from the strong collaboration had been established with few banks for example RHB Islamic Bank. Flyers and pamphlet had been actively distributed to the customers by the hashtag "Leave your legacy behind for them". This active promotion by RHB Islamic Bank on behalf of As-Salihin could to certain extend generate awareness among Muslims customers.

Having established on this respected company managing intestate will once should bearing in mind and fully understands on the reason why do Muslims need to have proper planning to our properties. Are the any differences between intestacy (without will) and the testacy (With will) in the event to liquidate the asset leave behind? The table below indicates the procedure involved in the process of liquidation of Muslims property after his death.

1. Procedure to Liquidate Asset

Table 1: The Procedure to Liquidate Asset between Intestacy (Without will) and Testacy (With will)

It should be further notes that in terms of typical time frame, in the case of testacy that make a wasiyyah the duration period starting from petition, probate obtained and estate distributed will last for about 18 month which equivalent to 1 year 6 month. Meanwhile, the duration period for the settlement of intestacy (without will) estate up to the estate being distributed will

consume for about 5 years. This fact shows that unlike the intestacy who did not make a wasiyyah, the period for those who make wasiyyah (testacy) is shorter than those who not.

Testacy (With Will)

Intestacy (Without Will)

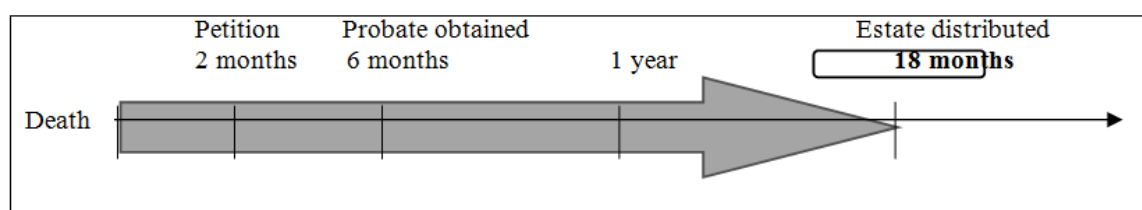
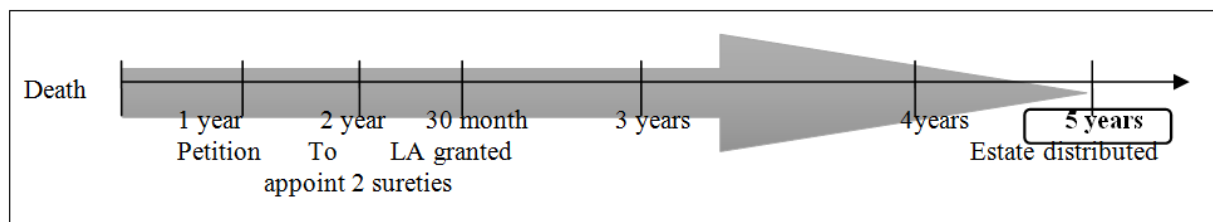
Table 2: The duration period for the liquidation of Testacy (With Will)'s asset

Table 3: The duration period for the liquidation of Intestacy (Without Will)'s asset



V. THE IMPLICATION FOR NON-PRACTICING DOCUMENTATION OF WASIYYAH

Wasiyyah is one of the methods that can be applied to distribute property after the death of giver to non-beneficiaries. Even though the original ruling said wasiyyah will only be effective towards non beneficiaries, this general ruling has still subject to exception where some scholar agreed that wasiyyah will also be applicable towards beneficiaries provided that all of the beneficiaries unanimously agreed to such implementation.

Via interview session conducted with Mr. Irwan of As-Salihin, the findings reveals that the failure on the part of Muslims to have proper documentation of wasiyyah would be amounting to the accumulation of frozen asset. He further adds that the beneficiaries would be detrimental causing by non-documented wasiyyah. In this situation, it will lead to conflicting among those beneficiaries and tension will occurs stressing for their rights. Amanah Raya Berhad has given the same view where it was stated that RM 52 million of property had frozen because of lack of awareness on documentation of wasiyyah (Utusan Malaysia, 2013). Noh Gadut, former Mufti of Johor in his press statement also gives the same idea where a lot of problem like fight among beneficiaries, frozen property and non-beneficiaries will not get their right will arise (Harian Metro, 2012). It surprising facts nowadays the amount of frozen asset that unable to distribute increasing year by year and the most surprising, the asset that unable to distribute almost 50 years (Abdul Aziz Peru, 2013).

VI. CONCLUSION & RECOMMENDATION

The abandonment of wasiyyah property seems to increase year by year causing the accumulation of these inheritance properties. Also, the absence of proper distribution among the testator's beneficiary would worsen the situation. Hence, understanding on the concept and the documentation of wasiyyah as well as the procedure involved in the documentation of wasiyyah would provide the best mechanism and option to manage the properties particularly the inheritance via wasiyyah accordingly. Apart from that, this would serve as useful information for the stakeholders particularly Muslim community on the importance of documentation

of wasiyyah for the protection of their beneficiaries. Future studies could embrace on quantitative study based on a larger sample and over a longer period of time in order to get more respondents who are involved with wasiyyah. By conducting questionnaires and interviews, more in depth information can be gathered to examine the factors that can increase wasiyyah adoption among Malaysian Muslims. The analysis would be more accurate in determining the factors that can influence people in writing a wasiyyah. It is also recommended that the government institutions undertake research on these particular topics on a larger scale, since the case study method is relatively restricted due to several and confidentiality constraints.

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