

THE APPOINTMENT OF A WASI IN ADMINISTRATION OF TESTATE ESTATES IN MALAYSIA: A LEGAL ANALYSIS

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Abstract:

In the event of death, an appointment of a *wasi* is considered as an important requirement under the law because he plays a vital role in ensuring the deceased's estate to be managed properly and efficiently. In addition, the appointment of *wasi* may expedite the process of administration and distribution of property and avoid disputes among the family members of the deceased. In Malaysia, the Rules of Court 2012 does not include the estate of a Muslim dying leaving a will because it does not come within the scope of the Wills Act 1959. However, the existence of will with the appointment of a *wasi* is valid for application of grant of Probate though the fact it is a Muslim will. Moreover, the appointment of a *wasi* is not clearly mentioned in any states' enactment but it is only provided under the statutes of general application such as Probate and Administration Act 1959. Thus, this paper attempts to analyse the laws on the appointment of a *wasi* in estate administration. This study is based on a qualitative study and its approach is a content analysis methodology. This study reveals that the laws governing the appointment of a *wasi* in Malaysia involves a dual legal system and it subjects to several legal constraints under federal and state laws. The findings of the study provide room for further improvement with regards to the appointment of a *wasi* particularly in the administration of Muslim's estate. The study concludes that there is a lacuna in the existing laws where the appointment of a *wasi* is not expressly clarified in any state laws except provided in federal laws.

Keywords:

Wasi; Executor; Appointment; Testate; Estate

Introduction

In Malaysia, the administration of Muslims' estates should be in compliance with Islamic law. An estate should be properly administered, or otherwise to a certain degree it will contribute harm to the well-being of the community. In 2013, statistics disclosed that some RM66.6 billion worth of assets and property left behind by such deceased persons remained unclaimed and unsolved (Utusan Malaysia, 2013). These assets include property such as houses, land, unclaimed money in various institutions such as Employees Provident Fund, Tabung Haji, Amanah Raya Berhad (ARB) and Permodalan Nasional Berhad (PNB). Surprisingly, there has been an increasing trend in volumes of unclaimed inheritance properties over the years, and this shows the seriousness of the problem as evidenced by the latest figure standing at RM90 billion (Malay Mail, 2021).

Table 1: Number of Unclaimed Assets in Malaysia

No	Year	Unclaimed Assets	Increasing Percent (%)
1	2009	RM40 billion	-
2	2010	RM41 billion	+2.5%
3	2011	RM42 billion	+2.5%
4	2012	RM52 billion	+19.23%
5	2013	RM60 billion	+15.38%
6	2020	RM70 billion	+16.66%
7	2021	RM90 billion	+28.57%

Source: (Shafie et al, 2014 with modification by researcher)

On the other hand, it could be argued that there were no official reports that could be found specifically on the said matters except for some uncorroborated and anecdotal evidence reported in newspapers (Halim et al, 2018). Nevertheless, the above statistic number of unclaimed assets has been referred to and cited as an authority by many writers in their discussions. Several studies have shown that various factors such as ignorance of the heirs in following the required procedures, fraud and disputes among the heirs, as well as the lack of awareness on the importance of estate planning among Muslims also contributed to the problem (Ismail, 2016; Muhamad et al, 2023). It should be highlighted that numerous researchers opined that the issue of delays in Islamic estate planning can be resolved if the testator appoints a responsible executor in the will document. (Abdullah et al, 2020, Mohammad, 2015; Nor Muhamad, 2017).

Moreover, lack of awareness and confusion of Muslims society on the appointment of *wasi* in estate planning could cause a delay in distribution of estate to the beneficiaries which lead to frozen assets in country (Hassan, 2022). It was discovered that, a *wasi* appointed among family members tend to end with delay in estate administration due to the lack of knowledge or failure to manage inheritance efficiently (New Straits Times, 2022) and subsequently failed to resume his duties as the administrator of the estate (Drs Nasrul, 2018). This also has caused problems in managing the estate such as misconducts of the *wasi* whereby he was dishonest and did not properly allocate the deceased estate to the proper beneficiaries (Mohd Noor, 2017). Moreover, where a *wasi* violates his duties of administration, he commits *devastavit* where the loss occurs to the estate owing to his omission to act promptly or to his negligence. In the case of *Re Haji Ali bin Haji Mohamed Noor (deceased)* [1933] 2 MLJ 135. the Court held that two of the three executors were held to have committed *devastavit* and hence jointly liable for the loss

occasioned up to the date of judgement. Additionally, for Muslims there might be cases on failure to administer and distribute the estate in accordance with *Hukum Syara'* as the duties to distribute the estate in accordance with the *faraid* laws are not clearly mentioned in the related statutory provisions. Serious conflicts among family members over estates left by the deceased may occur and will trigger emotions reactions and subsequently create disorder in the Muslim family institution and society. The objective of this paper is to analyse the existing laws on the appointment of a *wasi* in the administration of a Muslim's estate. On the other hand, the scope of this study is confined to the appointment of a *wasi* by Civil High Courts and Syariah Courts under Federal laws and State laws, and its application in testate estates in Malaysia.

Literature Review

In Islamic estate planning, the appointment of a *wasi* could be considered as crucial because he is responsible for collecting, maintaining and protecting the deceased's estate pending the final distribution (Hassan et al, 2016). Hence, Muslims needs to appoint a *wasi* who will execute, administer and distribute the estate accordingly. However, the customary practice among Muslims society indicates that people have made a *wasiyyah* without appointing a *wasi*, and this may result the purpose of expediting estate administration and distribution could not be achieved. Mat Zain (2008) has examined the powers, duties and obligations of a *wasi* according to the four Mazhabs and confined the scope of discussion on the Islamic perspectives only. Thus, there is a need for further discussions on the legal position of *wasi* by referring to the law of general application, as it is applicable to both Muslims and non-Muslims. Md Yusoff (2008) has emphasized on the role of a *wasi* in resolving disputes among family members including the responsibility to carry out the instructions of the property owner according to the will, such as the settling of debts, distributing *hibah* property, managing endowment, and allocating jointly acquired property between the wife or wives.

On the other hand, Mohammad (2015) has highlighted that one of the weaknesses in the implementation of *wasiyyah* is the absence of an appointed *wasi* which cause the heirs to have delayed division of estate, as the task can only be carried out by him. In addition, Ibrahim (2020) found that the law in relation to the role of *wasi* in the administration of minor's property was not adequate and there should be an improvement of law relating to the role of *wasi* in the administration of minor's property. In determining the role and position of an executor and administrator, the types of grants of representation would be an important element as there are several related bodies involved in the appointment of the *wasi*, for instance, the Civil High Court, land administrator or Corporation (Mohd Noor, 2017). In the administration of estate, normally the beneficiaries are relying on the specialized skills of a *wasi* to manage the deceased's estate. On the other hand, one of the contributory factors causing the problem and dispute in estate management is the misconduct of the *wasi* whereby he was dishonest and failed to properly allocate the deceased estate to the proper beneficiaries. Furthermore, except the powers, rights, duties and obligations provided under Part V of the Probate and Administration Act 1959, the existing framework of the Small Estate (Distribution) Act 1955 provides no provision for an action against any misconducts of *wasi* (Mohd Noor, 2017).

Ramli (2013) viewed that under the Muslim Wills (Selangor) Enactment 1999, there is no specific provision on the appointment of a *wasi* through the instruments of *wisayah*. The author suggested that *wisayah* instruments should be included in the *wasiyyah* in order to prevent the problem of frozen estates, and to ensure the smooth process of administration and distribution of property. Yahya (2004) in his article pointed out that based on practice, the executor (*wasi*)

referred to in Probate and Administration Act 1959 (Act 97) is an administrator of the *wasiyyah* only and not muso lahu (the receiver of the *wasiyyah*) according to Shara'. Such status is the same as a *wasi* in *wisayah* matters according to Shara'. Buang (2007) suggested that there should be a legal provision which excludes the application of trust law (civil law) in a Muslim's will involving the appointment of a *wasi*, as this may otherwise lead to confusion in the society.

For Muslims, in the absence of appointment of *wasi*, the estate will be automatically administered under intestacy laws and the estate will be distributed to the legal heirs in accordance with *faraid* laws. In Malaysia, the civil laws takes precedence over other laws, i.e. Islamic laws. Apart from that, the appointment of a *wasi* will ensure the estate will be distributed in accordance with the testator's wishes and *faraid* laws. Although many studies claimed that the appointment of *wasi* may curb or reduce the problem of frozen estates and avoid hardship to the beneficiaries, there were few literatures on the appointments of a *wasi* in Muslims' estates administration. This paper hopes to expand the scope by analysing the law on appointment of a *wasi* with special reference to Muslims' situations in order to fill the gap in the literature. The table below summarizes the previous studies by the researchers which have been discussed and analysed on the issues of a *wasi* in various perspectives.

Table 2: Summary of the Previous Research

No	Title, Name oAuthor & Year	Discussion Of Research
1	The Implementation of Wasiah in Courts: Theory and Practice - Ismail Yahya (2004)	Discussed the implementation of <i>wasiyyah</i> and its current issues.
2	Kuasa Wasi Dalam Pengurusan Harta Menurut Islam. Mat Noor Mat Zain (2008)	Discussed the types, qualifications, powers and duties and obligations of <i>wasi</i> according to the four Mazhabs.
3	Hukum Wisoyah & Realiti Permasalahannya Dalam Konteks Perancangan Pusaka Islam. - Naziree Md Yusof (2008)	Discussed the concept of <i>wisayah</i> as the Islamic concept of entrustment,
4	Wisayah: Kepentingannya dalam Pengurusan Harta dan Keluarga Orang Islam, Seminar Serantau Kajian Manuskrip Melayu dan Kearifan Tempatan - Yusof Ramli (2013)	Discussed the importance of <i>wisayah</i> in Muslims' estate administration and Islamic family law.
5	The Contemporary Application of <i>Wasiyah</i> (Muslim Will) In Malaysia. - Muhammad Tahir Sabit Haji Mohammad (2015),	Examined several weaknesses in the implementation of <i>wasiyyah</i> by a <i>wasi</i> that affect the efficient distribution of estates.
6	Executorship in Muslim's Testate Estates in Malaysia: Law and Procedure. - Nor Azlina Mohd Noor and Akmal Hidayah Halim (2015)	Discussed the law and procedure on executorship in Muslims' testate estates.
7	Legal Protection for Estate Beneficiaries Against Personal Representatives in Malaysia - Nor Azlina Mohd Noor (2017)	Examined the legal protection for estate beneficiaries against personal representatives in Malaysia.
8	The Role of <i>Wasi</i> in the Administration of Minor's Property under Provisions of Islamic law in Malaysia. - Badruddin Hj Ibrahim (2020)	Examined the role and power of <i>wasi</i> particularly in the administration of minor's property under Islamic law in Malaysia.

Methodology

This study employed doctrinal qualitative research. Doctrinal research deals with the law on a particular issue where the legal doctrine is analysed as to its development and applications (Abdullah, 2020). This type of research is selected because the basic aims of this research is to discover, explain, examine, analyse and present in a systematic form, facts, principles, provisions, concepts, theories or the working of certain laws or legal institution (Yaqin, 2007). The primary sources gathered in this paper are based on the governing statutes namely the Probate and Administration Act 1959, the Rules of Court 2012, Federal Constitution, State Islamic Administration Enactments and Muslims Wills Enactment while the secondary sources consist of law cases, articles, books, journals and newspapers.

In order to provide a reliable finding of the research, the study adopts content analysis methods. A content analysis method is based on the analysis of the statutory provisions, case law and other legal and non-legal literatures relating to the appointment of a *wasi*. This type of analysis were made in determining the loopholes, gaps, ambiguities and inconsistencies in the law. Furthermore, a comparative analysis of identical legal rules from different legal systems also was adopted for improvement of the law relating to the appointment of a *wasi*. Hence, the paper demonstrates a comparative analysis with the State of Sabah (East Malaysia) where the law on appointment of a *wasi* is slightly different from that of West Malaysia.

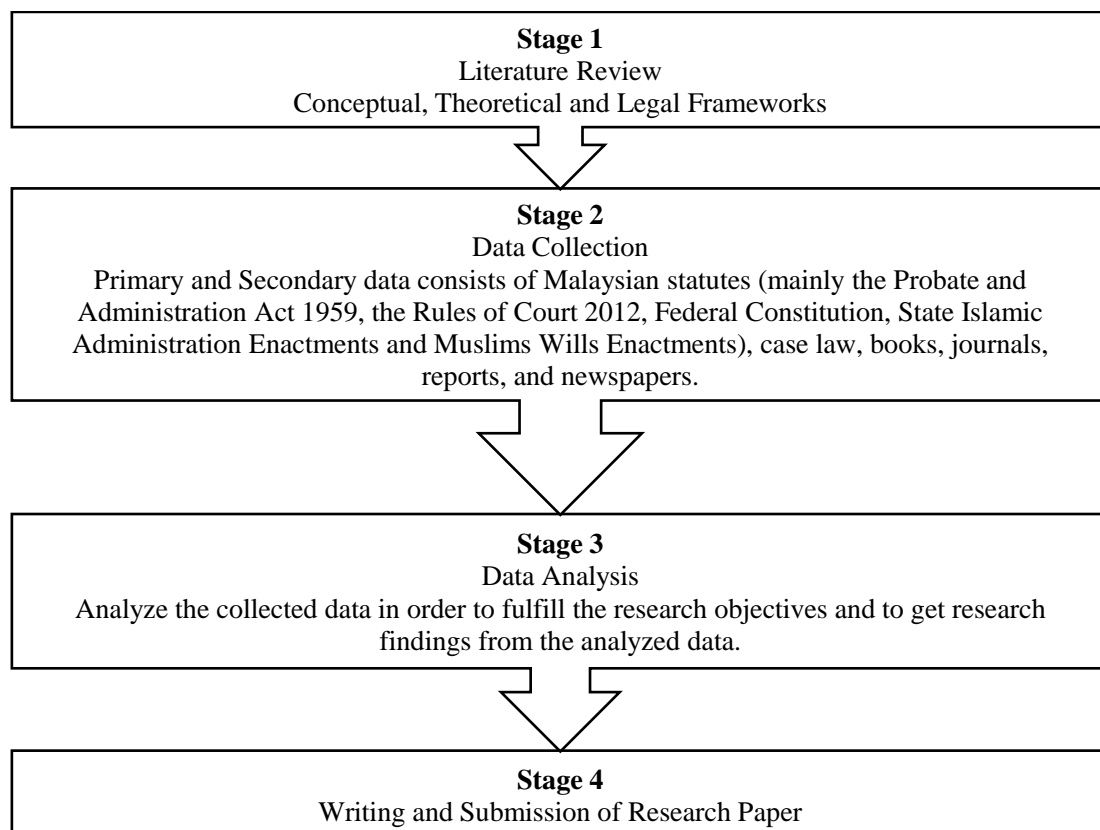


Figure 1: Flow Chart of Research Activities

Results and Discussion

Definition of a Wasi

Wasi is also known as executor. Section 2 of the Probate and Administration Act 1959 define executor as a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided in, and includes a person deemed to be appointed executor as respects settled land. In other words, executor is a person appointed by a will to administer the testator's estate (Martin, 2002). These terms appear to be synonyms and are used interchangeably in our law. In addition, the term '*wasi*' will also be referred to as 'administrator' where letters of administration with the will annexed is also granted by the High Court.

Under Islamic law the word *wasi* وصى literally related to *wasiyyah* الوصية which originally means to link one thing with another. Technically, *wasi* is one who is requested, entrusted or ordered to take care of something (ISRA Compendium for Islamic Financial Terms: Arabic-English, 2011). Section 2 of Muslim Will Enactment (Selangor) 1999 gives a wide interpretation as it includes the appointment by the testator and the court. According to the section, *wasi* is defined as 'a person to whom the execution of a will of a deceased person is confided and includes a person deemed to be appointed as executor by the Court'.

The Appointment of a Wasi in the Administration of Testate Estates

When a person dies, his estate may be left either testate or intestate. A testate estate is where a person dies leaving a valid will for the administration of his estate, whereas, an intestate estate is where the owner dies without leaving a will. In the case of intestate estate where the total value of the estate is more than RM2 million, an administrator will be appointed by the Court to administer the estate of the deceased person. According to Section 3(2) of the Small Estate (Distribution) Amendment Act 2022, the definition of "small estate" has been increased from RM2 million to RM5 million which include any property, whether it is movable or immovable. On the other hand, in the case of testate property, an executor who is appointed by the will to administer the property of the testator will 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.

The term "administration" includes the management and distribution of the estate by an executor or administrator of the estate of the deceased (Tan, 1993). Upon death, the deceased's assets need to be administered for the purpose of paying funeral expenses, debts and liabilities, and thereafter the remainder should be distributed to the entitled beneficiaries through a legal process known as the administration of estates. The administration of estates consists of three stages. First, obtaining of the letters of representation (grant of Probate or Letters of Administration). Second, management of the estate by the executor or administrator by selling off the property or other manner of disposing of the estate of the deceased. The administration of estates involving Muslim subjects, involves the participation of the civil High Court for the issuance of letters of representation and the Syariah Court, namely for the issuance of fara'id certificate. Thirdly, distribution of the property or the proceeds of sale to the heirs or beneficiaries (Arshad, 2015).

i. **Civil High Court**

The High Court is the part of the civil court system which possesses an exclusive jurisdiction in succession matters as stated in Article 74 of the Ninth Schedule of the Federal Constitution. The jurisdiction of the High Court is also determined by the value and types of assets. Technically, the High Court possesses jurisdiction in cases involving two categories of assets, namely (a) estates comprising of immovable or movable assets or a combination of immovable and movable assets where the value is more than two million ringgit, (b) estates comprising of immovable or movable assets or a combination of immovable and movable assets where the value is less than two million ringgit, involving the deceased who died testate and (c) estates comprising of movable assets only. Any value of assets outside these three categories will be subjected to the jurisdiction of the Estate Distribution Division or ARB accordingly.

There are two types of grants of representations provided by the High Court, namely, the grant of Probate and the grant of Letters of Administration. Firstly, the Grant of Probate means a grant under the seal of the court authorizing the executor therein named to administer the testator's estates. Grant of Probate shall be granted to an executor appointed by a will which includes a trust corporation, there is no caveat filed or there is no other action in court against the executor questioning the validity of the will. Secondly, the Grant of Letters of Administration is granted where the deceased died intestate. The person who is entitled to be an administrator normally would be the beneficiary of the deceased's estate. The object of applying for the grant of probate or letters of administration is to empower the applicant to deal with the deceased's estate.

Section 77A(1) of the Probate and Administration Act 1959 provides that a grant of probate and letters of administration is an order under seal of the High Court, which has exclusive jurisdiction to issue grant. Section 24(f) of the Court of Judicature Act, 1964 provides a specific civil jurisdiction of the High Court where it empowers the court to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property. In addition, Section 5 of the Small Estate Distribution Act 1955 gives the High Court an exclusive jurisdiction to grant probate or letters of administration to a small estate of part thereof, or to reseal a grant of representation affecting a small estate. On the other hand, the Small Estates (Distribution) Act 1955 is not applicable to a testate estate even if the total value of estate does not exceed two million ringgit (Halim, 2018).

Thus, the application for a grant of probate and letters of administration should be filed at the High Court and governed by Order 71 and Order 72 of the Rules of Court 2012 which regulate the law for non-contentious and contentious probate proceedings respectively. Contentious proceedings may involve caveats or, for instance, where there is failure or refusal of the person entitled to apply for letters of representation to do so, actions to issue citation, applications for the revocation of the grant and actions for a decree pronouncing for or against the validity of an alleged will. While a non-contentious probate proceeding involves a straightforward application process, a contentious probate proceeding generally involves court hearing sessions which usually take some time to complete the entire procedure. In other words, non-contentious proceedings arise where there is no dispute on letters of representation being granted to the applicants, whereas contentious proceedings arise where there is such dispute. Sometimes, there are situations such as a failure to appoint executors or the testator appoints an executor subject to certain conditions, and those conditions are not fulfilled, then the will is still considered as valid. Consequently, the High Court has no power to appoint someone else as

executor, as the court will grant letters of administration with the will annexed to such person or persons as the Court deems fittest to administer the estate and it applies in a similar manner as in case of a grant of Probate, wherein the estate must be administered in accordance with the terms of the will of the testator. This is provided under section 17 of the Probate and Administration Act 1959.

Although the Rules of Court 2012 are meant to be a statute of general application, some of the provisions of the Rules of Court 2012 in relation to the existence of a will that determines the types of grants of representation are not applicable to the Muslims wills. Even if the Muslims' wills are to be considered a privilege will as it can be made orally, the wills are still not governed by the provisions of the Rules of Court 2012. This is because an oral will is considered a privilege under the Rules of Court 2012, and only refers to the privileged wills of soldiers, airmen and sailors as provided by Section 26 of the Wills Act 1959. Even though the Civil High Court has jurisdiction over the conduct of the testamentary property, including the property of Muslims, there is a contradiction in the provisions in which the Rules of Court 2012 refer to the Wills of 1959 Act, that is not applicable to Muslims. Therefore, there is a lacuna in the Rules of Court as the law does not include the estate of a Muslim dying, leaving a will. However, the existence of will with the executor named therein is valid for grant of Probate though the fact it is a Muslim will (Halim, 2014). This kind of instrument is known as *al-wisayah* which contains a provision for the appointment of an executor to carry out the deceased's affairs upon the latter's death.

The law clearly provides that the High Court have exclusive jurisdiction on testate matter regardless of whether the deceased is Muslim or non-Muslims. In *The estate of Tunku Abdul Rahman Putra ibni Almarhum Sultan Abdul Hamid [1998] 4 MLJ 623*, the issue before the court was whether the High Court has the jurisdiction to hear and determine a dispute arising out of the administration of the estate of a Muslim and a related dispute pertaining to the validity of a marriage contract between one Chong Ah Moi alias Chong Mee Nee and the deceased, i.e. the late Tunku Abdul Rahman ibni Almarhum Sultan Abdul Hamid. Low Hop Bing J in the High Court held that:

"Parliament had enacted the Probate and Administration Act 1959 to deal with matters relating to probate and administration. This Act is an Act of general application to both Muslims and non-Muslims alike, as opposed to other statutes which have a clause limiting their application to non-Muslims, e.g. see s 2(2) of the Wills Act 1959 (Act 346) (Revised 1981) (5 Succession); s 2 of the Distribution Act 1958 (Act 300) (Revised 1983) (3 Succession); s 31 of the Adoption Act 1952 (Act 257) (Revised 1981) (3 Family Law). Rules of procedure have also been enacted in order to enable the High Court to deal with matters of 'probate and administration', eg O 71 and O 72 of the Rules of the High Court 1980, and specifically O 71 r 36(1) thereof.

Therefore, His Lordship held that the High Court is empowered to deal with matters of 'probate and administration' involving estates of Muslims. Although the Federal Constitution provides that the Islamic law relating to succession, testate and intestate comes within the State List and so within the jurisdiction of the Syariah Court, however the appointment of the *wasi* is within the jurisdiction of the Civil Courts. This must be emphasized that the grant of probate had to

be applied for in the Civil High Court because the federal constitution and state enactment do not empower the Syariah Court to grant the letter of probate and letter of administration. The Syariah Court is not vested with the jurisdiction to set aside orders made by the High Court although it is contrary with Islamic law. The author opines that this may amount to the abandonment of *Hukum Syara'* as the proper Islamic rules should be applied to Muslims accordingly. Consequently, this may cause dissatisfaction if the *wasiyyah* itself is against *Hukum Syara'*, for instance, a bequest which exceeding one-third or bequest to the beneficiaries.

Under Islamic law, a *wasi* should ensure the estate is not only distributed based on the testator's wishes, but it must also comply with Syariah principles. Since Islamic law is recognized under Malaysian law as main sources of law for Muslims, an executor must ensure that the administration and distribution of testate estate must be according to *Hukum Syara'*. In Malaysia, most of the *Hukum Syara'* applicable in Syariah Courts are codified under relevant statutes. Therefore, it would be improper for the Civil High Court judge to give an order that Syariah court does not have the jurisdiction to hear the case over matters of probate and administration of a Muslim without scrutinising the Syariah Law's principle in toto.

ii. Syariah Courts

Unlike the High Court, which is established by the Federal Constitution, the Syariah Court is a creature of State law. Article 74 of the Federal Constitution, read together with the State List, prescribes that Islamic law and Islamic matters, including the establishment of Syariah Courts, fall under the state's jurisdiction. The State List stipulates that the Syariah Court has jurisdiction only over persons professing the religion of Islam, however their jurisdiction and power lie within the boundaries of the respective state. It is also provided that the Syariah Court shall not have any jurisdiction in respect of offences unless conferred by federal law.

Generally, matters pertaining to Muslims testate, and intestate are within the powers of the state, and this is specified in item 1 of List II (State List) in the Ninth Schedule of the Federal Constitution. Therefore, Syariah courts shall have an exclusive jurisdiction to hear and determine all actions and proceedings in which all the parties are Muslims, and which relate to *wasiyyah*, *hibah*, division and inheritance of testate or intestate property. This is demonstrated in Section 46(2) (b) of the Administration of Islamic Law (Federal Territories) Act 1993. On the other hand, according to the Ninth Schedule, List 1 - Federal List, para 4(e) reads:

Subject to paragraph (ii), the following:

(i) succession, testate and intestate; probate and letters of administration;

(ii) the matters mentioned in paragraph (i) do not include Islamic personal law relating to gifts or succession, testate and intestate;

Thus, the civil jurisdiction of the Syariah Court, as set out under various State Enactments, does not include such matters as 'probate and administration'. The jurisdiction conferred upon a Syariah Court is by way of an express provision and not by implication (See *Shaik Zolkaffily bin Shaik Natar* [1997] 3 MLJ 281; *Ng Wan Chan v Majlis Agama Islam Wilayah Persekutuan (No 2)* [1991] 3 MLJ 487; and *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib*

[1992] 2 MLJ 793). Conversely, this approach has been overruled by the Federal Court in the case of *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2007] 4 MLJ 585. In this case, the Syariah court may derive its jurisdiction by implication. For instance, the jurisdiction of the Syariah court to deal with the issue conversion out of Islam, although not expressly provided in State law, could be implied from the express provisions conferring jurisdiction on the issue of conversion into Islam. In other words, the Syariah Court may derive powers directly from the State List without the need for any Enactment to confer power upon it.

As regards deceased Muslims' estate, the Syariah court only deals with limited jurisdictions, such as to determine the shares allotted to the beneficiaries under Islamic law and issue 'Sijil Faraid' upon the request of the civil court and the Estate Distribution Division, or any person claiming to be a beneficiary or his representative. The 'sijil faraid' will determine the portion of the estate each beneficiary is entitled to. In applying for the *sijil faraid*, the applicant shall make a request by letter, stating the names of the beneficiaries and their relationship to the deceased or the land administrator or the solicitor acting for the beneficiary. Therefore, Syariah Court has no jurisdiction over the appointment of the *wasi* as the powers to grant probate and letter of administration are vested to the Civil High Courts. However, in determining the substantive laws, it will be left to the Syariah Court to determine the issues, for instance, *wasiyyah*, *hibah*, wakaf and others.

In Sabah, the Syariah Court has the power to appoint the *wasi* or wali in the distribution and administration of Muslims' estate. Meanwhile, in exercising this power the Sabah Syariah Court will refer to the guidelines as provided by the State namely the the Guidelines for Division, Appointment of Trustees and Certificate of Inheritance Inheritance 2007 (Garis Panduan Pembahagian, Perlantikan Wali Harta dan Perakuan Perwarisan Harta Pusaka 2007). One of the differences in Sabah Syariah Court with the other Syariah Courts in Peninsular Malaysia is the word "appointment of the *wasi* or executor and the matters connected therewith". In other words, only Sabah Syariah Court has the provision on the appointment of the *wasi*. This may be considered an advantage to the Sabah Syariah Court to issue an order for the distribution of the estate and the appointment of the *wasi* as an executor and administrator of Muslim deceased's property.

In the case of *Noh Bin Abdul Aziz & Anor v Director of Lands and Surveys, Kota Kinabalu & Anor* [1999] 6 MLJ 772, the Tawau High Court recognised that the Syariah lower court has the jurisdiction to hear and decide on matters pertaining to division and inheritance of property, testate or intestate under section 11(2) of the Syariah Court Enactment No 14 of 1992. Moreover, there was nothing wrong for the applicants to go before the Syariah court for such orders, even if it is also within the jurisdiction of the civil courts. Section 11(3) b (viii) of the Sabah Syariah Courts Enactment 2004, provides that:

the Syariah Court shall in its civil jurisdiction, hear and decide all actions and proceedings if all parties to the actions or proceedings are Muslims and the actions or proceedings relate to division and inheritance of testate or intestate property or appointment of wasi and for matters relating thereto.

This statutory provision clearly empowers the Syariah Court to appoint *wasi* in the administration of estate. Conversely, in Sabah, there are no diversities in the jurisdiction of the estate administrative bodies and conflict with the special law and general law because the Small Estate (Division) Act 1955 and the Public Trust Corporation Act 1995 (sections 17 & 18 on

the administration of movable property) are not applicable in Sabah. Furthermore, the legal provisions on the jurisdiction of the Syariah court in Sabah is different from the Peninsular.

Conclusion

This research successfully achieves its objective by examining the laws governing the appointment of a *wasi* in Malaysia. The findings indicate that the appointment of a *wasi* particularly Muslims involves a dual legal system including federal and state laws. This diversity of laws provides complexity in the rules and regulations, particularly in Muslim's administration of an estate where it involved substantive and procedural laws that govern *wasi* as the manager of the deceased estate. In addition, there is a lacuna in the existing laws where the appointment of a *wasi* is not expressly clarified in any state laws except provided in federal laws. Moreover, all Syariah Courts in Malaysia (except Sabah) have no power to appoint the *wasi* in the distribution and administration of Muslims' estate because the power to grant probate and letter of administration was given to the civil High Courts. Although the Federal Constitution provides that the Islamic laws relating to succession, testate and intestate comes within the State list and so within the jurisdiction of the Syariah Courts, however as probate and letters of administration are placed in the Federal List of the Federal Constitution, it is the civil courts which have jurisdiction to deal with the appointment of the *wasi*. Even the High Court is empowered to grant letter of probate and letter of administration, the Rules of Court 2012 does not include the estate of a Muslim dying leaving a will as it only refers will executed under the Wills Act. However, in practice, the High Court recognizes a *wasiyyah* that contains the appointment of the *wasi* (*al-wisayah*) as an important instrument for applying the grant of probate. Hence, it is proposed that the position of a *wasi* must be recognized by both Courts; Civil Courts and Syariah Court. The appointment of a *wasi* should be clearly mentioned in the statutes as this would ensure the smooth process of administration and distribution of estate to the legal beneficiaries particularly. As has been demonstrated, the study contributes to the existing body of literature concerning administration of estate in Malaysia. Revealing the need for and importance of the appointment of a *wasi* had significantly brought to ignite the new knowledge particularly in administration of Muslims' estate.

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