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Administration of Testate Estates: A Malaysian Identity

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ADMINISTRATION OF TESTATE ESTATES: A MALAYSIAN IDENTITY*

Akmal Hidayah Halim**

Introduction

The area of administration of estates in Malaysia is governed by various statutes of general application¹ which confer different jurisdiction to different categories of administrative bodies, depending on the types of estates left by the deceased. Generally, estates can be classified into testate and intestate estates.² Testate estate refers to the estate that is disposed of by a person through his will. Such a person is known as a testator. Intestate estate, on the other hand, refers to the estate of a person who dies without leaving a valid will. Such a person is also known as an intestate. Section 2 of the Probate and Administration Act 1959 provides that ‘intestate’ includes a person who leaves a will, but dies intestate as to some beneficial interest in his movable or immovable property.³

By virtue of section 24(f) of the Courts of Judicature Act 1964 (Act 91), the High Court has the jurisdiction to grant probates of wills and testaments of the estates of deceased persons leaving property within the territorial jurisdiction of the Court. In other words, the High Court has the jurisdiction to deal with testate estates. Even if such an estate falls under the definition of a small estate,⁴ it shall not affect the exclusive jurisdiction of the High Court relating to the grant of probate or letters of administration in any case where the deceased has left a valid will or other testamentary disposition in respect of the small estate. The grant shall have effect as if the estate had not been a small estate.⁵

Nevertheless, it must be noted that the Administration of the Religion of Islam statutes⁶ provides that the Syariah Court⁷ shall have the jurisdiction to hear and

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¹ General application means that the statutes are applicable to both Muslim and non-Muslim alike.

² Abdul Hamid Mohamad, “Administration of property in Malaysia: A civil and Shariah law perspective” [2002] MLJ i.

³ Akmal Hidayah Halim, *Administration of Estates in Malaysia: Law and Procedure*, Sweet & Maxwell Asia, Petaling Jaya, 2012 at pp. 1-2.

The definition refers to a case of partial intestacy. See section 8, Distribution Act 1958.

⁴ Small estate refers to an estate of a deceased person consisting wholly or partly of immovable property and not exceeding two million ringgit in total value. See section 3(2), Small Estates (Distribution) Act 1955.

⁵ Section 5, Small Estates (Distribution) Act 1955.

⁶ The statutes provide for the statutory framework for the administration of Islamic law among Muslims in Malaysia.

⁷ Malaysian legal system is generally based on the dual system of courts. A parallel system of Syariah Court is structured along the same lines as the civil courts in matters relating to the Muslim personal law. By virtue of Article 121(A) of the Federal Constitution of Malaysia, the High Courts and inferior courts established by federal law shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts as specified in the State List as set out in paragraph 1 of List II of the Ninth Schedule of the Federal Constitution. The specified matters include Islamic law relating to succession, testate and intestate.

determine all actions and proceedings in which all the parties are Muslim and which relate to, *inter alia* the wills of a deceased Muslim and the division and inheritance of his testate or intestate property.⁸

Hence, this paper seeks to analyze the jurisdiction of the High Court and Syariah Court over testate estates in Malaysia. The analysis would include the administration of testate estates by both courts, the nature of will executed by non-Muslims and Muslims in Malaysia and the effect of the existence of such will to the administration of the deceased's estate. The paper would also analyze the applicability the Rules of the High Court 1980, being a statute of general application that regulates the procedure for the grant of probate and letters of administration, to the Muslims' wills in Malaysia.

Administration of Testate Estates by the High Court

The High Court has the jurisdiction to deal with a testate estate by virtue of section 24(f) of the Courts of Judicature Act 1964 (Act 91). The section provides for the jurisdiction of the High Court to grant probates of wills and testaments of the estates of deceased persons leaving property within the territorial jurisdiction of the Court. Hence, even if such an estate falls under the definition of a small estate,⁹ it shall not affect the exclusive jurisdiction of the High Court relating to the grant of probate or letters of administration in any case where the deceased has left a valid will or other testamentary disposition in respect of the small estate. The grant shall have effect as if the estate had not been a small estate.¹⁰

The administration of testate estates by the High Court is governed by the Probate and Administration Act 1959 (Act 97) and the Rules of the High Court 1980 [PU(A) 50/1980]. The former provides for the law relating to the grant of probate and letters of administration. The latter, on the other hand, regulates the procedures for the application of such grants.

The object of applying for the grant of probate or letters of administration¹¹ is to enable the applicant to deal with the deceased's estate. If a person dies leaving behind a valid will and having appointed an executor who is willing to act as such, the executor has to obtain a grant of probate.¹² Although an executor derives his title and authority from the will of his testator and not from any grant of probate, the obtaining of the probate will ensure the validation of his actions. In other words, probate formalizes the authority of the executor to carry on the affairs of the deceased.¹³

⁸ Section 61(3)(b)(v) and (viii), Administration of the Religion of Islam (State of Selangor) Enactment 2003. Similar provisions are found in the Administration of the Religion of Islam statutes of other states in West Malaysia on the jurisdiction of the Syariah Courts to hear and determine all actions and proceedings in which all the parties are Muslim.

⁹ Small estate refers to an estate of a deceased person consisting wholly or partly of immovable property and not exceeding two million ringgit in total value. See section 3(2), Small Estates (Distribution) Act 1955.

¹⁰ Section 5, Small Estates (Distribution) Act 1955.

¹¹ The grants are also referred to as the grant of letters of representation.

¹² According to section 2, Probate and Administration Act 1959, 'probate' means a grant under the seal of the Court authorizing the executor or executors therein named to administer the testator's estate. The grant of probate to an executor is governed by section 3, Probate and Administration Act 1959.

¹³ G Raman, *Probate and administration in Singapore and Malaysia*, Lexis Nexis, 2005, p. 9.

The letters of administration,¹⁴ on the other hand, are granted in cases where the deceased dies intestate. However, an application for letters of administration shall also be made in cases where a person dies leaving behind a valid will but without having appointed an executor, or none of those appointed is able and willing to act, or no executor survives the testator, or all the executors die before obtaining probate or before having administered all the estate of the deceased, or the executors appointed by any will do not appear and extract probate.¹⁵ The grant shall be in form of letters of administration with will annexed. The will is annexed to the letters of administration to demonstrate the intention of the testator relating to the distribution of the estate. The procedure for the application of such a grant is similar to the application of letters of administration. The grant of letters of administration with will annexed is governed by section 16 of the Act.¹⁶

The administration of estates by the High Court is governed by Orders 71 and 72 of the Rules of the High Court that regulate the law for non-contentious and contentious probate proceedings respectively.¹⁷ Non-contentious probate proceeding is a common form proceeding where there is no dispute as to the application for probate or letter administration. Where there is a dispute, the probate proceeding will be in the form of an action in court. The proceedings then become contentious.

Administration of Muslims' Testate Estates by the Syariah Court

In the process of estates administration, the role of the Syariah Court differs from the role of the High Court in a way that the Syariah Court is not empowered to directly distribute the deceased's estate. The Syariah Court will be resorted to, only if, in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, an order from the Syariah Court is required for the purpose of determining any issue arising in the process of administration or distribution of the estate.¹⁸ In its civil jurisdiction, the Syariah Court has the jurisdiction to determine *inter alia*, the issues relating to the wills of a deceased Muslim and the division and inheritance of testate or intestate property of a Muslim.¹⁹ However, its jurisdiction is limited to the determination of the disputes relating to substantive law on *wassiyah*

¹⁴ The word "administration" means, with reference to the estate of a deceased person, letters of administration issued by the Court whether general or limited or with the will annexed or otherwise authorizing the person or persons therein named to administer the deceased person's estate in accordance with law. See section 2, Probate and Administration Act 1959.

¹⁵ Section 16, Probate and Administration Act 1959. These cases are known as failure of the executor. In other words, there is no proving executor.

¹⁶ Order 71 rule 17, Rules of the High Court 1980. Section 16 of the Probate and Administration Act 1959 provides that in such a case, a prior right to the grant shall belong to the following persons in the following order:

- (a) a universal or residuary legatee;
- (b) a personal representative of a deceased universal or residuary legatee;
- (c) such person or persons, being beneficiaries under the will as would have been entitled to a grant of letters of administration if the deceased had died intestate;
- (d) a legatee having a beneficial interest; and
- (e) a creditor of the deceased.

¹⁷ See G Raman, *Probate and Administration in Singapore and Malaysia*, Lexis Nexis, Singapore, 2005 p.85.

¹⁸ *Ibid.* p 20.

¹⁹ Section 61(3)(b)(v) and (viii), Administration of the Religion of Islam (State of Selangor) Enactment 2003. Similar provisions are found in the Administration of the Religion of Islam statutes of other states in West Malaysia on the jurisdiction of the Syariah Courts to hear and determine all actions and proceedings in which all the parties are Muslim.

only. The Syariah Court has no jurisdiction to grant probate or letters of administration with will annexed although the it involves the administration of Muslims' testate estates.²⁰

Nature of wills

Whilst the non-Muslims have an unfettered right to dispose of their property by a will, the Muslims' testamentary disposition is subject to limitations. The Wills Act 1959 (Act 346) which governs the making of a will in West Malaysia, does not apply to the wills of persons professing the religion of Islam whose testamentary powers shall remain unaffected by the Act.²¹ For the Muslims, the distribution and the right to succession are dependent on and governed by Islamic rules of succession.

Wills of Non-Muslims

According to section 2(2) of the Wills Act 1959, the word 'will' means a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death. This includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child. A will in the physical sense may, then, be defined as a declaration in a prescribed form of the intention of the person making it of the matters which he wishes to take effect on or after his death, until which time it is revocable.²²

As for the non-Muslims, the making of a will shall determine the method on how the distribution of his property will be carried out. The person who makes the will or the testator has unfettered right to dispose of his property by his will to his preferred beneficiaries. However, it is advisable that the testator should provide reasonably or adequately for the maintenance of the following persons, if any:

- (a) a wife or husband;
- (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself.
- (c) a son who is below the age of 21.
- (d) a son who is by reason of some mental or physical disability, incapable of maintaining himself.

If the testator has not attended to the above, the Court may order payment out of the deceased's net estate upon an application made to it if the court is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable provision for the maintenance of such persons.²³ The Court's view is that, the object of making the Will is just as much to leave out people from getting as much as it is to guarantee that the dependants are properly provided for.

²⁰ See *Jumaaton@Zaiton & Anor. v. Raja Hizaruddin bin Raja Nong Chik* [1998] 6 MLJ 556.

²¹ Section 2(2), Wills Act 1959.

²² Clive V Margrave-Jones, *Mellows: The law of succession*, 5th Edition, Butterworths, 1993, p. 6.

²³ Section 3, Inheritance (Family Provision) Act 1971 (Act 39),

Wills of Muslims

A *wasiyyah* or will means an *iqrar*²⁴ of a person made during his lifetime with respect to his property or benefit thereof, to be carried out for the purposes of charity or for any other purpose permissible by Islamic law, after his death.²⁵ A will of a Muslim or may be made orally.²⁶ The general principle of the Islamic law on bequest is that testamentary dispositions may not surpass one-third of the estate of the deceased. This rule is derived from the report by the Prophet's companion, Sa'ad ibn Abi Waqqas who said:

*The Prophet came to visit me in my sickness. I was then at Mecca and did not like to die at a place from where I had migrated. The Prophet of God said: "God shall have mercy on Ibn Nafra'." I said to the Prophet, "O Prophet! I am wealthy and my only heir is my daughter. Permit me that I make a will of my entire property." He said, "No". I said, "Should I make a will of two-thirds of my property?" He said, "No". I said, "Permit me for a third." The Prophet replied, "You may make a will of a third, although this is also too much. To leave after you your heirs well to do is better than you leave them poor and in want whilst others meet their needs."*²⁷

In *Shaik Abdul Latif v. Shaik Elias Bux*²⁸, it was held that that under Muslim law a testator has authority to dispose of not more than one-third of the property belonging to him at the time of his death; the remaining two-thirds of such property must descend in fixed proportions to those affirmed by Muslim law to be his heirs.

Another limitation for Muslims will is that it must not attempt to favour one heir by giving him a larger share of the estate than he is entitled to by Muslim law will also be completely invalid without the permission of the other heirs. This is based on a *hadith* reported by Abu Imamah:

*"I heard the Prophet said: "Allah has already given to each entitled relative his proper entitlement. Therefore, no bequest in favour of a legal heir."*²⁹

In the case of *Re Man bin Mihat*,³⁰ it was clearly stated that Islamic law rigidly prescribes the share of every heir and no alteration of these shares may be made by a will, for a bequest to an heir requires the consent of all co-heirs.

²⁴ 'Iqrar' means an admission made by a person, in writing or orally or by gesture, stating that he is under an obligation or liability to another person in respect of some right. See Muslim Wills (Selangor) Enactment 1999, s 2(1). Similar provisions can be found in and Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (Malacca) Enactment 2005.

²⁵ Muslim Wills (Selangor) Enactment 1999, s. 2(1).

²⁶Section 3, Muslim Wills (Selangor) Enactment 1999,. Similar provisions can be found in Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (Malacca) Enactment 2005.

²⁷ Al-Bukhari, *Sahih al-Bukhari*, translated by Muhammad Muhsin Khan, (Kazi Publication, vol. 4, 1979), p.3.

²⁸ (1915) 1 FMSLR 204; See also the cases of *Re Will of M.Mohamed Haniffa, deceased*, (1950) MLJ 286.

²⁹ Al-Bukhari, *Sahih al-Bukhari*, p. 6.

It is to be emphasized that the *wasiyyah*, would not, in any way, affect the scheme of distribution to the legal heirs. The property that becomes the subject of a valid *wasiyyah* would not be part of the deceased's estate and shall be excluded from the estate prior to the distribution of the residue which shall be made according the rule of *faraid* or according to the family agreement, as the case may be.

The position of Muslims' wills under the Rules of the High Court 1980

The procedures for the administration of a testate estate as provided by the Rules of the High Court 1980 have been largely adopted from the Non-Contentious Rules 1954 of England, which have now been superseded by the Non-Contentious Rules 1987. The disposal by a will is a concept borrowed from Roman law. The Roman conquest of England left behind principles of law which were accepted and adapted to suit local requirements.³¹ Consequently, some of the provisions of the Rules of the High Court 1980, especially in relation to the existence of a will that determines the type of grant of representation, are not applicable to the wills of Muslims although the Rules are meant to be a statute of general application.³² This is because the Rules refer to the will executed according to the Wills Act 1959 which is not applicable to the person professing the religion of Islam. The relevant provisions of the rules under Order 71 are as follow:

Rule 11. Evidence as to terms, conditions and date of execution of will. (O 71 r 11)

(1) Where there appears in a will any obliteration, interlineation, or other alteration which is not authenticated in the manner prescribed by section 15 of the Wills Ordinance 1959 or by the re-execution of the will or by the execution of a codicil, the Registrar shall require evidence to show whether the alteration was present at the time the will was executed and shall give directions as to the form which the will is to be proved:*

Provided that this paragraph shall not apply to any alteration which appears to the Registrar to be of no practical importance.

(2) If from any mark on the will it appears to the Registrar that some other document has been attached to the will, or if a will contains any reference to another document in such terms as to suggest that it ought to be incorporated in the will, the Registrar may require the document to be produced and may call for such evidence in regard to the attaching or incorporation of the document as he may think fit.

(3) Where there is a doubt as to the date on which a will was

³⁰ [1965] MLJ 1. See also *Siti bt Yatim v. Mohd Norbin Bujal* (1928) 6 FMSLR 135, and *Amanullah bin Haji Hassan v. Hajjah Jamilah binte Shaik Madar* (1975) 1 MLJ 30.

³¹ *Ibid.* p.2; Mahinder Singh Sidhu, *The Law of Wills Probate Administration and Succession*, International Law Book Services, Kuala Lumpur, 1998, p.1.

³² Akmal Hidayah Halim, *Administration of Estates in Malaysia: Law and Procedure*, Sweet & Maxwell Asia, Petaling Jaya, 2012 p. 4.

executed, the Registrar may require such evidence as he thinks necessary to establish the date.

Rule 14. Will not proved under section 6 of wills Ordinance. (O 71 r 14)

*Nothing in rule 9, 10, 11 or 12 shall apply to any will which it is sought to establish otherwise than by reference to **section 5 of the Wills Ordinance 1959*** but the terms and validity of any such will must be established to the Registrar's satisfaction.*

Rule 15. Wills of persons on military service and seamen. (O 71 r 15)

*If it appears to the Registrar that there is prima facie evidence that a will is one to which **section 26 of the Wills Ordinance 1959*** applies the will may be admitted to proof if the Registrar is satisfied that it was signed by the testator or, if unsigned, that it is in the testator's handwriting.*

Rule 18. Grant to attesting witnesses etc. (O 71 r 18)

*Where a gift to any person fails by reason of **section *9 of the Wills Ordinance 1959*** (which provides that gifts to attesting witnesses or their spouses shall be void), such person shall not have any right to a grant as a beneficiary named in the will, without prejudice to his right to a grant in any other capacity.*

** Now Wills Act 1989 (Act 346).*

Based on the above rules, it can be said that the reference to testate estates in the Rules of the High Court 1980 may not include the estate of a Muslim dying leaving a will. Even if the Muslims' wills are to be considered as a privilege will as it can be made orally, still the wills are not governed by the provisions of the Rules. This is because an oral will is considered as a privilege will under the Rules of High Court 1980³³ and only refer to the privileged wills of soldiers, airmen and sailors as provided by section 26 of the Wills Act 1959.

The application for the grant of probate, however, may be required if the *wasiyyah* contains a provision for the appointment of an executor to carry out the deceased's affairs upon the latter's death. Such a *wasiyyah* is termed as a *wisayah* under Islamic law. Considering the nature of the *wisayah*, it is submitted that this is the kind of instrument that requires the application for the grant of probate from the High Court and not the instrument recognizable as *wasiyyah* or will in Islam.

Therefore, as the Rules of the High Court is a statute of general application, the provisions must be amended to also include the wills executed by the Muslims in Malaysia, particularly if the will contains the appointment of an executor or *wasi*

³³ See Order 71 rule 15, Rules of the High Court 1980.

which is known as *wisayah* in order to grant proper authority to the appointed *wasi* in the administration of the deceased testate estate.

Conclusion

The jurisdiction of the High Court relating to the grant of probate and letters of administration to the executor and administrator respectively is exclusive in any case where the deceased has left a valid will or other testamentary disposition. However, as far as the Muslims' estates are concerned, any disputes as to the substantive matters relating to the wills executed by Muslims, the jurisdiction lies in the Syariah Courts. Nevertheless, if the Muslims' wills contains the appointment of an executor or *wasi* that necessitates the application for probate, the application for the administration of the estates will still have to be made to the High Court.