

Rights and Entitlements of a Foreign Spouse to the Deceased's Estate under the Malaysian Law of Succession

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Abstract

A valid marriage will undoubtedly give rise to some mutual rights between the husband and the wife. Such rights include a right to property under the law of succession which arises upon the death of the spouse. Under the Malaysian law of succession, such a right will be legally recognised if there is proof as regard to the marital relationship that is normally determined based on a marriage certificate issued upon registration of such a marriage. Nevertheless, in some cases of cross-border marriages, it is very unlikely for the parties to register their marriage due to non-citizenship of the foreign spouse or to the foreign spouse being an illegal immigrant. It is also a requirement that such a spouse, in order to be entitled to succession, should have the legal capacity to own Malaysian property. The requirements are rather strict in cases of property involving land which is subject to some restrictions and prohibitions as stipulated in the Malaysian National Land Code 1965. In light of these circumstances, this article seeks to analyse the rights and entitlements of a foreign spouse, particularly under the Malaysian law of succession. It is important that the appropriate legal constraints be ascertained to ensure that in the event of death, the interests of the foreign spouse would not in any manner be adversely affected or prejudiced.

Introduction

Today we live in a world without borders where distance no longer defines who we meet, fall in love with, or marry. Immigration, study abroad, travel, and multinational business have created a thriving cross-cultural community and established social networks that traverse the national border. Nowadays, many men view their work in Malaysia as a transient undertaking away from home that they must go through out of economic necessity.¹ The increased number of these immigrants has significantly led to an increased number of cases of cross-border marriages, which undoubtedly give rise to some mutual rights between the husband and the wife. The rights include a right to property under the law of succession which arises upon the death of the spouse.

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1 Tsuneda, Michiko "Gendered Crossings: Gender and Migration in Muslim Communities in Thailand's Southern Border Region", *Kyoto Review of Southeast Asia* 2006.

As the term "succession" is defined as a process of becoming entitled to the property of the deceased under a will or by operation of law,² this article seeks to analyse the rights and entitlements of a foreigner married to a Malaysian under both processes upon the latter's death particularly in relation to the deceased's estate in Malaysia. The discussion will focus on requirements for a valid marriage, the applicable substantive and procedural law relating to succession, the claim on jointly acquired property and the restrictions on the land ownership.

Requirements for a valid of marriage

A marriage is not a marriage unless it is a valid marriage. Otherwise, it remains a purported marriage, without the legal effect of a valid marriage. Under the Malaysian law, in order to accord proper recognition to the status of a marriage, the law requires that the marriage be properly solemnised and registered according to the provisions of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) and Islamic Family Law statutes for the non-Muslims and Muslims respectively. A proof of the existence of a marital relationship is determined based on a marriage certificate that is issued upon registration of such marriage. Although a valid marriage shall not be construed as invalid merely by reason of its not having been registered,³ such a marriage is not recognised by the law of the country particularly in cases involving claims to the rights that are supposed to arise from the marriage contract, as registration forms an essential process in the marriage procedures. To some extent, the requirement for the registration of marriage after the enforcement of the Law Reform Act has been made mandatory in cases of solemnisation of non-Muslims' marriages under any law, custom or religion, the failure of which will render the marriage invalid.⁴

In applying for the administration of the deceased's estate, the law requires the applicant to deliver all documents relating to the deceased's estate. Any spouse relict claiming the inheritance has to establish the validity and the existence of the marriage. For that purpose, the surviving spouse has to tender evidence normally in the form of marriage certificate that he or she was still married to the deceased at the time of the death. Otherwise, the claim would not be sustainable. In such cases, the spouse cannot claim his or her rights as the entitled legal heir since there is no evidence of his or her relationship to the deceased.⁵

2 Curzon, L B, *Dictionary of Law*, 3rd edn (Kuala Lumpur: International Law Book Services, 1989), p 422).

3 Law Reform (Marriage and Divorce Act) 1976, s 34. There is similar provision in the State Enactments governing the legal effect of registration of Muslims' marriages.

4 *Chai Siew Yin v Leong Wee Shing* Federal Court Civil Appeal No 02-10-2003 (W).

5 Akmal Hidayah Halim and Mohamad Asmadi Abdullah, "Women's Rights to Succession in Unregistered Marriages: A Reference to the Instrument of Wasiyyah" (2008) 16 IIUMLJ 125 at 129.

The applicable law on succession

The present arrangement requires different laws for movable and immovable property. In *Shaik Abdul Latif v Shaik Elias Bux*,⁶ the Court of Appeal held that the devolution of immovable property of a deceased person is regulated by the *lex situs*, the law of the place where the property is situate, and the distribution of the movable property of the deceased depends on the *lex domicilii*, the law of deceased's domicile. In this case, the immovable property was situated in the State of Selangor and the deceased had also acquired by choice a domicile in the State. It was held that the validity of the will and distribution of property both immovable and movable of the deceased person, a Mohammedan Indian and a British subject having a domicile of origin in Hong Kong, was governed by Islamic law as administered in Selangor. In *Sheriffa Fatimah v Syed Allowee*,⁷ the Court of Appeal held that the legality of a will disposing of immovable property must be decided by the law of the country where the property is positioned and in the instant case, the laws of this country applied.

This is also evident under the Distribution Act 1958 (Act 300) which regulates that the distribution of the movable property of a person who dies intestate shall be administered by the law of the country in which he is domiciled at the time of his death. Meanwhile, the distribution of the immovable property of a deceased intestate which is located in Malaysia is administered in accordance with the provisions of the Act wherever he may have been domiciled at the time of his death.⁸

Succession by will

Whilst non-Muslims have an unfettered right to dispose of their property by a will, 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.⁹ For Muslims, the distribution and the right to succession are dependent on and governed by Islamic rules of succession.

The statutory provisions for making a will are diverse in West Malaysia as against the East Malaysian State of Sabah. The West Malaysian Act has been extended to Sarawak, but similarly is not applicable to Muslims and natives of Sarawak. In Sabah, the provisions of the Wills Ordinance were amended to state that nothing in the Ordinance shall influence the validity of any Will made by a Muslim according to Muslim law.¹⁰ The application of the provision

6 (1915) 1 FMSLR 204.

7 (1883) 2 Ky Ecc 31.

8 Distribution Act 1958, s 4.

9 Wills Act 1959, s 2(2).

10 Sabah Wills Ordinance (Cap 158), s 1(2) as amended.

was illustrated in *Awang Bakar bin Awang Dewa v Dayang Munah binti Awang Hussin*,¹¹ where it was held that it is incumbent on the Native court to think about the query whether the bequests of the will were in agreement with or in divergence with native law or custom or Muslim law.

Testamentary succession of Non-Muslims

A spouse may be entitled to the estate via a valid will which specifically provides for the spouse's entitlement. This is known as testamentary succession. According to s 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.¹² For a will to be valid, it must satisfy three requirements as to the age,¹³ testamentary capacity¹⁴ and formalities¹⁵ for the execution of a will.

To be entitled under a will, a spouse must survive the testator. The testamentary gift will fail if the spouse pre-deceases the testator. In cases where the husband and wife die in circumstances rendering it vague which of them survived the other, such deaths shall (subject to any order of court) for all purposes affecting the title to property be assumed to have happened in order of seniority and consequently the younger shall be deemed to have survived the elder.¹⁶ This presumption however, is not applicable in cases of intestacy.

Since the law permits an unfettered right to dispose of the property by a will, there may be situations where the disposition of a deceased's estate effected by a will, is not such as to make realistic stipulation for the maintenance of the spouse. In these circumstances, under the Inheritance (Family Provision) Act 1971, the court may, upon application by or on behalf of the spouse, order sensible stipulation, as the court may enforce, be made out of the deceased's estate for the maintenance of such spouse.¹⁷ The court's view is that the object of making the will is just as much to leave out people from getting provision as much as it is to guarantee that the dependants are properly provided for.

11 [1975] 2 MLJ 256.

12 Margrave-Jones, Clive V, *Mellows: The Law of Succession*, 5th edn (London: Butterworths, 1993), p 6.

13 Wills Act 1959, s 4.

14 Wills Act 1959, s 3. See *Banks v Goodfellow* (1870) LR 5 QB 549 for the rule on testamentary capacity.

15 Wills Act 1959, s 5.

16 Presumption of Survivorship Act 1950 (Act 205), s 2.

17 Inheritance (Family Provision) Act 1971 (Act 39), s 3.

The Inheritance (Family Provision) Act 1971 is applicable throughout Malaysia, but is not relevant to the estates of deceased Muslims or natives of either of the States in East Malaysia. It is applicable only to persons dying domiciled in Malaysia. This is also subject to the stipulation that no application can be made by a spouse where he or she is already entitled to receive not less than two-thirds of the net estate and where the only other dependant or dependants, if any, is or are a child or children of the surviving spouse. The provision for maintenance ceases upon the re-marriage of the spouse.

Testamentary succession of Muslims

A *wasiyyah* or will¹⁸ means an *iqrar*¹⁹ 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.²⁰ Therefore, as the will is effective only after the death of the testator, it follows that the transfer of the property will only take effect on such death. Consequently, no claim can be made by the beneficiaries of a *wasiyyah* before the testator's death and the testator is free to deal with the property during his lifetime. The pillars of a *wasiyyah* according to Islamic law consist of the testator (*al-musi*), the beneficiary (*al-musalahu*), the subject (*al-musabihi*) and offer and acceptance (*sighah*).²¹

At present, only the states of Selangor, Negeri Sembilan and Malacca have successfully enforced Wills Enactments namely, the Muslims Wills Enactment (Selangor) 1999, the Muslims Wills Enactment (Negeri Sembilan) 2004 and the Muslims Wills (Malacca) Enactment 2005. The Enactments govern the making of a will by a Muslim.

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

18 The words "*wasiyyah*" and "will" will be used interchangeably throughout the discussion on *wasiyyah*.

19 "*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 the Muslim Wills (Selangor) Enactment 1999, s 2(1). Similar provisions can be found in the Muslim Wills (Negeri Sembilan) Enactment 2004 and the Muslim Wills (Malacca) Enactment 2005.

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

21 Al-Sharbini, Shams al-Din Muhammad bin al-Khatib, *Mughni al-Muhtaj ila ma'rifat ma'ani alfad al-Minhaj* (Cairo: Dar al-Fikr), vol 3, at p 50; Musa Fathullah Harun, *Masalah wasiat dan faraid* (Kuala Lumpur: Unit Penerbitan Akademik, UTM, 1994), at 4-15.

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."²²

In *Shaik Abdul Latif v Shaik Elias Bux*²³, 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.

A will of a Muslim which attempts 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."²⁴

In the case of *Re Man bin Mihat*,²⁵ 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. For the consent, it is an established law that it must be obtained after the death of the testator.²⁶ Consent given during the lifetime of the testator carries no weight to validate such a bequest.

At this point, it is pertinent to be noted that in Sarawak, there appears to be an anomaly in the law of wills for Muslims, as the wills made by Muslims must comply with the Muslims Wills Ordinance 1896 which hardly represents the Islamic law of inheritance.²⁷ The Ordinance provides that the drawing and division of property among Muslims in the state shall not necessarily be regulated by the Muslim law of inheritance but shall be in accordance with the desire and wishes of the testator.²⁸ In *Shariffa Unei v Mas Poeti*,²⁹ it

22 Al-Bukhari, *Sahih al-Bukhari*, translated by Muhammad Muhsin Khan (Chicago: Kazi Publications Inc, 1979), vol 4, p 3.

23 (1915) 1 FMSLR 204. See also the cases of *Re Will of M Mohamed Haniffa, deceased* [1950] MLJ 286; *Siti v Mohd Nor* (1928) 6 FMSLR 135, and *Amanullah bin Haji Hassan v Hajjah Jamilah binte Shaik Madar* (1975) 1 MLJ 30.

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

25 [1965] MLJ 1.

26 Al-Nawawi, Mahy al-Din Abi Zakariyya Yahya ibn Sharaf, *Minhaj al-Talibin: A manual of Muhammadan law according to the school of Shafi'i*, translated by E C Howard (Lahore: Law Publishing Co, 1977), p 260; Coulson, N J, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), p 246.

27 Pawancheek Marican, *Islamic Inheritance Law in Malaysia*, 2nd edn (Kuala Lumpur: LexisNexis: Malaysia, 2008), p 131.

28 Sarawak Muslim Wills Ordinance 1896, s 6.

29 [1949] SCR 5.

was held that a will made by a Malay in Sarawak giving his property to his adopted daughter was valid on the ground that adoption is recognised by Malay custom in Sarawak and the adopted child stands in the same relation as a legitimate child.

The Ordinance also provides that in the event of the testator willing all his property away to others than those of his own family, the witnesses (two Native Chiefs of the Islamic Religion and one Senior Government Officer) shall advise the testator to alter the will as they think fair for the children, wife or wives, concubine or concubines. If the testator refuses to make the necessary alteration, the registration of such will would be refused.³⁰

The Sarawak Ordinance is clearly inconsistent with the Islamic law on succession as it allows a Muslim to dispose of all his property by way of will in accordance with his desire and wishes. It is also morally indefensible under the Islamic law as it recognises the rights of concubine or concubines to the estate.

Succession by operation of law

The entitlements and rights of a spouse in the deceased's estate may also arise by the operation of law. This is commonly known as the intestate succession. For non-Muslims, the rules are governed by the Distribution Act 1958 (Act 300). For Muslims, the intestacy rules are also known as the rules of *faraid*.

In Sabah, the Intestate Succession Ordinance (No 1 of 1960) administers the distribution of intestate estates, but the Ordinance does not affect the estate of any Native or Muslim.

In Sarawak, it is the responsibility of the executor or administrator, as the case may be, to allocate the residue of the estate among the beneficiaries or heirs of the deceased. This is according to the will of the deceased or in the shares to which they are permitted by recognised law or custom. In the non-existence of any custom applicable to the estate of the deceased, the provisions of the English law as contained in the Administration of Estates Act 1925 and the Inheritance (Family Provisions) Act 1938 are made applicable.³¹

Intestate succession for Non-Muslims

The rights and entitlements of a spouse to the deceased intestate's estate are provided by s 6 of the Distribution Act 1958 as follows:

30 Sarawak Muslim Wills Ordinance 1896, s 6.

31 Zaleha Kamaruddin, Akmal Hidayah Halim and Mohd Naqib Ishan Jan, *Family and Succession Law*, (The Netherlands: Kluwer Law International, 2008), p 180.

- (i) If an intestate dies leaving a spouse and no issue and no parent or parents, the surviving spouse shall be entitled to the whole of the estate.³²
- (ii) If the intestate dies leaving no issue but only a spouse and a parent or parents, the surviving spouse shall be entitled to one-half of the estate and the parent or parents shall be entitled to the remaining one-half.³³ The entitlement of a spouse is different under the Intestate Succession Ordinance 1960 as applied in Sabah, where in such a case the spouse shall be entitled to all personal chattels³⁴ of the estate and one half of the remaining property.³⁵
- (iii) If the intestate dies leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the estate and the issue the remaining two-thirds.³⁶ In Sabah, according to section 7 rule (2) of the Intestate Succession Ordinance 1960, the spouse shall be entitled to all the personal chattels of the estate and a life interest in half of the remaining property of the estate.
- (iv) If an intestate dies leaving a spouse, issue and a parent or parents, the surviving spouse shall be entitled to one-quarter of the estate, the issue shall be entitled to one-half of the estate and the parent or parents the remaining one-quarter.³⁷

For the purpose of the Act, s 3 provides that "issue" includes the intestate's children referring to only the legitimate children and any child adopted under the provisions of the Adoption Act 1952. The definition of "issue" also includes the descendants of deceased children. For "parents", it refers to the natural mother and father of the intestate, or the lawful mother or father in cases where the intestate is a child adopted under the provisions of the Adoption Act 1952.

In cases where any person so dying intestate is permitted by his personal law a plurality of wives and shall leave surviving him more wives than one, such wives shall share among them equally the share which the wife of the intestate would have been entitled to, had such intestate left one wife only surviving him.³⁸ However, it is to be noted that by the enforcement of Law Reform

32 Distribution Act 1958, s 6(1)(a).

33 Distribution Act 1958, s 6(1)(b).

34 "Personal chattels" mean horses, stable furniture and effects (not used for business purposes) motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money. See the Intestate Succession Ordinance 1960, s 3.

35 Intestate Succession Ordinance 1960, s 7 r (2).

36 Distribution Act 1958, s 6(1)(e).

37 Distribution Act 1958, s 6(1)(g).

38 Distribution Act 1958, s 6(2).

(Marriage and Divorce) Act 1976 (Act 164) on March 1, 1982, polygamous marriage is no longer allowed.³⁹ Accordingly, if any male person who is lawfully married under any law, religion, custom or usage shall during the continuance of such marriage, contract another union with any woman, such woman shall have no right of succession or inheritance on the death intestate of such male person,⁴⁰ as the marriage is deemed to be void under the Act.

If the intestate and the intestate's husband or wife have died in circumstances rendering it uncertain which of them survived the other, s6(3) of the Distribution Act 1958 shall, in spite of any rule to the contrary, have consequence as regards the intestate as if the husband or wife had not survived the intestate. In intestacy, the presumption of death according to seniority as provided by the s 2 of Presumption of Survivorship Act 1950 is not applicable.

Intestate succession for Muslims

Under the Islamic law of succession, a husband is entitled to one-half of his wife's estate, with a condition that there are no descendants. If there are descendants, he will be entitled to receive one-quarter share. In the case of a wife inheriting from a husband, she is entitled to obtain one-eighth share of the estate, if there are descendants. If there are no descendants, the wife is entitled to a quarter from her deceased husband's property. If the wives are more than one, their combined share is also a quarter if there are no descendants. If there are descendants, their combined share is one-eighth and they share evenly among themselves. The allocation will only take place after legacies and debts, including the funeral expenses have been paid. This rule is clearly laid down in the following verse of Al-Quran:

In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what you leave, their share is a fourth, if you leave no child; but if you leave a child, they get an eighth; after payment of legacies and debts.

(An-Nisa':12)

As mentioned earlier, in order for the spouse to be entitled to the deceased's estate, the contract of his or her marriage to the deceased should be recognised as a valid one. What is imperative for the purpose of inheritance is not the consummation of the marriage, but the actual contract of marriage. In cases of a woman who has been divorced and is still observing her 'iddah period so that the divorce is revocable (*raji'*), she is still entitled to inherit. If the

39 Section 5 of the Act provides that a person who is lawfully married on or after the appointed date, under any law, religion, custom or usage shall be incapable, during the continuance of such marriage, of contracting any other valid marriage under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia. In other words, only monogamous marriage is allowed under the Act.

40 Law Reform (Marriage and Divorce) Act 1976, s 6(2).

pronouncement of divorce in its final form (triple divorce or the third divorce which is irrevocable) took place during the death sickness of the husband, the wife is permitted to inherit according to the Hanafi, Hanbali and Maliki on the presumption that the husband might have divorced her in order to prevent her from the right of inheritance. The Shafi'i however, differs and consequently the right to inherit ceases upon such divorce.⁴¹

Procedural law relating to estate administration

Whilst different laws are applicable to Muslims and non-Muslims relating to the modes of succession, a standard procedural law on the administration of the estate applies to all. The determination of the responsible administrative bodies to deal with the administration of the estate is highly dependent on the types of estate left by the deceased.

Generally, estates can be classified into testate and intestate estates.⁴² Testate estate refers to the estate that is disposed of by a person through his will.⁴³ Intestate estate, on the other hand, refers to the estate of a person who dies without leaving a valid will. Such a person is known as an intestate. An intestate estate can be either a small estate or a non-small estate depending on the value of the estate left by the deceased. A small estate is defined as the estate of a deceased person consisting wholly or partly of immovable property situated in any state and not exceeding RM2,000,000 in total value.⁴⁴ An estate that valued at more than RM2,000,000 is called a non-small estate. The last category of estate is based on the property left by the deceased that can be divided into immovable or movable property. Immovable property refers to land and any interest in, right over or benefit arising or to arise out of it. Movable property refers to all property other than immovable property such as shares, savings and motor vehicles.⁴⁵

In West Malaysia, the jurisdiction to deal with the administration of estate is vested in the High Court, the Small Estate Distribution Section and the Public Trust Corporation (Amanah Raya Berhad) depending on the types of estate left by the deceased.⁴⁶ There are four main statutes of general application⁴⁷

41 Coulson, N J, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), p 276.

42 Abdul Hamid Mohamad, "Administration of Property in Malaysia: A civil and Shariah law perspective", [2002] MLJ i.

43 According to the Wills Act 1959, s 2, "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 effect after his death. The situation created by the presence of a valid will of the deceased person is known as testacy.

44 Small Estates (Distribution) (Amendment) Act 2008, s 4. The value has been increased from RM600,000 to RM2,000,000 effective from September 1, 2009.

45 The definition is based on the Interpretation Acts 1948 and 1967 (Act 388), s 3.

46 Akmal Hidayah Halim *et al.*, *The Law on Wills and Intestacy in Malaysia* (Selangor: Harun M Hashim Law Centre and Department of Islamic Law, AIKOL, IIUM, 2009), p 105.

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

that govern the law and procedures for administration, namely, the Rules of the High Court 1980 [PU(A) 50/1980], the Probate and Administration Act 1959 (Act 97), the Small Estates (Distribution) Act 1955 (Act 98) and the Public Trust Corporation Act 1995 (Act 532).

Regardless of the estate value, the High Court has the jurisdiction to deal with a testate estate by virtue of s 24(f) of the Courts of Judicature Act 1964 (Act 91). The section provides for the jurisdiction of the High Court to grant probates to wills and letters of administration of an intestate estate. The object of applying for the grant of probate or letters of administration⁴⁸ 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.⁴⁹ 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 formalises the authority of the executor to carry on the affairs of the deceased.⁵⁰

The letters of administration, on the other hand, are granted in cases where the deceased dies intestate. The person most suitable to be the administrator would be the beneficiary of the deceased's estate. In such a case, the court is guided by the principle of who is best suited amongst the beneficiaries in accordance with the priorities to the entitlement of the estate under the laws of intestate succession set out in the Distribution Act 1958. Accordingly, the surviving spouse will be the first person in the list of priority to apply for the letter of administration.⁵¹ As there is no similar statute applicable for Muslims, the list of priorities set out in the Act is followed.⁵²

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

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

50 Raman, G, *Probate and Administration in Singapore and Malaysia* (Kuala Lumpur: LexisNexis, 2005), p 9.

51 See *Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors* [1997] 4 MLJ 464. In this case, the application by the petitioner to be the administrator of the deceased's estate was refused due to his failure to satisfy the court that he was lawfully married to the deceased. Hence, he was not one who could be said to be lawfully entitled to have an interest in the residuary of the deceased's estate.

52 There is a specific provision for the grant of letters of administration of a deceased Muslim in Singapore. This is provided by the Administration of Muslim Law Act (Chapter 3) of Singapore namely ss 116 and 117. Section 116 of the Act provides that in granting letters of administration to the estate of a Muslim dying intestate and leaving a widow or widows, the court may grant letters of administration to any other next of kin or person entitled to the estate of the deceased under the Muslim Law, either to the exclusion of the widow or widows, or jointly with such widow or widows, or any one or more of such widows. Section 117, on the other hand provides for the priority over the letters of administration in the case of a deceased Muslim woman. The section provides that if a woman, being a wife

As for the administration of a small estate, it is governed by the Small Estates (Distribution) Act 1955. The scheme of the Act is that in matters relating to the administration of a small estate, a man with small means should be spared the trouble of going to the High Court with its technicalities and expense. The aim is to enable such estate to be distributed speedily and cheaply.⁵³ In Sabah, extraordinary provision is made in the Administration of Native and Small Estates Ordinance (Cap 1) in respect of "small estates" as the Small Estates (Distribution) Act 1955 (Act 98) has not yet been brought into implementation in Sabah.

If a person dies leaving only movable property and the total value of the property does not exceed RM600,000, by virtue of s 17(1) of the Public Trust Corporation Act 1995, a summary administration in respect of the property may be made by the Public Trust Corporation.

In cases of immovable property, the law requires that the deceased's estate be registered in the name of the personal representative by way of transmission before the property may be transferred to the beneficiary. For small estates, if the order relates to a direct transmission to the beneficiaries, the Collector shall arrange for the order to be registered⁵⁴ under s 348 of the National Land Code which inter alia provides:

Where any distribution order under the Small Estates (Distribution) Act 1955, has become final in accordance with the provisions of Section 16 of that Act, it shall be the duty of the Registrar⁵⁵ to give effect there to by endorsing a memorial of any transmission thereby effected on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.

of a Muslim, dies intestate leaving property of her own and leaving male children above the age of 21 years, the following persons are entitled to the grant of administration:

- (i) the male children shall be entitled in preference to her husband;
- (ii) the husband shall be entitled next after such male children;
- (iii) after such male children and the husband, the daughters, father, mother, brothers, sisters, uncles, aunts, nephews and nieces of the intestate shall be entitled in the order above set out; and
- (iv) failing all the above, the next nearest of kin according to the Muslim law shall be entitled in where the preference shall be given to male over female relationship of the same degree.

53 It is extremely difficult for the beneficiaries of an intestate to administer and distribute a landed estate themselves without any legal assistance. Legal assistance involves lawyers' fees and costs and these the beneficiaries of estates of small value may find difficult to bear. See Balan, P, "The Small Estates (Distribution) (Amendment) Act 1977 and the Probate and Administration (Amendment) Act 1977" (1977) *Journal of Malaysian and Comparative Law*, 320.

54 Small Estates (Distribution) Act 1955, s 16. In practice, the beneficiaries themselves must cause the land to be transmitted on their behalf in the respective Land Office where the land is situated pursuant to the distribution order issued by the Collector.

55 In relation to land held or to be held under Registry title, this refers to a Registrar of Titles or Deputy Registrar of Titles appointed under the National Land Code, s 12. For land held or to be held under Land Office title, the Land Administrator.

Jointly acquired property

Where Malay customary law is applicable, the shares obtained in the jointly acquired property during the marriage are taken into consideration when assessing the shares under Muslim law.

The issue of jointly acquired property or commonly known as "*harta sepencarian*" only arises when a divorce occurs, either lifetime divorce or divorce upon death. It rests upon legal recognition of the part played by a divorced spouse in the acquisition of the relevant property and in improvements done to it (in cases where the property was acquired by the sole effort of one spouse only). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property.⁵⁶ In *Hujah Lijah v Fatimah*,⁵⁷ it was held that a suit in the High Court as a claim by a widow for *harta sepencarian* was not a claim for a share of the deceased's estate, but a claim adverse to the estate for property of the claimant held in the name of the deceased. This branch of Malay *adat* was legally recognised, apart from any question of the claimant's claim to a distributive share in the deceased's estate.⁵⁸

In *Boto' binti Taha v Jaafar bin Muhamad*,⁵⁹ Salleh Abas CJ (as he then was) stated that a divorced wife is "automatically entitled" to one-third share in the properties acquired during the marriage i.e. by virtue of the marriage per se. She would be entitled to a half share if she had assisted in the cultivation of the land or in the acquisition of the property. It was also stated that *harta sepencarian* applies equally to movable properties. Although the case dealt with the claim of *harta sepencarian* upon divorce, it could equally apply to the claim of the widows or widowers for *harta sepencarian* against the estate of their spouse.⁶⁰

Claims for *harta sepencarian* arise most frequently in applications for summary distribution of small estates under the Small Estates (Distribution) Act 1955 and the practice is to regard such a claim as one of the factors to be considered in attempting to formulate an agreed scheme of distribution. Such agreed schemes very often give full effect to the claim.⁶¹

As for the rights of foreign spouse to claim for *harta sepencarian*, it had been established in the case of *Roberts alias Kamarulzaman v Ummi Kalthom*⁶²

56 Pawancheek Marican, *Islamic Inheritance Law in Malaysia*, 2nd edn (Kuala Lumpur: LexisNexis: Malaysia, 2008), p 61.

57 [1950] 1 MLJ 63.

58 See also *Hajjah Saudah v Hanafi & Ors* (1990) 8 JH 66; (1992) 11 JH 21, *Bunga bt Ibrahim v Ila bt Abdullah* (1990) 9 JH 198 and *Che Mas binti Abdullah v Mat Sharie bin Yaakub* (2003/1426) JH XIX/132 for successful claims of *harta sepencarian* upon death.

59 [1985] 2 MLJ 98.

60 Pawancheek Marican, *Islamic Inheritance Law in Malaysia*, 2nd edn (Kuala Lumpur: LexisNexis: Malaysia, 2008), p 70.

61 Pawancheek Marican, *Islamic Inheritance Law in Malaysia*, 2nd edn (Kuala Lumpur: LexisNexis: Malaysia, 2008), p 62.

62 [1966] 1 MLJ 163.

where the foreign husband had successfully claimed for the jointly acquired property.

Nevertheless, it is important to be noted that the claim on *harta sepencarian* or jointly acquired property is not available for the surviving spouse of a non-Muslim deceased. Although a claim to a matrimonial property may be made upon divorce or judicial separation,⁶³ there is no provision for such claim on death.

Land ownership under the National Land Code 1965

Land ownership in Peninsular Malaysia is governed by the National Land Code 1965 ("NLC"), in force since January 1966. Since the law is based on the Torrens System (where "the register is everything") ownership is evidenced by having one's name on the title. There are three routes to ownership. The first method is by "dealings," such as by purchase followed by transfer, which must be in the prescribed form followed by registration at the relevant land registry. The second is through succession (from one's parents or ancestors), and the third is by acquiring it through "alienation" from the State Authority.

Under the National Land Code, policy on particular reservation in law has been made which gives a right of exclusive control and ownership only to a particular person or group of persons identified by law as the sole beneficiaries of the policy. This includes the Malay Reserve Land which refers to that special category of land situated within the territorial boundaries of each state in Peninsular Malaysia which can only be owned or held by Malays. Under the Federal Constitution, "Malay" refers to a Muslim who speaks the Malay language, complies with the Malay customs and is domiciled in Malaysia. Nevertheless, for the purpose of Malay reservations, what constitutes "Malay" depends on the definition and interpretation of that term as determined in the respective state legislation.⁶⁴ The basic objective of the reservation is to restrict any form of "dealings" affecting these lands by non-Malays. Kedah and Perlis Enactments however, have also made specific provisions for Siamese permanently residing in the states to own and occupy Malay reserve land.⁶⁵

For the non-Malays, there two methods by which they can acquire Malay reserve lands. In the case of *Tan Hong Chit v Lim Kin Wan*,⁶⁶ the Federal Court held that non-Malays can acquire Malay reserve land through the approval of the Ruler-in-Council and when the non-Malay has occupied the land prior to its declaration as Malay reservation by the state authority.

63 Law Reform (Marriage and Divorce) Act 1976, s 76(1).

64 There is a specific law governing Malay reserve land known as the Malay Reservation Enactment governing Perak, Pahang, Selangor and Negeri Sembilan and five separate legislations governing the remaining five states of Johor, Terengganu, Kelantan, Kedah and Perlis on Malay Reserve Land.

65 Ainul Jaria Maidin et al, *Principles of Malaysian Land Law* (Kuala Lumpur; LexisNexis Malaysia, 2008), p 442.

66 (1964) 30 MLJ 113.

As for the acquisition of the land by the non-citizens, s 433B of the National Land Code stipulates that alienated land, or any share or interest in such land, may be transferred or transmitted to, or vested in, or created in favour a non-citizen as "trustee" or as the beneficiary of such trust. The Land Registrar may also register a non-citizen as "representative" in respect of any land or endorse any memorial of transmission on the register document of title to any land in favour of a non citizen. However, this is subject to the prior approval of the state authority which has to be obtained by an application in writing by such non-citizen. Without such approval, the acquisition of land by the non-citizen shall be null and void.⁶⁷

Conclusion

In light of the above discussion, it can be established that the rights and entitlements of a foreign spouse in the testate and intestate succession to the deceased's estate in Malaysia stand on equal footing to that of a Malaysian surviving spouse provided that the marriage is a valid marriage under Malaysian law. A foreign spouse is also entitled to claim for the jointly acquired property upon the death of a Muslim deceased spouse. Although there are some restrictions in land ownership such as the requirement of the state authority's approval in cases of transfer or transmission of land to non-citizens, the approval would normally be granted as long as the procedures are complied with. As far as the Malay reserve land is concerned, although such a spouse is not a "Malay" as defined by the respective state's enactments, he or she may still apply to the Ruler-in-Council for an approval in the acquisition of such land. In any other case, the right portion of the spouse may be replaced with other types of estate. It is therefore important for the foreign spouse to be aware of his or her rights and entitlements as guaranteed by the law and the procedures to be complied with in the administration of the deceased's estate so that the interest of the foreign spouse would not in any way be adversely affected or prejudiced.

67 National Land Code 1965, s 433C.