

FAMILY AND SUCCESSION LAW



Wolters Kluwer

Malaysia

by

Zaleha Kamaruddin
Rector, International Islamic University, Malaysia

&

Mohammad Naqib Ishan Jan, Akmal Hidayah Halim, Azizah Mohd &
Norliah Ibrahim
Ahmad Ibrahim Kulliyyah of Laws, International Islamic
University, Malaysia

This monograph has been reviewed by the Authors and is up-to-date as of August 2018

2018



Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com
Website: lrus.wolterskluwer.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Air Business Subscriptions
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

The monograph *Malaysia* is an integral part of *Family and Succession Law* in the *International Encyclopaedia of Laws* series.

Printed on acid-free paper.

ISBN 978-90-654-4888-0
Family and Succession Law was first published in 1997.

Kamaruddin, Zaleha; Ishan Jan, Mohammad Naqib; Halim, Akmal Hidayah; Mohd, Azizah & Ibrahim, Norlia. 'Malaysia'. In *International Encyclopaedia of Laws: Family and Succession Law*, edited by Walter Pintens. Alphen aan den Rijn, NL: Kluwer Law International, 2018.

This title is available on www.kluwerlawonline.com

© 2018, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. More information can be found at: lrus.wolterskluwer.com/policies/permissions-reprints-and-licensing

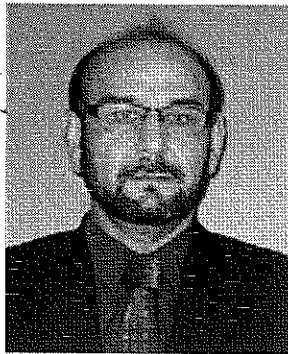
Printed in the United Kingdom.

The Authors



Prof. Dato' Sri Dr Zaleha Kamaruddin (LLB (Hons.), MCL, DSLP, PhD) is Rector and a Professor of Law at the International Islamic University Malaysia (IIUM). She published and advocates extensively in the area of family law and women's rights. She has also conducted several applied research mostly related to family law, served as an expert for various non-governmental organizations, government ministries and agencies. She also participated in various academic networks.

She was the Dean of Ahmad Ibrahim Kulliyah of Laws of IIUM. She also serves as a Member of the Malaysian Investigating Tribunal Panel, Advocates and Solicitors' Disciplinary Board Committee. She is also a Panel Assessor for National Accreditation Board (LAN) and chair for Women and Islam Advisory Council.



Prof. Dr Mohammad Naqib Ishan Jan is a Professor and Deputy Dean (Postgraduate and Research) at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia.

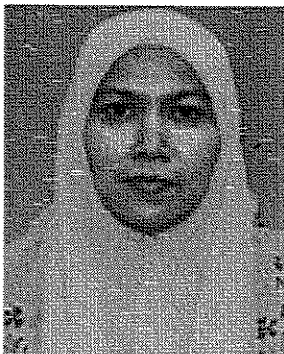
The Authors



Assoc. Prof. Dr Akmal Hidayah Halim is an Associate Professor at the Department of Islamic Law at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia.



Assoc. Prof. Dr Azizah Mohd is an Associate Professor at the Department of Islamic Law at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia.



Assoc. Prof. Dr Norliah Ibrahim is an Associate Professor at the Ahmad Ibrahim Kulliyah of Laws. She specializes in civil family law especially on matrimonial property and division of matrimonial property upon divorce.

Preface

Family law is one aspect of the laws that treat Malaysians differently according to their race, religion and custom. It is not the intention of the legislature to segregate them according to their creed. The present situation came about as a result of history and the development of Malaysian society.

Malaysia has always been under the influence of various religions and races. Prior to the English occupation, there was no uniform system of law, domestic or otherwise in Malaysia, although a Malay Legal Code had existed since the fifteenth century. Malay customary law, mixed with Hindu law and Muslim law, was also in existence but was mainly confined to the Malays. The Chinese and Indian customary laws were introduced with the large-scale immigration of Chinese and Indian labourers to assist in economic development of the then Malaya. Therefore, in many cases, judges had to take local customs into consideration.¹

Although Islam is, constitutionally, the official religion of Malaysia, other religions are permitted. Previously, each individual ethnic group was governed by a mixture of customary and civil law. Islamic law applied to Muslims, the Malay *Adat* to certain sections of the Malay people, Hindu law to those who profess the Hindu religion and Chinese law to the ethnic Chinese. However, the scope of these personal laws was confined to family law only.

Highlighting the need for legislative intervention in personal law, in the case of *Re Ding Do Ca deceased*, L.P. Thomson commented that:

The whole question of personal law in the country particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature. As regards persons professing Islam, the position is tolerably clear. But as regards persons of Chinese race, the law the courts are administering is probably different from any law, which exists or even existed in China. The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act 1955.

In all matters relating to the family, Muslims are governed by Muslim law.² Although the then Lord President stated that the position as regards persons professing Islam is tolerably clear, there were also defects in the administration of the

1. A. Ibrahim, *Family Law in Malaysia and Singapore*, 2nd ed. MLJ (Singapore: 1984).

2. See *Ramah v. Laton* (1927) 6 FMSLR 128, where the court held that Islamic law was the law of the land which the court must take judicial notice, and could not be considered as foreign law.

Preface

Islamic family law in Malaysia. As Islamic law falls within the purview of the State authorities, each State in Malaysia had its own law for the administration of the Islamic family law, as well as its own system of courts, and for this reason most parts of the law were administered at the State level in the State *Qadhi's* courts. The provisions in the various enactments were somewhat similar as they were all based on Islamic law. However, although the enactments followed the same pattern and had much in common, there were sometimes significant differences between them, and these gave rise to the diversity and complexity that became the hallmark of Muslim family law in Malaysia. Furthermore they contained numerous loopholes and weaknesses, which were taken advantage of in certain quarters.

The high divorce rate among Muslims in the country was particularly alarming, and this led to the demand by various organizations for a revision of the law, to consolidate and improve its provisions, thereby making them more or less uniform among the States. Against this background, the Federal Government made an attempt to draw up a model law for a uniform administration of Islamic family law. A draft was prepared which was approved in principle by the Conference of Rulers. It was sent to the various States for their comments and approval. In Kuala Lumpur, this resulted in the enactments of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) based on the advice of a committee set up to consider the legislation. Although the original intention was to have uniformity of the law among the various states, this has unfortunately not been possible until mid-2001 when the Council of Rulers approved six drafts of Islamic laws which include Islamic Family Law. This positive development towards uniformity bore fruit, with all states (except Kedah) adopting the model law (after some amendments) from 2002 onwards.

*Prof. Dato' Sri Dr Zaleha Kamaruddin
Rector, International Islamic University Malaysia
Kuala Lumpur, Malaysia
June 2017*

Table of Contents

The Authors	3
Preface	5
List of Abbreviations	15
General Introduction	17
§1. GENERAL BACKGROUND OF THE COUNTRY	17
§2. HISTORICAL BACKGROUND OF FAMILY AND SUCCESSION LAW	20
I. Marriage and Divorce	20
II. Succession Law	24
§3. SOURCES OF FAMILY AND SUCCESSION LAW	25
I. Constitution	25
II. Legislation	27
A. Federal Legislation	27
B. State Legislation	27
III. Treaties	28
IV. Judicial Decisions	29
§4. THE COURTS ADMINISTERING FAMILY LAW AND SUCCESSION LAW	30
I. Different Courts	30
II. Courts Dealing with Family Matters in Malaysia	32
III. The Unique Characteristics of the Courts Dealing with Family Matters in Malaysia	33
IV. Criticisms of the Enforcement of Family Law	34
Part I. Persons	37
Chapter 1. The Status of a Person	37
§1. DEFINITION OF A PERSON	37
§2. CAPACITY	37
I. Minors in Malaysian Law	38
II. Child as a Term of Relationship	38

Table of Contents

§3. REGISTRATION OF CIVIL STATUS	39
§4. MINORS' CONTRACTS	41
§5. MINORS' RESPONSIBILITY FOR TORTS	43
§6. MINORS' RESPONSIBILITY FOR CRIMES	46
§7. CRIMES AGAINST CHILDREN	50
§8. NAMES	51
I. Composition of Name	51
II. Surname	51
§9. NATIONALITY	51
§10. DOMICILE AND RESIDENCE	57
I. Domicile	57
II. Domicile Rules	58
III. Domicile of Origin	60
§11. MENTALLY HANDICAPPED PERSONS	61
Part II. Family Law	65
Chapter 1. Marriage	65
§1. THE NATURE OF MARRIAGE	65
§2. THE CAPACITY TO MARRY	66
I. Betrothal	66
II. Different Sex	68
III. Consanguinity	69
IV. Marriageable Age	70
V. Prior Marriage	70
VI. Failure to Consent	73
VII. Failure to Comply with Necessary Formalities	73
VIII. Consequences	74
§3. FORMALITIES OF MARRIAGE	74
I. Marriages Solemnized After the Issue of a Certificate for Marriage	74
II. Marriages Solemnized After the Issue of a Licence	76
III. Marriage in Accordance with Religion, Custom or Usage	77
IV. Marriages Solemnized Abroad	78
§4. EFFECTS OF MARRIAGE	79

Table of Contents

I. Duty of Consortium	79
II. Sexual Intercourse	80
III. Confidences in Marriage	81
IV. Contract	82
V. Tort	83
VI. Criminal Law	83
VII. Duty to Maintain	84
§5. VOID AND VOIDABLE MARRIAGES	85
Chapter 2. Divorce	87
§1. GROUNDS FOR DIVORCE	87
I. Divorce on the Ground of Spouse's Conversion to Islam	87
II. Dissolution by Mutual Consent	89
III. Divorce on the Grounds of Irretrievable Breakdown of Marriage	92
§2. PROCEDURE	102
§3. EFFECTS OF DIVORCE	104
I. Legal Effects	104
II. Conclusion	109
§4. DIVORCE UNDER MUSLIM LAW IN MALAYSIA	112
§5. GROUNDS OF DIVORCE UNDER MUSLIM LAW	113
I. Talaq	113
A. Procedure for Talaq	118
II. Khulu'	124
A. Procedure for Khulu'	128
III. Fasakh	129
A. <i>Procedure for Fasakh</i>	134
IV. Ta'liq	136
Chapter 3. Cohabitation Outside Marriage	141
§1. INTRODUCTION	141
§2. DEFINITION	141
Chapter 4. Filiation	143
§1. CHILDREN BORN IN WEDLOCK	143
I. The Status of Legitimacy	143
II. Acquisition of Legal Status of a Legitimate Child	143
A. Through Birth or Conception	143

Table of Contents

B. Legitimacy of a Child of a Void Marriage	149
C. Legitimacy of a Child of a Voidable Marriage	150
III. Disputes as to Legitimacy	150
§2. EX-NUPTIAL CHILDREN	152
I. Legal Disabilities of Ex-nuptial Children	152
A. Name	152
B. Maintenance	152
C. Guardianship, Custody and Access	153
D. Nationality and Citizenship	156
E. Surname	156
F. Inheritance	157
Chapter 5. Adoption and Foster Care	159
§1. ADOPTION	159
I. Introduction	159
II. Who May Adopt?	160
III. Ages and Religion	161
IV. Consent to Adoption	163
A. The Father	163
B. The Mother	164
C. The Child	164
V. Discharge	165
VI. Access to Information and Contact	167
VII. Adoptees	167
A. Adoptee under 18 Years Old	167
B. Adoptee over 18 Years Old	168
C. Natural Parents	168
D. Other Persons	169
VIII. Access to Adopted Children	169
IX. Foreign Adoption	170
§2. FOSTER CARE	171
Chapter 6. Guardianship and Custody	173
§1. INTRODUCTION	173
§2. ADOPTED CHILDREN	175
I. Interim Orders	176
II. Restriction on Removal of Children from Malaysia	178
III. Principles on Which Guardianship Custody and Access Awards Are Made and Procedure in Those Cases	179
IV. The Status Quo	180
V. Wishes of the Child	180
VI. Religion	182

Table of Contents

Part III. Matrimonial Property Law	183
Chapter 1. Matrimonial Property	183
§1. INTRODUCTION	183
§2. PROPERTY DURING MARRIAGE AND COHABITATION	183
§3. MAINTENANCE	184
§4. RE-ADJUSTMENT OF PROPERTY ON SEPARATION OR DIVORCE	188
§5. VARIATION OF ORDERS	189
§6. SETTING ASIDE TRANSACTIONS	190
§7. ADJUDICATION OF PROPERTY DISPUTES	190
Part IV. Succession Law	193
Chapter 1. Introduction	193
Chapter 2. The Opening of Succession	194
§1. DEATH OF THE DECEASED	194
§2. MISSING PERSONS AND ABSENTEES	194
§3. <i>COMMORIENTES</i>	195
§4. THE BONA VACANTIA	196
Chapter 3. Testamentary Succession	197
§1. INTRODUCTION	197
§2. CAPACITY TO MAKE A WILL	198
I. Persons Possessed of Property	198
II. Exceptions to Testamentary Capacity	199
A. Minors	199
B. Persons of Unsound Mind	199
III. Foreigners	200
IV. Soldiers, Airmen and Sailors	201
V. Malaysian Citizens	201
VI. Married Women	202
VII. Prisoners	202

Table of Contents

§3. DIFFERENT TYPES OF WILLS	202
I. A Valid Will	202
II. Nuncupative and Holographic Wills	203
III. Codicil	203
IV. Other Documents	204
V. Living Wills and Euthanasia	205
VI. Privileged Wills	205
VII. Joint Wills	206
§4. REVOCATION OF A WILL	206
I. Another Will	206
II. An Intention to Revoke	208
III. Destruction	209
IV. Revocation by Law	210
§5. PROVISIONS IN A WILL	211
§6. RESTRICTIONS: TESTATORS' FAMILY MAINTENANCE	213
I. Spouses	213
II. Children	214
III. Further Dependants	214
IV. Others	215
§7. INTERPRETATION OF A WILL	215
§8. FAILURE OF GIFTS	216
§9. WILLS OF MUSLIMS	216
Chapter 4. Intestate Succession of Non-Muslims	218
§1. INTRODUCTION	218
§2. THE RIGHT OF THE SURVIVING SPOUSE	218
§3. THE RIGHTS OF A PARENT OR PARENTS	218
§4. THE RIGHTS OF DESCENDANTS/ISSUE	219
§5. THE RIGHTS OF OTHER HEIRS	219
§6. ADOPTION	219
Chapter 5. Intestate Succession of Muslims	221
§1. INTRODUCTION	221

Table of Contents

§2. THE RULE OF FIXED PORTION (<i>FARAID</i>)	223
I. Exclusion of Heirs in Male, Female and Mixed Lineages	223
II. Shares Allotted to a Husband or Widower	224
III. Shares Allotted to Wives or Widows	224
IV. Shares Allotted to Children	225
V. Shares Allotted to Father and Mother	225
VI. The <i>Umariyyatani</i> Case	225
VII. Shares Allotted to Full Sisters	226
VIII. Shares Allotted to Sisters of the Same Father	226
IX. Shares Allotted to Brothers and Sisters of the Same Mother	226
X. Doctrine of Return or 'Radd'	226
 Chapter 6. Administration of Estate	 228
§1. INTRODUCTION	228
§2. ADMINISTRATION BY THE HIGH COURT	228
§3. ADMINISTRATION OF SMALL ESTATES	231
§4. ADMINISTRATION BY PUBLIC TRUST CORPORATION	231
 Selected Bibliography	 233
 Index	 237