



LEGAL PROTECTION FOR ESTATE
BENEFICIARIES AGAINST PERSONAL
REPRESENTATIVES IN MALAYSIA

BY

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ABSTRACT

In Malaysia, the law mandated the appointment of personal representatives before the deceased's estate can be dealt with. The central idea of the appointment of personal representatives is not only to protect the estate of the deceased person but also to ensure that the rights and interests of the beneficiaries are also safeguarded. However, vast powers, rights and duties conferred on the personal representatives create opportunities for widespread misappropriation of the deceased's estate. This research is undertaken based on the premise that the present law relating to the protection and remedies to estate beneficiaries against unscrupulous personal representatives is not comprehensive as the provisions are scattered all around the legal system from civil, criminal, procedural law and some relevant judicial decisions especially with the existence of the three different administrative bodies namely, Civil High Court, Estate Distribution Section and Amanah Raya Berhad (Corporation). Hence, reforming the existing legal framework with regards to the protection and remedial perspectives to the beneficiaries has become highly necessary. In pursuant thereto, this research analyses the qualifications and appointment of the personal representatives and issues on legal protection and remedies to the estate beneficiaries based on the analysis of the governing statutes, reported cases, interviews conducted with selected individuals and data obtained from the administrative bodies. A comparative analysis has also been made where ever appropriate with other laws in selected Commonwealth jurisdictions such as England, Australian and Canada. This research finds that reforms should be made to the existing legal and institutional framework due to the insufficiency inherent in the existing statutory provisions especially in regulating the protection and appropriate remedies to the estate beneficiaries. The research also predicates that there should be a regulatory body to monitor the conduct of the personal representatives so that the rights and interests of the estate beneficiaries are properly safeguarded and not adversely affected.

خلاصة البحث

في ماليزيا، فوض القانون تعيين الوصي قبل التمكن من التعامل مع تركة المتوفى. والفكرة الرئيسية في تعيين الوصي ليست فقط لحماية تركة الشخص المتوفى، ولكن أيضا لضمان حقوق ومصالح الوارثين مصانة أيضا. ومع ذلك، فإن الصلاحيات الواسعة والحقوق والواجبات الممنوحة للوصي تخلق فرصا واسعة للاختلاس من تركة المتوفى. ويضطلع هذا البحث على فرضية أن هذا القانون المتعلق بحماية وسائل الانتصاف للوارثين ضد الوصي عديم الضمير ليس شاملا لأن أحكامه متفرقة في جميع أنحاء النظام القانوني؛ القانون المدني والجنايي الإجرائي وبعض القرارات القضائية ذات الصلة خصوصا مع وجود الهيئات الإدارية الثلاث المختلفة وهي المحكمة العليا المدنية، وقسم توزيع التركة وأمانة رايا المحدودة. وبالتالي أصبح إصلاح الإطار القانوني القائم فيما يتعلق بحماية الوارثين من الضروري للغاية. ومن أجل ذلك يقوم هذا البحث بتحليل مؤهلات وتعيين الوصي، والقضايا في الحماية القانونية وسبل الانتصاف للوارثين للتركة استنادا إلى تحليل القوانين التي تحكم، والقضايا المبلغ عنها، والمقابلات التي أجريت مع الأفراد المختارين والبيانات التي تم الحصول عليها من الهيئات الإدارية. كما تم إجراء تحليل مقارنة عند الاقتضاء من ذلك مع قوانين أخرى في ولايات قضائية الكومنولث المختارة مثل إنجلترا وأستراليا وكندا. ويخلص هذا البحث أنه ينبغي أن تبذل الإصلاحات في الإطار القانوني والمؤسسي القائم بسبب القصور في النصوص القانونية الحالية وخاصة في تنظيم الحماية وسبل الانتصاف الملائمة للوارثين. ويقترح البحث أيضا أن يكون هناك هيئة تنظيمية لمراقبة سلوك الوصي حتى يتسنى للحقوق ومصالح الوارثين مصانة بشكل صحيح ولم تتأثر سلبا.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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LIST OF ABBREVIATIONS

All ER	All England Report
AMR	All Malaysian Report
ARB	Amanah Raya Berhad
Ch	Chancery
Ch D	Chancery Division
Ch. App.	Chancery Appeals
CLJ	Current Law Journal
Et al	(<i>et alia</i>): and other
FELCRA	Federal Land Consolidation and Rehabilitation Authority
FELDA	Federal Land Development Authority
Ibid	(<i>ibidem</i>) in the same place
IUM	International Islamic Universiti Malaysia
J	Judge
JAWHAR	Jabatan Waqaf, Zakat dan Haji
JC	Judicial Commissioner
JMCL	Journal of Malaysian and Comparative Law
KUIS	Kolej Universiti Islam Selangor
LNS	Legal Network Series
MAMPU	Malaysian Administrative Modernizations and Management Planning Unit
Melb. UL Rev	Melbourne Law Review
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
MR	Master of the Rolls
NRE	Natural Resources and Environment
NSWLR	New South Wales Law Report
OJLS	Oxford Journal of Legal Studies
Ors	Others
OTC	Ontario Trial Cases
PP	Public Prosecutor
Prob. L.J.	Probate Law Journal
SCJ	Supreme Court Judge
ShLR	Shariah Law Reports
SYA	Syariah
UiTM	Universiti Teknologi MARA
UUM	Universiti Utara Malaysia

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

When a person dies, everything owned by him is referred to as deceased's estate. Through legal mechanism, inheritance and succession look to the natural laws to support the authority to govern the way in which properties are transferred from one generation to another. The administration process of collecting and gathering the deceased's estate in facilitating the procedure of transmitting and transferring to the rightful owner left by the deceased is known as administration of estates. It is in principle the period during which the estate is supposed to be realized and prepared for liquidation which sometimes produces an emotional and visceral reaction.¹

The administration of estates may either be a straightforward process or an extremely complex process depending on the value and nature of the estates of the deceased and the diligence of the deceased owner during his lifetime in planning his estate.² The immediate needs for a legal, judicial or administrative intervention in the disposition of an owner's wealth at his death arises from several factors such as to determine the entitlement of the beneficiaries either under the laws of intestacy or under the terms of the will. The intervention is also important as it served as a machinery for payment of claims against the deceased's estate and provides for a cutting off timeline for any claims after a reasonably abbreviated period.³ Usually, properties of deceased's

¹ Sneddon, Karen J. "Beyond the Personal Representative: The Potential of Succession without Administration." *S. Tex. L. Rev.* 50 (2008) at 449.

² Todd, Ronald W. "Decedents' Estates: Selected Guidelines for Administering Estates in Tennessee." *Bulletins* (1986) at 4.

³ Ritchie, John, Neill H. Alford, and Richard W. Effland. *Cases and Materials on Decedents' Estates and Trusts*. 8 Ed. (New York: Foundation Press, 1993) at 1121.

estate pass to another person particularly to the legal beneficiaries or heirs of the deceased by two methods that are either by the execution of testamentary documents such will, codicil and trust documents or by the operation of law that is through the enforcement of rule of intestacy in pursuant to Distribution Act 1958 for non-Muslim and rules of *faraid* for Muslim. Heedless of the method used, someone must oversee the process and that person is usually those recognized by the law as the personal representative and will be responsible from the death of the deceased to the time of the distribution of the properties.

The stakeholders who play significant roles in administration of deceased's estate can be categorized into four groups. They are the administrative bodies, the personal representatives, the trustees and the beneficiaries of the deceased person's estates. These stakeholders are related to one and another. For instance, the administrative bodies are the institutions empowered by the law to appoint personal representatives who after receiving the letters of representation are responsible for settling the deceased person's affairs after death and distribute the remainder to the beneficiaries of the estates and sometimes may further acts as a trustee to the deceased person's estates. In this event, personal representatives are appointed for the purpose of ensuring that the deceased's debts are paid and the remainder of the deceased's estate are distributed to the estate beneficiaries.

During that stage, the deceased person's estates will temporarily pass to the personal representative where he will be granted the full power and control to the said properties. Legally, it is regarded as the consideration for duties of protection and support owed by the deceased during his lifetime⁴ which has been extended

⁴ Coulson, N.J. *Succession in the Muslim Family*. Reprint Ed. (Cambridge: Cambridge University Press, 2008) at 4.

posthumously. Beneficiaries of the deceased persons estates in the other hand are the beneficial owners of the deceased's properties who does not hold the actual legal title on that properties but for whose benefit the legal title are held by trustee under any trust arrangement.⁵ They will profit from the deceased's estates after the payment of debt and settlement of other expenses related to the liability of the deceased.

The legal landscape of personal representation originates from Norman Conquest in the thirteenth century where ecclesiastical courts in England started to appoint a personal representative who possessed powers to step into the shoes of a deceased. Ecclesiastical courts dealt with the problem of administration of estates with primary emphasis upon the claims of legal heirs and developed safeguards to protect the interests of these claimants. During that time, the personal representatives were required not only to inventory the estates when administration began, but also to give bond in some cases and to render an account when administration was completed. During that period, it seems that the personal properties did not simply glide between generations, instead they entered a kind of limbo upon their owner's death.⁶ This situation had overturned the Roman tradition of universal succession where the process of inheritance did not involve court process. It is so as inheritances in that particular period were regarded as private transactions and estates passed seamlessly to one's heir and beneficiaries as though they were clothed with the deceased legal personality.⁷

Malaysia inherits much of the law of administration of estates from the law of England as applied where there was no unified system and the jurisdiction over deceased's estate was divided between common law courts and the ecclesiastical courts.

⁵ Krishnan, Ananda. *Words, Phrases & Maxims Legally & Judicially Defined*. Vol. 2, (Petaling Jaya: Lexis Nexis, 2007) at 21.

⁶ Ritchie, n.3, at 8.

⁷ Ibid, at 9.

During that particular period, the common law courts were part of the royal judicial system, deciding cases involving the distribution and the use of real property. Whereas the ecclesiastical courts were part of the judicial system of the Roman Catholic Church, deciding cases involving the distribution and the use of personal property. Personal property is movable property which is anything that can be subject to ownership, except land. On the other hand, real property is immovable property that is land and anything attached to the land.⁸

Henceforth, the law regarding the appointment of the personal representatives was consequently imported to Malaysian legal framework through the introduction of doctrine of reception.⁹ The onslaught of English law to the Malaysian legal system begin with the British intervention in Penang in 1876 and continues even after the independence of Malaya in 1957.¹⁰ English Law was applied to Malaysia through the passing of the Charter of Justice of 1807, 1826 and 1855 correspondingly.¹¹ The Charter of Justice of 1807 seems to have set at rest the vexed question of the *lex loci* of Penang. The law of England introduced in the Strait Settlement by Second Charter of Justice in 1826 had superseded the previous law.¹² Any local inhabitants of the Strait Settlement who wish to leave their property by will in accordance with their personal laws must

⁸ Ritchie, n.3, at 5.

⁹ Doctrine of reception is a Common Law doctrine devised by the British colonial legal minds to explain the methods of introducing and applying English law in a colonised territory. See Mohamad Naqib Ishan Jan, "The Doctrine of Reception," in *Malaysian Legal System*, ed. Asghar Ali Ali Mohamed (Selangor: CLJ Publication, 2014) at 79. See also Abdul Hamid Mohamad, and Adnan Trakic. "The Reception of English Law in Malaysia and Development of the Malaysian Common Law." *Common Law World Review* 2, no. 44 (2015): 123-44 at 124.

¹⁰ Farid Suffian Shuaib. "Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods". *Jurnal Undang-Undang* no. 13 (2009): 158-69 at 159. See also Shamrahayu Abdul Aziz. "The Malaysian Legal System: The Roots, the Influence and the Future." *Malayan Law Journal* 3 (2009): xcii-cvii.

¹¹ Ahmad Ibrahim, and Ahilemah Joned. *The Malaysian Legal System*. (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1987) at 21-23.

¹² Salleh Buang. *Malaysian Legal History: Cases and Materials*. (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1993) at 9.