

# Wasiyyahas an Alternative in Malaysian Muslim Estate Planning

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**Abstract:** Estate planning is about the plans that involves the transfer of estate after somebody passed away. If there are no appropriate estate plan, friends and relatives can spend a lifetime battling over your assets. The estate, which is include cash in bank or cash in hand and properties that own by the deceased likes land and buildings will be distribute to the legal heirs after deduction of funeral expenses and debts for Muslim. The debts are including the debts among human or the debts between God. From the research, they noticed that most of the Malaysia people do not make a will for their estate. It is because in regards to them, the just need to make a will if they have a lot of estate and rich. From time to time, the amount of unclaimed assets keep increasing and this situation have become a significant problem and need to be settled immediately. In regards to this situation, the estate planning is very important in order to make the operation will go smooth without facing any future problems because all the things are related to the law. This paper discussed about a will as an instrument of Muslim estate planning. Nowadays, the will is very important in estate planning because by having the will, we tend not to have problem in the future especially in regards to the process of estate distribution. A will provides for the distribution of certain property owned by the deceased at the time of death, and generally they may dispose of such property in any manner. In fact, the will can change any time before death. They can change for many times. This paper also highlights the importance of will and how to make a will in estate planning. The insight of this paper can contribute to instilling awareness among the public that the wills not just for the wealthy person but everyone can make a wills.

**Keywords:** Estate planning, Wasiyyah, Muslim will, Estate distribution

## 1. Introduction

Estate planning is any effort and planning to distribute the property owned to the beneficiaries or other potential beneficiaries when the property owner dies. This subdivision plan was made while the testator was alive. Managing and planning property is highly encouraged in Islam in some cases, estate management is no longer an option but it is a need especially when there is a situation where the execution of matter is compulsory wewo. In this context, Islam allow us to dispose of property to the specific people through will. Unfortunately, many of us think that a will is insignificant things. This is because of the average view of inheritance distribution is limited to the heirs and is divided only by faraid. The will is actually the pledge or acknowledgment of a person to complete the distribution of property after death to the non-heirs or beneficiaries of estate. The rate which property can be amortized is one-third of the balance of the property is the right of the heir to be distributed by faraid.

Although the law of the will is a favorable act of circumcision, the will may also change based on the situation. It is required or become compulsory when one has a duty to fulfill, especially in the form of 'GOD' rights such as zakat, kafarah and pilgrimage. Then, the will is illegal when a person presents something that is forbidden by the syariah or intended to harm the heir. Besides, the will become necessary if it is made to the rich either by relatives or any other party with no particular purpose. If the will was to do good and connect to the cord of friendship, then it would be circumcision. The will becomes makruh when if the heir has a small estate but at the same time has the poor heir who is in dire need of property. Similarly, it is not advisable to give a will to wicked person or to a person who often commits sin because it is withheld that the will can increase his tendency to commit evil.

In a certain situation if there is no will, it will result in the existence of unclaimed assets. Unclaimed property is one of the growing economic problems. It is because the property will freeze and take a long time to melt. This should not have happened since Islam have set aside property distribution according to faraid law. Unclaimed property is a detriment because they cannot enjoy the wealth left behind. This property issue causes the property to freeze and cannot be developed for the purpose of

economic development of the heirs. This is because when a property is declared frozen, it requires various procedures and take a long time to complete.

The issuance of a will can be seen through the text of the Qur'an, hadith, the practice of companions and consensus. Inside al-Quran, Allah SWT commands a person to make a will as in surah al-Ma'idah:

“O you who believe, when one of you faces death, while he is about to watch, let it be witnessed by two just men you or two people of different religions with you, if you are on the road ahead earth and then you are in danger of death”. (al-Maidah: 106)

Real estate management is very important in managing the distribution of property to the rightful heirs. By being careful, we can give the property to anyone we want and love. For example, if we are indebted to someone in our life, and want to gift that person with a treasure, then we will be able to give the gift after death. In addition, the will be able to expedite the process of distributing the estate to the rightful heirs. Rapid distribution of property may be as little as possible to help the beneficiary financially. When it comes to estate issue, some families will become sensitive and may cause fights. By will, this is avoided because it is clear that the property will be managed according to will.

The major players in estate planning who involved in working on and executing wills and trusts, which are testator, settlor, executor, administrator, trustee, beneficiary, and heirs. In this paper will be discuss about the things that need to be done by each of them. Apart from that, there a lot of important of will that will be discuss in this paper.

The will may also be used as a property planning instrument in the circumstances one has a lot of property, and wants to keep it in its original form in the sense that it is not for sale the proceeds of the sale to the heirs at the rate of distribution of faraid. Therefore, what made by some people in this situation, especially the villagers to own different types of property is to distribute properties to certain heirs.

## 2. Important of Will

Will is a legal document that executed testator wishes regarding to the property or estate after he passed away. A will is importance for someone because he is able to leave instruction for the distribution of his estate or properties and also can hire someone to become an executor of the will to carry out the instruction. It is important for testator to speak or discuss with the lawyer and think carefully before writing a will. Writing a will is very crucial as the testator will determine who will be benefit from it. If testator have anyone specific you wish to give a part of the estate or properties it is better to write the wishes in will especially if that person is not testator legal heir

A will communicates and executed your wishes in a legally enforceable way to avoid leaving such decision to the states or someone else.

### 2.1 Protect the love ones

As parents that have young children who is still young or minor it is very common to be worried about their child wellbeing and safety if anything happens them. Wills is very important as it will protect your loved ones especially the children in case of unexpected death. By writing a will the testator can appoint someone to be the guardian of the children when neither the testator or his spouse are alive.

It is very important to carefully pick and appoint someone whom you trust as a guardian because your children wellbeing and safety and not to mention education is on the line. When writing the will that testator also need to discuss with that person who will be the guardian whether he/she agree and willing to take the responsibility to take care of the child. The testator need to be aware of the consequences of

not writing a will earlier for such matter because the children might end up not living a decent life or worst when they might end up in orphanage even though they still have relatives.

In case somebody not writing a will to appoint a guardian for their children, the court will decide who will be guardian of your children. In most cases it usually will be responsibility of your close relatives. But that might not be the best decision as we know not all relatives are close or the better person to take care of your children. There are also some cases regarding orphan who get bullied or abuse by their relatives. This is because they only took their children into their family because of the inheritance that the children will receive.

This is why it is important for you to choose carefully a guardian and leave the children in the right hands. As for the inheritance or estate that the children will receive later on. The parent can specify the instruction in the will. Usually the estate will be received by the children when they turn 18 years old or when they are old enough to be dependent and no longer the responsibility of the guardian.

## 2.2 To decide the distribution of the estate

As long as we live in this world and we must have something that we treasure the most such as children or siblings but it also can be our estate or properties as it was the proof of our hard work in this life. Even after dead, we need someone to protect our estate or properties especially if it has some sentimental value such as the first house you bought with your spouse.

Is it very natural that we will be concerned whether our estate will be protected after we passed away or not. This is because there are some cases where the person who inherits your estate suddenly sell all of those for money. All your hard work asset suddenly goes to drain. This must make us very sad and upset.

By using will you can create various trust that act in accordance with your intention to protect your estate. You can state in your will if you have someone in mind to give you estate to. This is to make sure that your estate is in the right hand and goes to the people you intended to give to. In those will you can state your instruction or wishes to the people who will inherit on your estate and how you want them to handle the estate. You can also specifically request that you don't want them to sell those estate and wish them to respect your wishes.

## 2.3 To avoid lengthy probate process

Probate process is the official proving of a will. When someone (testator) passed away, all their estate and properties will be frozen. This means that all their bank accounts and asset cannot be moved, cashed or sold until the estate administration is complete. Estate administration is the process of determining the legal transfer of ownership and determining the rights of all possession and assets. If you have a will written before you passed away then all you need to settle your will or authorize the process of estate administration is grant of probate (GP). That means, that if you provide a will the process of administering of the estate will be a lot easier and it can avoid long and unnecessary delays.

If testator passed away with a written will, the High Court will grant or approved your grant of probate. When the grant of probate is issued, the executor that you have appointed will be responsible for your estate administration and execute your will. This process can take 3 to 6 months and some fees is required. For other cases when somebody passed away without a will or the will is invalid or there is no executor appointed, then a letter of administration is needed to determine the legal transfer of ownership and determining the rights of all possession and assets.

## 2.4 As a gift and donations

There are some people who are like in helping in charitable event or supporting charity work. Some people might do it for such motive like to receive recognition and there is also some that just having fun and achieve happiness by doing this so and have no other motive than to helping those who needed.

In Islam we believe that such acts and good deeds will reach a believer after his/her death. For example, a mosque that he built, a copy of Al-Quran that he leaves as a legacy, knowledge which he learned and then spread and etc. These kinds of deeds will reach him after his death. Choosing to leave a gift or donation to your favorite non-profit organization such as a school, mosque, orphanage or other qualified charitable organization is another way of saying thank you and doing some good deeds during your lifetime.

By writing your wish to donate to those organization, you can state on how you want your estate to be used or how the organization will be benefits from your donations. Aware that the organization will be named as one of your beneficiaries, you must simply state the full legal name and location and other related information of the organization and also the nature of your gift for clarification.

Before making donation, you must first discuss with suitable person such as your lawyers and financial planner to get more thorough explanation about every information and details related to donations. This is to make sure that you fully know and understand on how your estate will be used in donations. You can donate to the charitable organization whether in form of cash or property. But usually, people are likely to donate something that are lasting like capital project rather than general operating costs.

Other than that, you also can put some restriction about your donations in your will. For example, you can state that you want your estate to be used as an orphanage or to be used only for a particular program or something that you are deemed better by doing so. Those who are in charge has no option but to follow your wishes because they are bounds to your restrictions. But you must aware that your restrictions will not bring more harm or potential difficulties and only for good purposes.

Another good thing about donations is that you can receive recognition. This is very subjective as some people might not want their deeds to be known. But for some people this is a good chance to create a better image of yourself. Recognition in donations can be done in many various ways. One of it is a plaque or inscription with the deceased's name. There is also a published thanks for dedicating a building or there are some organization that will hold a thank you events and mention their donor's name.

### 3. Wasiyyah as an Alternative of Estate Planning

Referring to a wasiyyah or will as an instrument of estate planning, it is a part of Islamic inheritance system besides faraid, hibah, wakaf and others. The use of these syariah instrument, especially wills, hibah and wakaf depends on the need, circumstances, and wishes of the property owner. Wills will be valid after the testator death.

The will can be used as a property planning instrument for someone who has a family who cannot inherit their inheritance because of religious differences or being hindered by a close heir or because they do not have the right to inherit it. Thus, concerns about barrier to passing on the wealth of the original (non-Muslim) family to them new converts to Islam do not arise because they can be resolved through will.

The will may also be used as a property planning instrument in the circumstances one has a lot of property, and wants to keep it in its original form in the sense that it is not for sale the proceeds of the sale to the heirs at the rate of distribution of faraid. Therefore, what made by some people in this situation, especially the villagers to own different types of property is to distribute properties to certain heirs.

A person who wishes to do charity after death can benefit certain part of the property (provided that the property does not exceed one-third of the property) to certain bodies that it thinks fit. Distribution of property by will is also significant for those who have adopted children because they are not reserved the right to receive property through faraid. However, for some people, this will is something that should not be done because it can be harmful to their heirs rights.

### 3.1 People who tend to have a will as an alternative

Generally, we need a will because through the will, we can make sure all of our estate can be distributed and can benefit to all people we love ones. People who want to have a will need to hire the executor in order to handle the will. In this situation, the testator need to carefully choose the executor because to make sure the process of making a will is going well without having any problems in the future.

As we know, the will have to distribute after the testator death. So, in regards to this, it is very important for us to have a good executor in order to make sure there are no issue or conflict on distributing the assets. If the estate cannot distribute after the death, then that estate will be the unclaimed assets because there are no person want to take over that duty.

#### 3.1.1 The person who have a lot of properties

The person who have a lot of properties need to have a will in order to facilitate the distribution of the estate to the beneficiary by providing good guidance as long as it does not conflict with syariah. They need to list all the assets that they have. So that, there are no undistributed assets to the beneficiaries after they died. The advantage of having the will is there are no issue among beneficiaries about the inheritance.

Wealthy person will have a lot type of assets. So, it is important for them to handle it carefully in order to reduce the future problems. For instance, the beneficiaries did not notice that the testator have another land or properties. So in case the testator do not make a will about that land, then the heirs or beneficiaries cannot claim it and that properties will be an unclaimed assets that will effects beneficiaries welfare and as well as our economic growth. By having the wills, all of the estate can be managed well.

#### 3.1.2 Debtors

If the testator have a debt, it is important for them to have a will in order to settle the debt before distribute to the heirs according to faraid. For Muslim, it is compulsory for them to settle the debt. The heirs sometime does not know the exact amount that the debtor owed. So, in regard to this, the testator need to list the debt that he or she owed. Then, after they died, the executor or the heirs will know the amount to pay back the debtor by using the inheritance that left behind by the testator.

If there are no will, it will have a problem when suddenly, the people come to the house and ask for the debt. Maybe there are some people will take this advantages by not telling the truth about the exact amount that the testator owed. On the other hand, sometime the beneficiaries do not know with who the testator owed. This clearly show that the important of will for a debtor.

#### 3.1.3 Unmarried person

The unmarried person do the will on the purpose of to avoid on burden their parents. This is because once the person died without a will especially unmarried person all of their estate will belong to their parent and siblings so, this indirectly make the process to claim the estate become difficult because maybe the parents are not know or familiar with the procedure in claiming assets. in order to make it more simple and easy the unmarried person can have a will to make sure their parent can claim it easier and can also save their parent's time.

On the other hand, it could be the person want to give charity to the needy. If they are not make a will, so that his or her parents do not know about that intention. So, that intention cannot be accomplish.

#### 3.1.4 Muallaf

Look at the situation inheritance in Malaysia involving muallaf, several cases of muallaf that can be studied

shows a problem in conflict legislation affecting the law and his heirs, especially involving inheritance. Fundamentally, Islamic law dictates property a Muslim cannot be inherited by his heirs non-Muslims and vice versa. Here because the law clearly decided the difference faith creates the right to inherit obstruction. So, as a Muslim affords their legal heir is non-Muslim.

In this situation, it is important for them to have a will in order to make sure that the welfare of their parents is protected. Islam allows the will to non-Muslims to receive no more than 1/3 of the inheritance. Islam does not prevent *muallaf* relationships with family members but encourages doing the best to both parents.

### 3.1.5 People with adopted children

People who have an adopted child need to take care of their welfare because they were relied on foster parents since they were adopted. So, after the foster parents died, they may have no place to rely on. Nevertheless, according to *faraid*, adopted children is not a legal heirs. In this situation, they can decide to make a will.

By having will, the adopted children can have inheritance as permitted by *syarak* which is not more than one-third of the net estate. In this way, the well-being and support of the adopted children, especially those who are under 18 years old and those who are come from the orphanage. They do not have any person that they can hope for expect their adopted family.

## 4. Factors Affecting Wasiyyah Adoption

Most of the Malaysian people are not practicing wasiyyah or will for their estate. This situation happen because some of them will think that he or she still young and they still need those assets. They are thinking that they still have a long time before died. In this situation, they conclude that making a will is not an obligation for them.

Apart from that, some people think that they are not rich enough in order to make a will. According to them, they do not need to think about the will because they just have a few estate and maybe does not have problem in the future. There are no fighting because of the assets. Nevertheless, when it comes to money, the probability to involve fight is quit high. There are a few reasons why the leaving of will have poor practicing in our country.

### 4.1 Knowledge

The Malaysian Muslim do not willing to write their wasiyyah for three reason which is not really knowledgeable about the wasiyyah and its significances, they are reluctant to write wasiyyah even though they are well informed about it, or they afford to draw up a wasiyyah even though they are well informed about it (Ghul et al., 2014).

People think that *faraid* is already enough. They do not need the will. According to them, by only according to *faraid* the distribution of estate can be done. Malaysian people not really know well about the Islamic estate planning. Clearly they are not aware about the significance of writing will or wasiyyah. In this situation, because of the lack of awareness, then they do not have enough knowledge about the will. According to this, sometimes they will have misunderstanding about the concept of Islamic estate planning, *faraid* and will.

Malaysian Muslim mostly think that will is make just for any intention or planning of the testator like want to donate to the orphanage or for the non-heirs. For the other purpose, they assume that there are no need for the will or wasiyyah. Apart from that many people often use excuses for their misunderstandings by claiming that there is no property they want to

enjoy. The will is not just an order for the distribution of property. However, it was an order to appoint the executor (wasi) to his estate. If the owner of the property has a responsibility, it must be settled and it is up to him to make a will. In addition, the owner of the property may also make an order to appoint any guardian to the minor, or specify that the property held is not his property to be returned to the original owner. That is, any order that does not conflict with Islamic law may be in the will document.

The reluctant on writing the wasiyyah happen because of the estate planning is not widely practice in Malaysia even though they know about the importance of it. They think that doing a will is light matter. So, they will keep postpone in order to make a will. For example, they have a lot of money and estate then they do not want to make a will because they feel it is just a small matter and keep postponing to do that. Unfortunately, he died at the young age. Then, sometimes the estate that they left behind cannot be settle because of the some problem that need the will. For this group, they know all about the will or wasiyyah but not practicing it.

They cannot afford to draw up a wasiyyah because of involves the high cost. So, they are unable to draw up the wasiyyah even though they are very much know about it. They may be come from the poor family but have estate like land. So, in order to make the wasiyyah, they need to pay someone like the executor to handle it. This happen toward especially the old person that not really known about the technology that we havenow. They also may not very known about the step that need to be follow in order to draw up a will.

#### 4.2 Life events

Most of the people will think that there is no need for them to prepare a wasiyyah now because they are still young. According to them, they will think about the will when they are getting older and have a high level of serious disease and he or she do the will at that point of time. Nevertheless, we cannot predict when the death will take over. If they are not complete the will before they death, they may behaving conflict with indeceased family and relatives. The process of the distribution of estate also will be a quite long. It is because it needs to follow a certain process compared to the estate that have will.

#### 4.3 Institutional factors

Institutional factors also will influence the person in order to make a will. As we know, it is not easy for us to make the will. We need to face a lot of procedure to make a will. That obstacles include when lies on rules and regulation in regards of the estate administration and settlement. The institutional factors include in regards to the organization that required a promotion for a client and customer to know their existence in those market.

There are two types of the deceased estate which is testate and intestate. The intestate estate is an estate that belong to the deceased without a will where as testate estate is an estate that belong to the deceased with the will. Both of the type of estate will be settled under two different laws and authorized bodies. There are four main authorized bodies in Malaysia such as Amanah Raya Berhad (ARB), high courts land office and shariah court.

For the procedure that related to the land office, the land administrator is given the power and authority in order to dealing with the administration and distribution of the small estate matter. For the high court, it has the jurisdiction in order to deal with the procedural aspects relating to succession, testate and intestate, probate and letter of administration. shariah court is about the administration of Islamic law. In regards to the deceased Muslim's estate, the shariah court just handle the simple things like determining the shares allotted to the beneficiaries according to Islam.

### 5. Efficiency of Distribution Process of the Muslim Will

Leaving will (wasiyyah) is better than leaving the intestate estate. It is because the property or estate without the will is really hard to be distribute. It clearly shows when someone want to

give the estate to those not qualified according to the faraid. Apart from that, the distribution of the estate with will not take the long time in order to settle the distribution. If there are estate without a will and want to distribute to the other person not qualified under faraid, it will have problem when there are legal heirs that not agreed about it.

String of that, it will form unclaimed assets because that assets or properties cannot be distribute. Without a will from the property owner, it is feared that the distribution of property according to faraid and inheritance will make it difficult for the heirs who are still alive at the time of his death. This is because there are still many Muslims who are ignorant about estate management, management and division of inheritance cannot be done perfectly.

Muslims are strongly encouraged to make a will to appoint an executor who will administer his property upon his death. An executor or administrator is a person appointed by the testator, whether among the heirs or not, to manage or administer the distribution of the deceased's property to the entitled heirs including the fulfillment of all the wills of the deceased. The executor will act as the administrator of the estate of the deceased including starting the process of managing the estate, executing a will, settling all debts of the deceased and dividing the balance from the estate to the heirs in accordance with the law.

### 5.1 Cannot be automatically executed in common law jurisdiction

In regards to the will, the court have to formalize the power of the executor in order to settle the will. In Malaysia, Muslim will are subject to the procedural provisions of Rules of the Courts 2012, Probate and Administration Act 1959 (Act 97), Small Estate (Distribution) Act 1955 (Act 98) and Public Trust Corporation Act 1995 (Act 532) as well as the States' statutory provisions applicable in shariah courts. Then, they will collect all the information from the testator. After the death of the testator, the executor or wasi will take over the duty. At this point time, all the assets of the decease will be frozen. For this process, they need to apply for probate grant from the high court. This process is not involve a longer time. It just about six months to two year only.

Compared to the person with no will, they will go through the several particular hierarchy order. In Malaysia, the civil courts have lack of jurisdiction for the validity of the Muslim will. Then, it need to go through the shariah court because the determination of the validity of will is under the shariah court. So, it will take a long process in order to settle it. This process being complicated because of the two courts which is shariah courts and civil courts need to be exhausted. In addition, the estate will also related to the Small Estate Section, JKPTG and Amanah Raya Berhad. The amount with not exceed RM600,000 or an estate comprising land and cash and its value is not more than RM2 million the Amanah Raya Berhad and Small Estate Section have jurisdiction over the estate respectively.

## 6. Conclusion

Based on the above discussion, we can be analyzed that an individual should have plans against all the property in order to make sure that the property can be enjoyed continued either for the sake of and personal well-being and others. In this regard, the various aspects and steps are attention must be given to design especially in the context of asset allocation. Although it undeniable that the distribution the inheritance system still dominate the method distribution of property among Islam society in Malaysia, but another form of instruments should also be noted that it is able to simplify the process of distributing property that can be created and implemented either before or after death property owner.

Most of the Muslim citizens of Malaysia do not really practice will or wasiyyah for their properties. This condition comes about when some of them may believe heirs she is still young and will need those things. They say they would have a long time to go before they died. They say in this case that having a will isn't the duty for them.

Within this paper we think about a will as a planning tool for the house. The will is very important in estate planning

nowadays because we tend to have no problem in the future especially with regard to the portion by having the will. A must allow for the disposition of such properties possessed by the deceased at the time of death and they will usually dispose of such properties in any manner.

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