

Gift Inter Vivos as an Alternative Method of Property Distribution for Muslim Woman

¹Rusnadewi Abdul Rashid, ¹Siti Asishah Hassan and ²Noor Inayah Yaakub
¹Faculty of Law, Universiti of Teknologi MARA (UiTM), Selangor, Malaysia
²Faculty of Economic and Management,
Universiti of Kebangsaan Malaysia (UKM), Bangi, Malaysia

Abstract: The administration of Islamic property in Malaysia is governed by rules of inheritance (faraid). Under the rule of faraid, the daughter will only get half portion of the son. Although, faraid has been playing a vital role in the division of inheritance, the fact remains that the distribution of the property through this way may in some situations requires to be complemented with other mode of distribution of property as it has to certain degree create problem to well being of the community especially women. It is because that there may be situation where a daughter or a woman is entitled to be given more than a son. This study aims to propose a more flexible way of distribution of property which should be adopted in order to remedy the situation. In this regard, the giving of property by way of hibah could be used to achieve several aims which other methods of division of estates could not do. The transfer of property by way of hibah enables the property owners to decide for themselves the recipients of the property. They also have rights to determine the amount and proportion of property to be distributed with due regard to its suitability in terms of the beneficiary's need, commitment and his or her economic status. Furthermore, the transfer of property by way of hibah is possible to help the woman divorcee to get the property from the previous spouse which the law of inheritance could not do. Thus, the application of hibah should be regarded widely as not only religiously recommended but also socially legitimate. It could be used as a means of giving woman compensation in situation for what is seen as their disadvantaged position under the other methods of estate distribution, especially under the rule of inheritance.

Key words: Faraid, hibah, property, estate distribution, inheritance

INTRODUCTION

A hibah or known as a gift inter vivos, in the law of property has a very specific meaning. It is the immediate and unqualified transfer of the corpus of the property without any return. It is a contract consisting of proposal or offer on the part of the donor to give a thing and the acceptance of the thing by the donee. The element of consideration in hibah is absent and this distinguishes it from a contract of sale. In order for a hibah to be legally effective, the donor must have intended to give the property to the donee. The property must actually be delivered to and accepted by the donee. Unlike wasiat (a mortis causa gift) hibah is made from one or more persons, without any prospect of immediate death, to one or more others.

About 3 conditions must be met for a hibah to be valid. The first one is that the individual making the transfer actually intends to make a hibah; it must be demonstrated that the donor's objective was to make a hibah when he or she transferred the property. Delivery of

a chose in possession requires the actual transfer of the property in question so that effective possession (seizing) comes into the hands of the donee; the property has to be physically in the hands of the donee. The second condition is that the donee accepts the hibah property made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour. In general, such acceptance is presumed once the third condition is met that is to say the delivery of the property that is the subject-matter of the transfer by the donor to the donee. The donor has to divest him or herself of the property. He or she has to place it in the possession of the donee. This delivery confirms the donor's intent to make the hibah and must be deemed to be unequivocal.

HIBAH AS OTHER LEGAL TECHNIQUE OF ESTATE DISTRIBUTION

The administration of property through the rules of inheritance (faraid) in some situation could be less effective due to the current living trend where most of

people are busy with their own chaos. They often ignore the responsibility to make the distribution of the deceased's estate because the process must go through several stages that involve several jurisdictions. For this reason, a hibah can be one of the best mechanisms to be considered as part of Islamic estate planning in Malaysia. Furthermore, the ignorance of the true concept of faraid has caused many problems. Thus, the implementation of hibah will not only ensure the distribution of property to the heirs is in accordance with donor's wishes but also to reduce the number of unsolved cases in distribution of Muslim's property through faraid. This is because the distribution of property through hibah does not have to go through the administrative process as necessary to be through faraid.

The other purpose of implementation of hibah is to solve the problem when the division of property fails to run properly. This is because the distribution of estate cannot be considered complete if the proportion of each beneficiary cannot be used or fails to give any benefit to the recipients. In the Muslim estate distribution, the legal heirs are entitled to a certain amount of portion as governed under the rule of faraid. It does not differentiate between the distribution of movable and immovable property. The distribution of movable property is not an issue. But, when it comes to immovable property such as land, there is a lot of problem to be faced. The ignorance in application of the spirit of faraid will lead to the fragmentation of land which would lead to small division of land. Property which is divided in the conventional way by placing the names of all beneficiaries in each plot of the inherited land will not bring any benefit for economic point of view. It will also cause difficulty for subsequent transactions.

Whilst the purpose of transfer of property by way of hibah is aimed to benefit the beneficiary (Muda *et al.*, 2006), the donor in certain situation quite hesitate to surrender all or part of their property during their lifetime for fear or worry about being neglect after all the property being distributed. This is because a hibah as a lifetime gift leads to the immediate and complete loss of control over the property on the part of donor. Thus if a person is considering giving his or her property by way of hibah, he or she will normally make sure that he or she does not give too much of his or her estate away. Many retired individuals give away most of their estate and then they do not have enough resources to last them for the rest of their life. Since, a person does not know how long he or she could live, it generally makes more sense to give a small hibah and then pass the rest on to his or her beneficiaries through a trust arrangement. By this reason, Hibah Amanah (Trust Hibah) is introduced by certain financial institutions (for example, Bumiputra Commerce Trustee Bhd) to have turned out to be an instrument of trust property which will only be transferred to the

beneficiary upon the death of the donor (Yaacob, 2006). During his or her lifetime, the donor retains complete control and enjoyment over the trust property. After the death of the donor, the property will pass to the beneficiary and consequently the other legal heirs cannot claim to be entitled to the property anymore (Yusof, 2006).

HIBAH TO A WOMAN

In Malaysia, Islamic inheritance rules (faraid) is the most adopted method of estates distribution as it is provided under the law of succession. These inheritance principles are intended to facilitate distinctive Islamic conceptions of property, family, community, empowerment and justice. It is in this context that Islamic inheritance systems have to be appreciated and implemented to meet their divine objectives. However, this formal inheritance rules are fairly rigid in terms of predetermined shares. In order to remedy this situation, Islam opens some flexible doors of other estate planning techniques. The most obvious tool for estate planning is a hibah. Muslim, like their non-Muslim counterparts can choose to make a hibah or gift *inter vivos* that will take immediate effect. Thus, every muslim male or female who is major and sane may make a hibah provided he or she is not subject to any force or fraud. The transfer of property by way of a hibah enables the property owners to decide for themselves as to whom the property is to be given (Ali Marghinani, 2005). Many people prefer of this arrangement because it gives them a total control of the entire process. It allows parents to divide up all or part of their assets between their heirs during their lifetime. They are also have the rights to determine the amount and proportion of property to be distributed with due regard to its suitability in terms of the beneficiary's need and his or her economic status. Here, the giving of property by way of a hibah could be used to remedy the situation where a woman is seemed to deserve more than a man. Depending on the beneficiary's capability in term of wealth and her responsibility towards the family, there may be situation where a daughter is entitled to be given more than a son. Unlike if the property is to be divided by way of faraid, the daughter will only get half portion of the son. This concept of hibah provide, therefore, some opportunities for estate planning for those person who are concerned about the distribution of their property after death and for those who wants to predetermine the shares to their children.

When the majority of people get married, especially a woman, they will not expect to get divorced in the future. Unfortunately, now-a-days, there are number of divorce cases worldwide and in Malaysians on its rise. Therefore, it is very important to know how the divorce can affect the property assets. In Islamic rule of inheritance, a woman who is divorced by the husband is

prohibited to get the property. However, this principle may be remedied by a transfer of property through a hibah. In order to guard the rights of woman to the property such as a matrimonial house which form parts of a shelter to their spouses' children and other properties for the benefits of the divorced woman and their children, the husband may use hibah in giving away his properties. This is in order to protect the woman's, as well as the children's welfare.

Islamic rules of inheritance by way of faraid would in certain circumstances, limit the person's freedom of choosing their own successors and may produce inappropriate distribution of their estate. Hence, a hibah can be one of alternative that could be utilized to avoid the application of the Islamic law of inheritance to some or all of the property. Thus, Islamic estate planning in Malaysia permits a person to transfer ownership of his property from his individual name into a person that he or she wishes (Mujani *et al.*, 2011a, b). Since, property is the most essential element for human requirements and needs, the way how the property should be distributed must become an important agenda to the community to decide.

CONCLUSION

Looking at this point of view, the researchers believe that the implementation of a hibah in Malaysia especially to a woman who is in need is really a must. It is because the concept of estate management in Islam is not just to collect, manage, develop and protect the property but also to ensure that the property should be passed to the beneficiaries without causing inconvenience and hardship to them (Muda *et al.*, 2006). Islam has provided the rules of inheritance in a complete way but there is the possibility of sharing the property while the parents are still alive, as in a hibah. By applying this technique, the Muslims are not dominated by the compulsory inheritance rules in considering the devolution of their property. This estate-planning technique may be seen as a socially acceptable means of mitigating the effect of the unequal legal status of woman with respect to inheritance in some Muslim societies like Malaysia.

ACKNOWLEDGEMENT

The researchers would like to express thank to the Ministry of Higher Education of Malaysia for the financial support to this study through ERGS grant.

REFERENCES

- Ali Marghinani, S.B.A.A.H., 2005. The Hidayah: Commentary on the Islamic Law. Vol. II, Part 3 and 4, Darul-Ishaat, Karachi, Pakistan, Pages: 1604.
- Muda, M.Z., W. Yusof and Z. Zakaria, 2006. Konsep harta dan kepentingan pengurusannya menurut perspektif Islam [The concept of property and the interests of management from Islamic perspective]. Prosiding Seminar Kebangsaan Pengurusan Harta Dalam Islam Disunting Oleh [Proceedings of the National Seminar on Islamic Wealth Management], August 8-9, 2006, Pahang, Malaysia, pp: 12-13.
- Mujani, W.K., W.M.H. Wan Hussain, N.I. Yaakub and R.A. Rashid, 2011a. The concept of law of gift inter vivos under Islamic law and the contracts act 1950. *Int. Bus. Manage.*, 5: 319-325.
- Mujani, W.K., W.M.H. Wan Hussain, N.I. Yaakub and R.A. Rashid, 2011b. Constructions of failure ad delay under Islamic estate management. *Int. Bus. Manage.*, 5: 326-330.
- Yaacob, O., 2006. Pembentukan Trust Hibah Sebagai Alternatif Perancangan Harta [Trust Formation Grants as an Alternative Estate Planning]. In: Harta Amanah Orang Islam di Malaysia: Perspektif Undang-Undang dan Pentadbiran [Property Trust Muslims in Malaysia: Perspectives and Administrative Law], Mahamood, S.M. (Ed.). Penerbit Universiti Malaya, Kuala Lumpur, Malaysia, ISBN-13: 9789831003152, pp: 174-175.
- Yusof, N.M., 2006. Hibah dan Aplikasinya di Malaysia [Grants and applications in Malaysia]. *ShLR*, 2: 54-56.