

## **Claims of Intangible Interest as Matrimonial Property at Shari'ah Courts: A Special Reference to Kelantan, Terengganu, and Malacca**

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### **ABSTRACT**

Most of the cases related to claims of matrimonial property or *harta sepencarian* are confined to existing personal property which existed or acquired during the marriage prior to the divorce, such as buildings, land, vehicles. However, many modern families are venturing into business either as a principal means of generating income or as an additional measure to generate income. This has resulted in interest in intangible interests such as shares and investments in business (in addition to tangible ones). With the changes in proprietary interest, it is perceived that the scope of claims on matrimonial property shall also be revolutionised to include claims of future earning and intangible interests. This paper analyses cases related to matrimonial property claims in Shari'ah courts in Kelantan, Terengganu and Malacca. The objective is to highlight scope of claims and approaches of the Shari'ah courts in dealing with matrimonial property claims related to intangible interest, such as business interest and future earnings. The research was based on doctrinal and statutory analysis.

*Keyword:* Intangible interest, Malaysia, matrimonial property, *shariah*

### **INTRODUCTION**

In most cases on matrimonial property, the disputed claims are on the rights of the parties to certain properties or assets. Under the Malaysian law, the court shall have power to order the division of any assets acquired by the divorcing parties during their marriage including those attained by

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the sole efforts of one party prior to the marriage. Reference to personal property is usually not contentious as the court would apply the general rule/method in dividing or concluding the matrimonial property. The conventional approach of the courts in Malaysia, both the Civil courts and the Shari'ah courts, in determining and distributing the matrimonial property is the "contribution" test (Ghadas & Ibrahim, 2012). Nevertheless, when it comes to distribution of future interest such as rights in business, business assets, shares, investment, continuous and future human capital's earnings, legal issues crop up, such as the *locus standi* of the divorced parties to take legal action on the future interest and the proportion/division of the assets as a matrimonial property, and rights to future interest/benefits of the business assets/profits. This issue is vital since traditional claims of spouses on personal property or assets of the other have 'expanded' to include claims in business assets or interest, which are owned by the other parties. Therefore, this paper analyses the scope and approaches adopted by the Shari'ah courts in Kelantan, Terengganu, and Malacca in dealing with claims of *harta sepencarian* related to an intangible interest such as business interest and future earnings.

#### **DEFINITION OF MATRIMONIAL PROPERTY IN SHARI'AH COURT**

Matrimonial property refers to any property acquired during the marriage whether by joint efforts or by sole effort of the parties. The term *harta sepencarian* (matrimonial

property) has long been recognized under Malay customary law and has now been given statutory recognition in the Federal Territories Act and its equivalent state enactments (Buang, 1988.) Most of the relevant statutes define *harta sepencarian* as "property jointly acquired by husband and wife, whether directly or indirectly, during the subsistence of their marriage in accordance with the conditions stipulated by *Shariah* principles".

The definition of *harta sepencarian* has also been highlighted in decided cases including the case of *Hujah Lijah binti Jamal v. Fatimah binti Mad Diah* [1930] 16 MLJ 63, Briggs as:

*"property acquired during the subsistence of their marriage by a husband and wife out of their resources or by their joint efforts. The acquisition referred to may be extended to cover enhancement of value by reason of cultivation or development."*

The above definition indicates that the basis of *harta sepencarian* is contribution by both parties during the marriage whether directly or indirectly. The scope of contribution itself has been addressed in a number of cases where the judge emphasises that contribution is not only confined to both their efforts in acquiring the property, but extends further to cover their contribution whether formal or informal (refer to *Piah binti Said v. Che Lah* 1983, 3 JH 220), and whether it is made in monetary terms or effort to acquire the property (Ibrahim, 1997).

From the above definitions it is clear that *harta sepencarian* is based on “recognition of the part played by a divorced spouse in the acquisition of the relevant property and improvements done to it (in cases where it was acquired by the sole effort of one spouse). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property. Thus, once it is proven that a property was acquired (during coverture) or that the claimant has assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption.”

The Muslim jurists appear to derive the same principle in Islamic jurisprudence on the basis that a wife who has no obligation to perform all the household duties including looking after the children is entitled to compensation for any work she performs during the marriage, if she so desires. In view of this, any housework done by a wife is recognised in Islam as productive work where she is therefore entitled to remuneration for the services rendered (Mustafa, 1996). Thus, the Malay custom of the division of the *harta sepencarian* in divorce, applied throughout Malaysia, has been accepted and judicially recognised and is now codified in the Islamic Family law statute, which is applicable in the states of Malaysia. Hence, if formerly the claim on *harta sepencarian* usually takes the form of land, matrimonial houses and animals used to work the land, it has developed so that the scope of the claim has been extended to include moveable and immovable property

like household goods and furnishing, in line with the life style and the purchasing power of society (Kamariah, 1999). It might also include joint bank accounts, compensation paid for land acquired by the government as well as shares registered in the name of either spouse (see *Rokiah bte Haji Abdul Jalil v. Mohammad Idris bin Shamsuddin* (1410) JH 111; [1989] 3 MLJ ix, *Kamariah v. Mansjur* (1968) 6 JH 301). This contention is also supported by other authors by highlighting that matrimonial property are no longer in the form of traditional properties such as agricultural land, kampong houses and livestock but have changed into more complex, modern and higher value items such as business shares, stock market shares, houses worth millions of Malaysian ringgit and other movable and immovable properties (Raihanah, Patricia, & Wirdati, 2010).

#### LEGAL PROVISIONS ON MATRIMONIAL PROPERTY

Under the Islamic Family Law Enactment (Kelantan) 2002, section 122 provides the power of Court to order division of *harta sepencarian* as below:

- (1) The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during their marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
- (2) In exercising the power conferred

by subsection (1), the Court shall have regard to-

(a) the extent of the contributions made by each party in money, property, or labour towards acquiring of the assets;

(b) any debts owing by either party that were contracted for their joint benefit;

(c) the need of the minor children of the marriage, if any,

and, subject to those considerations, the Court shall incline towards equality of division.

(3) The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole efforts of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3), the Court shall have regard to-

(a) the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;

(b) the need of the minor children of the marriage, if any,

and, subject to those consideration, the Court may divide the assets or the proceeds of sale in such proportions

as the Court deems reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage by one party include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.

Similar legal provisions are also found in the Administration of Islamic Family Law Enactment (State of Terengganu) 1985 by virtues of section 57 and Islamic Family Law (State of Malacca) Enactment 2002 by virtue of section 122.

#### **INTANGIBLE INTEREST AS MATRIMONIAL PROPERTY**

Intangible property generally refers to something which a person has ownership of but not the substance like statutory creations such as copyrights, trademarks and *choses in action* in addition to bonds, shares/stock, long term contracts, rights in lease agreements which represent future value but have no intrinsic value on their own.

Possession of intangible property gives the owner a set of legally enforceable rights over reproduction of personal property, for example, a copyright owner can control the reproduction of the work forming the copyright. However, the intangible property forms a set of rights separate from the tangible property that carries the rights. For example, the owner of a copyright can

control the printing of books containing the content, but the book itself is personal property which can be bought and sold without concern over the rights of the copyright holder.

Generally, claims related to matrimonial property concern personal property of the divorced parties. Such claims do not normally give rise to contentious issues as the court often apply the conventional approach in defining and dividing the matrimonial property which are premised upon just, equitable and fair distribution approach (Ibrahim, 2008). However, issues on how to treat interest that accrue to the spouses in future or prospectively would crop up. How would the court decide accrued interest from intangible property owned by the divorced parties in claims of matrimonial property? What is the distribution formula? Can the conventional “contribution test” be applied in claims on interest in intangible property like matrimonial property?

The concept of future interest is commonly used in law of trust especially in relation to interest in land. Such application is observed to be gradually extended to other areas of law like family law especially in relation to interests in personal property (Tan, 2011) including business entities operating during matrimonial relationship. The basis for recognising future interest as a divisible matrimonial property is fundamentally based on the fact that both spouses contribute seamlessly to the advancement of the welfare of the family with or without demarcation of roles

(Ibrahim & Ghadas, 2014). According to Lim (2003), the couple will usually acquire physical and capital assets together such as buying cars, renovating their house, investing in business ventures, among others. More often than not, individual enters into a marriage with certain skills, talents, education and training which they have acquired prior to their marriage, and which enhanced during their marriage either financially or non-financially (Ibrahim & Ghadas, 2014). Those personal attributes and skills may contribute to future income, known as “human capital”, in which the other party may have an intangible interest in it. Although the Syariah Court does not directly discuss about the claims of intangible interest because there have been no cases as yet claiming on future interest, the contribution made by the wife while the husband is pursuing his degree has been highlighted by the court in determining the wife’s share of *harta sepencarian* in the case of *Hamidah bt Abdullah v Mohd Johanis bin Busu* (Jurnal Hukum, p181). This shows that although the degree acquired during the marriage is not expressly recognised as matrimonial property, the court indirectly takes note of the contribution made by the wife while the husband is pursuing his degree in the university which has led to increase in the earnings of the husband.

## **OBSERVATION**

This study examined unreported cases of the Syariah Court of Kota Bharu Kelantan, Terengganu and Melaka to analyse intangible interests in these claims such as

human capital or future business interest as *harta sepencarian*. It was discovered that matters relating to intangible interest has not been claimed by the parties either upon a divorce or upon the death of the deceased. Most of the cases dealt with personal assets including landed property, shares in the Amanah Saham Bumiputera and other banks like Bank Rakyat, savings account as well as vehicles or cars. It is interesting to note that there is only one case in Terengganu claiming intangible interest over the property of the deceased as *harta sepencarian* and subject to division upon his death. The plaintiff apart from claiming from the deceased few lots of land and vehicles as *harta sepencarian*, also claimed profit from the deceased's company and profit accruing from the fishing boat as *harta sepencarian*. The Court granted the application declaring all the property as *harta sepencarian*. It ordered that one third of the property be given to the plaintiff while the remainder would be divided according to *faraid*.

## CONCLUSION

The study found only very few cases dealt by the Shari'ah court on claims of intangible interest as matrimonial property. However, it is interesting to see that there are claims already being brought to the Shari'ah court related to intangible interest. It is not surprising to see that the conventional approach in determining and dividing matrimonial property was used by the court in the claims, although the value of the intangible interest cannot be ascertained.

Therefore, the approach of conventional courts in determining future earning of human capital as matrimonial property might be useful in claims on intangible interest as matrimonial property.

Interest in human capital generally refers to an individual's expected future earnings and considered as an asset that promises a return on investments such as education, training, and work experience. It is an investment of time and money in self-development to enhance skills and abilities, which are a source and form of wealth. Human capital consists of intangibles such as skills, knowledge, and ability acquired through education, training or experience, which may be manifested in a degree, a license, by reputation, or a resume (Weitzman, 1974). The author also highlights that a modern conception of marital property might well be broadened to include the 'earning power' of the marital partners. The recognition of earning power as marital property would legitimately compensate a non-income earning spouse for contributing to the other's education, employability and job success (Weitzman, 1992).

Weitzman further noted that people today invest more in human capital and career instead of in land or a family farm leading to *inter alia* enhanced earning capacities which are often the major assets acquired during the marriage. By this, the law must be prepared to expand the definition of property and recognise them as part of dividable matrimonial assets (Weitzman, 1992). The inclusion of human

capital as matrimonial assets is clearly and consistently recognised in New York. However, in other parts of the United States, courts have overwhelmingly rejected the claim that human capital is matrimonial property. The most common rationale offered to deny the claim of property in these cases is that degrees, licenses, and earning power are not property in the usual sense of that term (See *Graham v. Graham*, 1978, 574, P.2d 75)

The English court of Appeal in the case of *Wachtel v. Wachtel* [1973] 1 All ER 829, include in its definition of “family assets” divisible on dissolution not only assets “of capital nature”, such as the matrimonial home and the furniture in it, but also assets “of a revenue-producing nature, such as the earning power of husband and wife”. This shows that the English courts recognise earning potential as a family asset which Lord Denning proposed that the wife should receive, as a “starting point”, one-third of the capital assets of the family and one-third of the spouses’ joint earnings.

Thus, this study suggests a thorough and further research to identify the appropriate principles and legal approach which the Shari’ah courts should adopt in dealing with claims on intangible interests as matrimonial property.

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