

The Rights of Children Over a Deceased Parent Matrimonial Property: Special Reference to Family Business

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Abstract

A couple of years ago, the country was stirred by the legal suits taken by eleven siblings against their estranged father over their inheritance and their deceased mother's matrimonial property (Khalilullah Che Ibrahim and Ors v Che Ibrahim Che Ismail, Syariah High Court, Kota Bharu, Kelantan). The children succeeded in their application for an ex parte interim order to restrain their father from entering into any form of transaction on the claimed property. The law suit is expected to be in the millions as it involves numerous properties and shares belonging to the defendant. This paper discusses issues relating to rights of children to claim a deceased parent interest in matrimonial property by way of legal analysis. Research methodologies applied in this paper are statutory and doctrinal analysis.

Introduction

Family business generally refers to a business structure in which the ownerships, the management and the decision making power are retained and intended to be for family members. All over the world, family business structure has a profound establishment as one of the main actors in the country's economy (Wan Noraini and Zuhairah, 2012). The development of family business in Malaysia has contributed in producing numbers of tycoons with their respective business field (Haslindar and Fazilah, 2010). The fact that the business was set up during the marriage subsequently recognized as a matrimonial property or harta sepencarian has led to a very complicated issue especially on the termination of marriage either by divorce or by the death of one of the parties. There would be a repercussion to the family business when this happens because the separation may directly affect the succession planning of the business if the children are not properly tied up to the business. The initial

idea of setting up the family business so that it could be passed on and inherited by the next and continuing generation shall be affected by the divorce as the parties' interest in the business are divided as matrimonial property in accordance to the law which generally does not look at the issue of succession of the business and the long term effect of the interest in business to the children. (Zuhairah and Norlia, 2011). Therefore this paper analyse the right of the children to claim over a deceased parent matrimonial property especially with regards to a family business by making a comparative analysis between the law for Muslim and non-Muslim Malaysia.

Matrimonial Property

The statutes in Malaysia are silent as to the definition of the matrimonial property. Even though the Married Women Act (Revised 1990) is the main statute, which deals with the married women's property, no reference is made to the term matrimonial property. The Law Reform (Marriage and Divorce) Acts 1976 (hereinafter referred to as the LRA 1976) which governs marriage and divorce for the non-Muslim provides no definition of what matrimonial property is. However, generally matrimonial property has been refers to any property, which is acquired during the marriage either by the joint effort or the sole effort of the party. It also includes property, which is owned before the marriage provided that it has been substantially improved by the other parties or by both parties during the marriage. (Section 76 of the LRA). Shankar J in the case of Seng Woah v Lim Shook Lin ([1997] 1 MLJ 109 (CA) at p.122, provides a wide definition by emphasizing that:-

"... the expressions refer to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset."

The above definition clearly indicates that matrimonial property should cover everything that is acquired during the marriage. The definition is wide enough so as to cover the earning power of the spouse even though the quantification of the amount may lead to another dispute. (Zuhairah and Norlia, 2011).

While for the Muslim, the definition clause of the Islamic family law acts and enactments do define the term harta sepencarian. For instance, the Islamic Family Law (Federal Territories) Act 1984 in section 2, (hereinafter referred to as the IFLA) defines it as a —property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara'.

Looking at the definition of matrimonial property / harta sepencarian and the nature of family business itself which is set up by the parties mostly during the marriage, it is undisputable that the family business is a matrimonial property in which both parties contributed directly or indirectly in its establishment.

Section 76 of the LRA 1976 provides:

(1) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties any proceeds of sale.

(2) In exercising the power conferred by sub-section (1) the court shall have regard to:

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

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

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

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

(3) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by the sole efforts of one part to the marriage or the sale of any such assets and the division between the parties any proceeds of sale.

(4) In exercising the power conferred by sub-section (1) the court shall have regard to

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

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

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the courts think reasonable; but in any case the party by whose effort the assets were acquired will get a greater proportion.

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

As for the Muslim parties, section 122 of the IFLA 1984 provides an identical provision to LRA 1976 except for the words 'matrimonial property' being substituted by *harta sepencarian* while 'divorce and judicial separation' are replaced with the words *talaq* and when making the order of divorce'.

Both the legal provisions in the LRA and IFLA empowered the court to order a division of matrimonial property upon divorce without mentioning at all about the right to claim after the death of one of the parties.

The Right of Children to Claim over the Deceased Parent Matrimonial Property

Section 122 of the IFLA provides that the court is allowed to order a division of matrimonial property when permitting the pronouncement of divorce or when making an order of divorce. There are many precedents which shows that the division of matrimonial property can be done after the death of one of the parties.¹ There is also a Practice Direction which had been issued by the Department of Islamic Judiciary Malaysia in 2003 which allow such claim to be

¹ See *Hajah Saudah v. Hanafi*, (1992) 8 JH 284; (1997) 11 JH 21, *Bunga bt. Ibrahim v. 'Ila @ Zila bt. Abdullah & Ors* (1990) 9 JH 198, *Semek binti Mamat v Siti Zubaidah bt Yassin & Others* [(1997) 11 JH 153], *Re Hajjah Nek Maimunah bte. Salleh* (1995) 11 JH 153, *Habsah binti Saad v Surianata bt Baharom & Shaari Bin A. Samad*, [2004] 17 JH 83 and *Sofiah Moo @ Moo Nyok Yin v Syed Gamal bin Syed Kechik al-Bukhary & Ors* (2013) 1 ShLR 9

made. Similarly, a Fatwa has also been gazetted in Selangor which clearly states that a claim on a division of matrimonial property is allowed on the death of either party, before the property of the deceased is to be divided according to faraid (Islamic law of inheritance).

Apart from allowing the application made by the surviving spouse or ex-spouse, the court has also granted the application made by the heirs including the children, on behalf of the deceased parents. This principle is best illustrated in the case of Bukhari bin Mohd Noor v Aisyah Binti Ismail (2006) JH XX1/1 p 26). In this case, the plaintiff was the son of the defendant and the deceased husband. The deceased, during his lifetime has transferred all his property amounted to 1.7 million to the defendant as a pre-condition for him to practice a polygamous marriage. After his death, the plaintiff brought an action to the court claiming that since the property was acquired during the marriage between the deceased and the defendant, the property was harta sepencarian and subject to division. However it was rejected by the Court. The case was brought to appeal and it was allowed.

The claim made by the deceased's children was also granted by the court in the case of Zailan Abas & 3 yang Lain v Zaiton Abdullah .[2006] JH 22 (2) 277. In this case, the appellant i.e the deceased's children claimed that the moveable and immoveable property that was registered under the deceased's name was harta sepencarian and subject to division and it was granted by the court.

Similarly, in the case of Khalilullah Che Ibrahim and Ors v Che Ibrahim Che Ismail, Syariah High Court, Kota Bharu , Kelantan whereby eleven siblings took a legal action against their estranged father over their inheritance and their deceased mother's matrimonial property (Adham Shadan, 2011) .The children succeeded in their application for an ex parte interim order to restrain their father from entering into any form of transaction on the claimed property which is belong to their deceased mother.

It is noted that this practice is actually in conformity with the verse which explains about the distribution of the deceased's property to the legal heirs which can only be done after the payment of legacies he may have bequeathed or debts. Allah mentions this in surah In surah Surah al-Nisa:11 to the effect.

"Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise.

Additionally, it was reported by Sayidina Ali that he saw the Prophet Muhammad (PBUH), settled all the deceased's debt prior to the execution of legacy. (Wahbah al Zuhaili 1989) Thus, from the above authorities, it is undeniable fact that to allow the claim after the death of the spouse is actually does not contradict with the Islamic principle and is in line with the administration of the deceased property after his death whereby the property will solely be his estates after setting aside inter alia, his funeral expenses, his debts and others person's rights including the right of the spouse to claim harta sepencarian. (al Sharbini, Muhammad ibn. Ahmad, 1978)

While for the non-Muslim, different principle is applicable. The claim for a division can only be made while both parties are still alive. The principle is elaborated in the case of Wong

Yuk Fong Lily v. Menezes (Menezes Daniel Matthew, Intervener) [1992] 2 SLR 446. where the court said that an application for ancillary relief is personal to the parties. Consequently, in the event either party dies before the question on division of matrimonial property is determined, then the application will abate. In this case the petitioner and the respondent, who were married in 1968, were granted a divorce in May 1991. With the granting of the decree nisi, the court ordered the matrimonial property to be divided in the ratio of 55% to 45% in favour of the respondent. Dissatisfied with the apportionment, the counsel for the respondent suggested to the court to consider further arguments. Before the judgement was delivered, the respondent passed away. The question that now arose for consideration was whether the court had any further jurisdiction to make an order for the division of the matrimonial property. The petitioner submitted that all proceedings should have abated with the respondent's death while the son of the deceased intervened and submitted otherwise. The court, after referring to the English law which puts a stop after the death of one party, held that the court had no further jurisdiction in the matter and there was therefore no order on the ancillary matter to be enforced. The court further said that, in construing the provision of the matrimonial property, the jurisdiction of the court is personal to the parties and should only exercise if both parties are still alive. The principle is well received by a family law expert, who said, "while the parties are alive, the ancillary power may be invoked and the court may properly decide how the matrimonial assets should be divided between them. After one of the spouses has died, his or her property falls to be disposed of, instead, by the law of succession." (Leong Wai Kum, 1996)

Observation

It is observed that the Shariah court allowed a division of matrimonial property when permitting the pronouncement of divorce or when making an order of divorce and that the division can be done after the death of one of the parties. While for the non-Muslim, the claim for a division can only be made while both parties are still alive. The Shari'ah principles generally allow the next of kin or children of the deceased spouse to file a claim on the matrimonial property on behalf of the respective deceased parent.

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