

# A PROPOSAL FOR A SINGLE TRIBUNAL OF ESTATES DISTRIBUTION IN MALAYSIA

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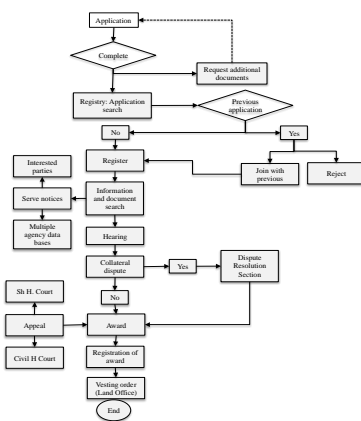
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## Graphical abstract



## Abstract

This research paper attempts to propose the replacement of the costly and time consuming process for the distribution of estates of Muslims in Malaysia in four agencies with a cost-effective process in a single tribunal that have full information about estates and has expertise in Islamic and Civil laws. For this, the existing framework and process of estates distribution is evaluated. The overall process is lengthy, costly, and in some cases, it is ineffective. Duality of legal systems and multiplicity of administrative and judicial agencies are thought to be the causes of the problem. To remedy this problem, a single tribunal with a new process therefore is proposed.

Keywords: Single tribunal, distribution of estates, existing framework, new process

## Abstrak

Kertas kajian ini merupakan satu usaha untuk mencadangkan penggantian proses pembahagian harta pusaka bagi orang Islam di Malaysia yang mahal dan lambat di empat buah agensi dengan proses yang kos-efektif di dalam satu tribunal yang memiliki maklumat penuh berkaitan harta pusaka dan kepakaran dalam perundangan Islam dan Sivill. Dengan demikian, penilaian sistem perundangan dan proses pembahagian harta pusaka sedia ada dikaji. Proses keseluruhannya mengambil masa yang lama, mahal dan tidak efektif. Dua sistem perundangan serta kepelbagaian bidanguasa pentadbiran dan badan kehakiman merupakan penyebab kepada permasalahan ini. Maka, satu tribunal dan proses terbaru dicadangkan.

Kata kunci: Satu tribunal, pembahagian harta pusaka, proses sedia ada, proses baru

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## 1.0 INTRODUCTION

In Islamic law the property of an individual is considered the property of his heirs, soon after he passes away, and for this reason, an estate needs to be distributed to the beneficiaries soon after the legal personal representative clears the debts of a deceased person. A timely claim should be made within first week after the death of the death of the decease, and a timely distribution of estate should be within one to four months. Otherwise, one may consider it a delay in making the claim or delay in the

distribution of the estate by the personal representative of the deceased. This would be the violation of the rights of the beneficiaries because they may be deprived from their means of income, subsistence, and control over their properties.

Yet, the records in the Malaysian Land Offices indicate that a substantial number of lands still remain registered in the name of the deceased Muslims, which shows that such lands are not transmitted to the beneficiaries of the estate of the deceased persons. Due to such a state of affairs, one may soundly presume that some beneficiaries of Muslim estates

may not enjoy the fruits of their property in the estate. If such is proved to be the fact on the ground, questions may arise as to the fairness of the law, effectiveness and efficiency of its administration.

The lack of transmission of land title to the rightful beneficiaries may have occurred due to lack of claim by the beneficiaries to the estate, and delayed distribution of such estates by a qualified tribunal of adjudication. Various reasons for lack of claims or their delayed disposals may be given.

The authors of UN guidelines on land administration system (2005) have viewed the lack of claim from the perspective of the beneficiaries and outlined the internal causes for lack of claims to be: "ignorance, a misunderstanding of the procedures or a wish to avoid payment of death duties or taxes". While ignorance of the heirs and misunderstanding of the procedures seem relevant to this discussion, avoidance of death duties is not considered relevant due to the prevailing legal system of Malaysia. Ignorance of heirs could be of the facts or laws. They may not know the deceased has left behind any property or its whereabouts. Similarly, they may not know their entitlement to a share in the estate, or they may know about both but are discouraged to claim their share due to complexity of substantive rules of inheritance, complexity of process and multiplicity of agencies involved. Other times, the heirs may not claim their share in the estate due to their attitude towards their share in the estate influenced by factors related to socio demographics. Additionally, where the heirs do claim their share in the given estate, irrespective of whether or not such a claim is made sooner or later following the death of the deceased Muslim, the complexity of the process may have contributed to the lack of transmission of title in land to the rightful beneficiaries.

Among the above-presumed causes, this paper focuses only on the existence of various laws and the involvement of too many agencies in the distribution of estates. Both contribute to the delayed distribution of estates among the heirs because the process of claiming and distributing estates is complex, and sometimes confusing. This is so because any application regarding the administration of estates is dependent on the jurisdiction of a tribunal for the purpose of ascertaining the estates of a deceased person and the entitlement thereto. There are several laws that create multiple jurisdictions. These laws are considerably ambiguous, which in turn some time cause conflict of rights, jurisdiction, and lead to debarring the rightful heirs from their shares in the estates. In fact, there are several faulty parts in the existing process of estates distribution that make this process cumbersome, lengthy and costly, which may cause delayed distribution of estates and prevent the heirs from claiming their share in the estates.

Less attention is paid to the above issues so far. Legal researchers so far have focused on the description of existing substantive and procedural law, and few have realized the need for a single tribunal without suggesting its structure and jurisdiction.

This paper describes one aspect of a research project that was commenced in 2010. Thus far, the authors have discussed various causes of delayed distribution and the complexity of law and procedures from the perspectives of inefficiency and ineffectiveness elsewhere. But that is considered insufficient without proposal for the organizational structure and process of a new tribunal. Hence, this paper is dedicated to the description of the existing organizational framework and that of a proposed tribunal and their processes of disposing inheritance cases. It is hoped such a tribunal may solve the problems of conflicting jurisdictions, reduce the complexity of laws, and provide justice to the deserving beneficiaries. Even this new tribunal and new process cannot be successful without having an integrated data system and a triggering mechanism, which are also part of the abovementioned research project. All these, may be an attempt to realize the vision of the Malaysian Prime Minister, Datuk Seri Najib Tun Razak who seek ideas, skills, technology and financial support for the establishment of "Pusat Daftar Setempat Harta dan Tanggungan (Aset dan Liabiliti) Milik Si Mati 1 Malaysia" [13].

The paper views the procedural law as it is and ought to be. Statutory legal principles and case law are analyses in terms of efficiency and speediness of the proceedings. The speed of proceeding in courts and land office are compared. Reference is made to legislations, judicial precedents, facts of cases, and views of administrators.

The authors consider the current process expensive and costly and in need of reform. For this end, they discuss first the existing process in various institutions, together with weaknesses and the causes delaying the distribution of estate, the proposal for a single tribunal and its process, comparison of the existing and proposed processes and conclusion.

## 2.0 THE EXISTING PROCESS

The process of distribution of estates of Muslims is complex<sup>1</sup> and handled by various agencies and courts of laws. The original design for the creation of various agencies was to overcome the rigidity and formality of judicial system. These reforms to an extent have solved some problems, but not all. Additionally, the reforms seem to have their own problems. To see the problems the existing process is divided into two: that of a general nature and specific. Both are discussed below.

<sup>1</sup> Complexity of law is defined to be: voluminousness and bad quality of the legislations. A law is voluminous if it is lengthy, involves several statutes, rely on different moral, ethical and ideological principles of justice and its adjudication. A law may be of bad quality if it is unnecessary, unclear, disjointed,

ineffective, and inaccessible. See Kades, Eric, (1997). *The Laws of Complexity & the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*. Faculty Publications. Paper 646. See further related works from USA and England.

## 2.1 The General Process

Under current legal framework, when a person passes away, his or her heirs should make a claim to the relevant agencies such as the Land Office<sup>2</sup> or Amanah Raya Berhad<sup>3</sup> (ARB) or civil High Court<sup>4</sup> including Shariah High Court<sup>5</sup>. Each agency has its own process regulating petitions initiated in the same agency or referred to by another.

The procedure to liquidate a deceased's estates is illustrated in Figure 1, indicating two different procedures for distribution of estates, namely: testate and intestate [2; 15; 18; 19; 25]. In the case of testate, executor is required to obtain a Grant of Probate from the civil High Court. Under intestate case, a Letters of Administration will be issued by the said High Court [2; 8; 9; 16; 26] if the estate has value more than RM 2 million (non-small estate) and less than RM 2 million but limited to the movable estate. If it is less than RM 2 million (small estate), it can be obtained from the Land Office for immovable and movable estates or Amanah Raya Berhad (ARB) for movable estates only. The current framework has several weaknesses that may delay the distribution of the estate:

- (1) Even though in practice a lawyer or individual petitioner would be required to provide the list of assets, a rough estimate of its value, the Land Office or the civil High Court need reliable valuation report to determine whether or not the case can be filed in the Land Office or the civil High Court. Nevertheless, there is no legal provision requiring the valuation report to be attached to the application form. This could shorten the process.
- (2) There is a possibility that application for letters of administration can be made to the civil High Court even though the properties including immovable estate are less than RM 2 million because the law does not require applicant to submit valuation report of the estate to the High Court or land office.
- (3) A petition by an heir or beneficiary is made to the Land Administrator or ARB or Civil High Court, who then holds an inquiry [16]. The applicant may have obtained the certificate of faraid from the Shariah High Court indicating the portion each beneficiary is entitled to the estate according to Islamic law [1]. Here, the Shariah High Court relies on sworn affidavit of the claimant, and after hearing, and issues the certificate [16]. It is doubtful whether, after inquiry by the said agencies or reliance on the affidavit by Shariah Court, all deserving beneficiaries could be identified correctly [1; 8; 9; 20]. The current legal frameworks may be deficient, because there is no link with the national registration office. Therefore, some beneficiaries may be excluded from the

distribution of the estate because the applicant may have not disclosed the names of all beneficiaries, intentionally or out of ignorance. The officers of the courts or land office or Amanah Raya Berhad would be unable to verify the given list of beneficiaries during their interrogation of the applicant or beneficiaries. It is found that some officers rely only on the documents before them. Other beneficiaries may come to know about the proceedings in land office or the civil high court and thereby may be allowed to intervene. This could be contentious and hence in either way may prolong the process of the distribution of the estate.

- (4) Inefficacy of Certificate of Faraid. Current practice is to advise the claimant to obtain certificate of faraid before one applies for letters of administration or distribution of estates in Civil High Court or Land Office. In fact, there is no provision under Civil Courts procedure when such a certificate can be obtained. The Shariah Court procedural law does cater for originating applications as well as when such is required by an agency such as the land office. The Small Estate (Distribution) Act 1955 also provides for such a referral but not at the outset of proceedings. But, one may think of the insignificance of such certificate because Shariah Court and Land Office are criticized for being unable to identify the rightful beneficiaries, despite the fact that the same may be true about Civil Courts. Hence, the current process needs identification of its weakness, and a unified process for identification of beneficiaries and assets. Momentarily, this can be done by Land Office or the Civil High Court first, and then the issue be referred to the Shariah Court for certificate of faraid. Despite Shariah Court jurisdiction, it is thought that a Muslim need not obtain the certificate of faraid from the Shariah Court because the Land Administrators have the power to act as the second-class magistrates who can hear and decide on cases involving small estate. They can calculate the allocation of shares using the e-faraid software that is embedded into the e-TaPP system at the land office.<sup>6</sup> This can be an illustration of redundancy and duplication if there is any authority conferring such jurisdiction on Land Administrator.
- (5) Due to the lack of an integrated property database system, there is possibility of unavailability of a comprehensive list of the properties belonging to the estate. Manual process for the preparation of such list takes time. There could exist cases where a property of the decease is discovered after a distribution order is made by the Land Office or the civil High Court.

<sup>2</sup> Pursuant to Section 12 (7) of the Small Estates (Distribution) Act 1955.

<sup>3</sup> Section 17 of the Public Trust Corporation Act 1995.

<sup>4</sup> Order 71 and 72 Rules of Court 2012.

<sup>5</sup> Section 61 (3) (b) (iv-ix) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003

<sup>6</sup> Noraini Noordin *et al.* (2011) Problem to Petition Rights to Islamic Inheritance-Practical Solution Found Elsewhere than the Legal System of Malaysia. PERINTIS e-Journal. Special Issue on Science for Sustainability. Pp: 44-81.

(6) The law empowers the court to issue letters of administration to the applicant who falls in the priority class, i.e. those entitled to residue of the estate, without notifying other beneficiaries. This could be open to abuse by excluding others from

the estate. In fact, once the letters of administration is granted the administrator may take years to distribute the estate for his own gains or out of sheer negligence.

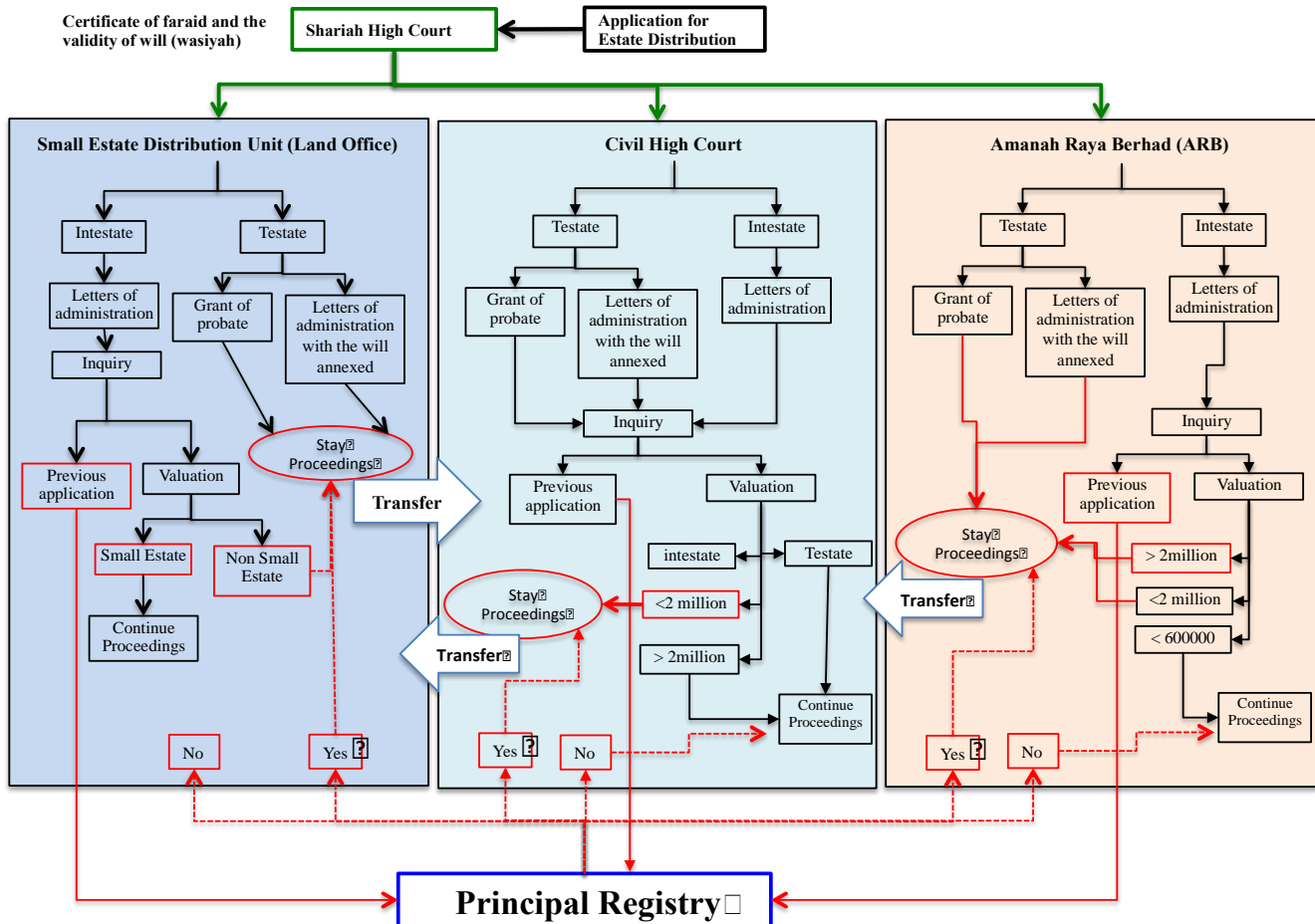


Figure 1 General process

(7) As indicated in Figure 1 (see the red and dotted lines), the interconnection between the various agencies makes the law complex, which may cause procedural errors that is time consuming and costly. Generally, if a claimant has brought a case, to a wrong tribunal, the claimant would be required to start afresh in a proper agency and the early claim will be dismissed. For example, when a claimant brings his case to the civil High Court, which is not under its jurisdiction, if the value of estates is small, the said Court would dismiss the case and the claimant has to file a petition with the Collector in the Land Office<sup>7</sup>.

(8) In case there is no error committed, jurisdictional issues may cause disputes and this will need appeals to civil High Court and then to the Court

of Appeal and Federal Court. This unnecessarily makes the process lengthy and costly. Additional weaknesses arising from the specific processes are given below.

**2.2 The Specific Process**

The specific process refers to those in Land Office, Amanah Raya Berhad, Civil High Court, and Shariah High Court.

**2.2.1 Land Office**

Estate below RM 2 million, according to Section 8 (1) of the Small Estates (Distribution) Act 1955, will be under exclusive jurisdiction of Land Administrators.

<sup>7</sup> See Abdul Khair bin Haji Said (sebagai kepala kuasa bagi harta pusaka Asma bt. Haji Mohamad, simati) v Haji Ibrahim bin Mohamad Said & Ors [2001] MLJU 16; Syed Hamid bin

Syed Bakar v Syed Mahadi bin Syed Hassan & Ors. [2000] MLJU 570; Fatimah bt. Mat Akir & Anor v Sharifah bt. Hj. Ahmad & Ors. [1997] 1 MLJ 106).

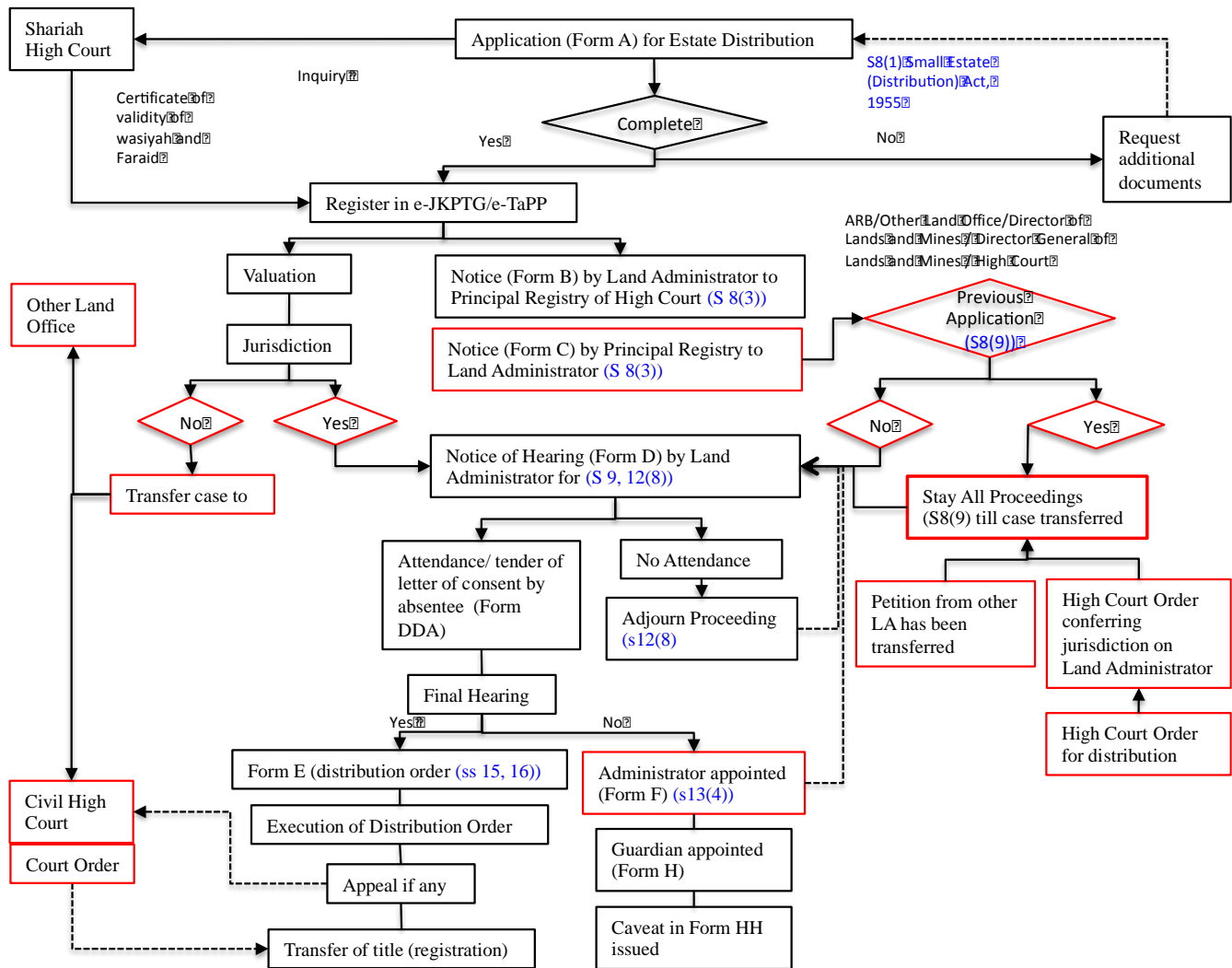


Figure 2 Existing Process of Estate Distribution in Land Office

Figure 2 illustrates the procedure in Land Office [2],<sup>8</sup> which begins with an application and claim under Section 8 (3) of the Act. Where the estate involves movable property, the proceedings start with an application for distribution of estates. A claim must be in Form A under Section 8 [26] or Form P pursuant to Section 17 of the Small Estates (Distribution) Act 1955 for the subsequent application<sup>9</sup>. Other documents that must be submitted together with Form A or Form P are: (i) death certificate, (ii) documents of title or other documents evidencing title in his power or possession relating to the land of the deceased e.g. sale and purchase agreement, land revenue receipts, (iii) copies of the documents relating to the deceased's estate e.g. account statements, vehicle registration certificates, insurance policies, lists of deceased's debts, (iv) copies of the documents of the surviving heirs e.g. birth certificates or identity cards

and marriage certificate. It is also advised that certificate of faraid issued by Shariah High Court be also included. Upon the receipt of this claim, the Land Administrator must enquire about few issues: (1) through Form B inquire, in Principal Registry of High Court, whether or not an application for probate or administration regarding the estate has yet been lodged, or filed in the Civil High Court or with any other Land Administrator. (2) At the same time he also has to inquire about the value of the estate and (3) determine whether or not the petition comes under the scope of powers of Land Administrator.

Upon the receipt of the notification, the Principal Registry after certification will send back the Form C to the Land Administrator. Following this, the Land Administrator would issue the notice of hearing under Form D to the petitioner and not to all the surviving heirs. The petitioner has the responsibility to give the

<sup>8</sup> See for explanation of the procedure page three and four.  
<sup>9</sup> The party interested may make an application to the land administrator in case of appointment of new trustee or administrator or to make any other or further order (include

the discovery of the new list of property or an order from the Shariah High Court particularly hibah or harta sepencarian, and contentious matter) or to withdraw the caveat.



copy of the hearing notice to the others who were listed in the Form A. The Land Administrator investigates the estates whether it could be categorized under a small or a large estate. In practice, even without the result of the search from the Principal Registry, the determination is done upon the lodging of the claim for distribution. Indeed, the valuation is carried out at the same time the notice to the principal registry is issued. Under Section 4 (5) of the Small Estates (Distribution) Act 1955 [26] the valuation officer must determine the value of the estates, as at the date of lodging the claim, or, if more than one claim has been lodged, as at the date of lodging the earliest claim and every such valuation shall be conclusive. The Land Administrator under section 8A also has to investigate by requiring the ARB 'to deliver to the Land Administrator any document relating to the property for the purpose of determining whether the estate is or is not a small estate'. Pursuant to Section 4 (2) and Section 5 (2) (c) of the Act 1955 [26], when the result of the search shows that another claim for distribution has been previously lodged with another Land Administrator, or Director of Land and Mines or the Director General of Land and Mines, or that a petition for probate or letters of administration with a will or a copy of a will annexed has been filed in the Civil High Court, the Land Administrator must then stop all proceedings concerning the application before him, until he is directed by his superiors or an order is made by the Court directing him to proceed with distribution of the estates. This process however, may delay the distribution of estates.

The Land Administrator may decide whether the estate is a small or non-Small based on the valuation report that has been released by the Valuation and Property Services Department of the Ministry of Finance Malaysia. When he finds that it was out of his jurisdiction, pursuant to section 4 (5) and section 8A, if the estate is not small estate, the Land Administrator should then transfer the case to the Civil High Court by submitting the Form I coupled with the file in accordance with Section 8 (7) of the Act 1955. If the estate has been previously petition in the civil high court or ARB, the Land Administrator must make a reference to the petitioner and offering them either wish to proceed with the previous application or start with a new application (reject the old Form C who was produced by the civil high court of Kuala Lumpur and issued a new Form C) as the case may be.

If he thinks that the case must be heard by another Land Administrator, he may apply for an order of the Director of Land and Mines or the Director General of Land and Mines in accordance with Section 8 (8) of the Act [26]. To get other opinions from the Collector in different district or state may only give difficulty to him in respect of disputed order and time consumed.

Section 8A of the Small Estates (Distribution) (Amendment) Act 2008 provides if any movable estate administered by ARB but the application for distribution is lodged in the Land Office, ARB must deliver any documents of estates to the Land Administrator. This situation may only complicate and lengthen the estates distribution process.

After the notice of hearing (Form D) has been issued by the Land Administrator to the claimants, all beneficiaries have to attend the hearing but those who are unable to attend they have to surrender their share in the estates. Those who, agree to the method of distribution, he may tender a letters of consent in Form DDA to the respective Land Administrator [2]. In the absence of the beneficiaries to attend the hearing and failure to send a letters of consent, the Land Administrator may postpone the proceedings.

The process has the symptom of ineffectiveness. The copies of the notice about the date and place of hearing must be posted up at the land office [2; 26]. Failure to serve any such notice does not invalidate the proceedings unless it has occasioned any substantial injustice. The weakness of this provision is that the notice may not be received by all beneficiaries especially those whom the claimant intend to exclude. This therefore makes the flow of distribution ineffective.

During the hearing, the Land Administrator under Section 12 of the Small Estates (Distribution) Act 1955 [26] has to record all the evidences in writing. He may (i) affirm the attendance of all witnesses, (ii) allow the cross-examination of witnesses produced by claimant or who has been appointed as guardian under Section 10 of the Act [25], or who is capable of giving relevant evidence<sup>10</sup>, (iii) ascertain the religious or customary law, (iv) the beneficiaries and their proportions on the estates<sup>11</sup>. (v) He also has to consider the claims of any alleged purchasers. The hearing process conducted in land office is claimed to be good compared to Shariah Court as the sworn affidavits comprises all surviving heirs and not rely on one petitioner.

In case there is any collateral dispute it must be decided before the distribution order is made. The Land Administrator must issue a certificate regarding to the collateral dispute and file the same in the distribution suit. Notice of hearing must be issued and forthwith posted at the land office. Copies of the notice must be served on all disputed parties but in reality, such notice would be sent to the petitioner solely and the other parties would know about it once the petitioner informs them. This therefore does not guarantee effectiveness of the process, as other claimants could be absent during hearings.

The Land Administrator must make a distribution order at the end of the hearing. The claimant is required to pay all debts, fees and the respective

<sup>10</sup> Section 12 (2) and (3) of the Act [26] provides any penghulu or Settlement Officer whom he trusts to give any information on the estates.

<sup>11</sup> It is not compulsory for the Land Administrator to comply with the portion of estates according to the law since his main

preference will be the agreement among the beneficiaries respectively. In cases where no agreement can be reached, the Land Administrator shall follow the basic sources of law (faraid).

shares of the beneficiaries from the estate. According to Section 13A of the Small Estates (Distribution) Act 1955 as amended in 2008 (Act A1331), in cases where any movable estate comprised in the small estate has been administered by ARB, the Land Administrator must accept any direction or declaration made by ARB in respect of the estates [2; 26].

The distribution order can be in the form of a direct transmission to the beneficiaries under Section 348 of the National Land Code 1965 [15], a grant of letters of administration or an order for sale. The transfer is to be effected by an order from the Land Administrator<sup>12</sup>.

Any person aggrieved by any order, decision or act made or done by a Land Administrator may appeal to the High Court by giving a notice of appeal in Form K2 pursuant to Section 29 of the Small Estates (Distribution) Act 1955. The notice of appeal must be filed in the land office within 14 days from the day on which decision was pronounced (Regulation 10 (1) (c) of the Small Estates (Distribution) Regulations 1955). The decision of the Civil High Court upon such appeal must be final. Once the court order is issued, the Land Administrator shall implement it as ordered by the court. This may take months or years to settle the claim, which may be too late for the needy heirs to receive their shares.

The above shows ineffectiveness of the process in Land Office. It is longer if it goes to Civil High Court. The time taken by land officer is shown in Table 1.

**Table 1** Time taken for application to land office and distribution of estates

Year	State	Time Frame	
		Date of death and date of application	Date of application and date of distribution order
2013	Johor	3 – 45 years	5 – 7 months
	Kelantan	3 months – 8 years	5 – 9 months
2012	Johor	1 – 41 years	4 months – 1 year
	Kelantan	1 month – 21 years	6 months – 1 year 3 month
2011	Johor	5 months – 11 years	5 months – 1 year 6 month
	Kelantan	1 month – 7 years 5 months	6 months – 2 years 6 months
2010	Johor	1 month – 29 years 9 months	4 months – 1 year 6 months
	Kelantan	1 month – 21 years	8 months – 3 years 4 months
2009	Johor	4 months – 29 years 10 months	8 months – 1 year 6 months
	Kelantan	4 months – 24 years	1 year 4 month – 3 years 6 months
2008	Johor	8 months – 12 years 4 month	9 months – 1 year 9 months
	Kelantan	3 months – 19 years 3 months	2 years 9 months – 5 years 6 months

Year	State	Time Frame	
		Date of death and date of application	Date of application and date of distribution order
2007	Johor	4 months – 35 years 7 months	8 months – 1 year 6 months
	Kelantan	5 months – 17 years 1 month	9 months – 5 years 6 months
2006	Johor	4 months – 11 years 8 months	5 month – 1 year 9 months
	Kelantan	3 months – 10 year 9 months	5 months – 6 years 11 months

Table 1 shows the time taken for settlement of cases of small estates distribution in Kelantan and Johor Land Offices. If the case was settled within six months or less, then that can be considered as efficient but if the estates has been distributed after ten months it is treated as inefficient. From the table, majority of the cases were resolved within more than eight months. All ten cases can be considered late claimed estates and delayed distribution.

As indicated in Figure 2, the process is old fashioned. Had there been an integrated information system, connecting the different agencies, and had there be system showing the assets and liabilities of the deceased person, the complex process would not be needed. At a touch of fingertip, the jurisdiction of an agency could be identified, and there would be no need for appointment of administrators.

### 2.2.2 Amanah Raya Berhad (ARB)

Other than the Land Office, ARB also has power to administer the movable estates, the right to possess some intestate estates before obtaining the letters of administration, summary administration (applicant is not required to apply for the letters of administration or probate in Court; direct distribution and transfer of assets if below RM 50, 000, subject to the conditions under written laws. The role of ARB includes appointment as executor, administrator, trustee by individuals (for minors) and courts, substituting executors and administrators in some cases. The process for the Small Estates Distribution in ARB is explained below [3].

According to Section 17 (1) of the Public Trust Corporation Act 1995 [19], ARB can summarily administer the estate of a deceased person. The application for a summary administration may be made in a standard form together with the necessary documents such as death certificate or proof of death, marriage certificate, copy of the personal identification document or birth certificate of the beneficiaries, and documents showing ownership by deceased of property, e.g. car, land grants, etc. including the certificate of faraid for Muslims.

ARB has to enquire about whether or not there has been any previous application for the administration

<sup>12</sup> In the case of transfer by the administration of the Civil High Court is using Form 14A [2].

of the same estate. If no application has been filed, ARB may declare to undertake the administration of the estate as the letters of administration has been granted [2]. ARB then enquires from the parties involved, to ascertain the status of the beneficiaries as well as the assets and the liabilities of the deceased through investigation regarding the type of assets that has been claimed by the applicant and held by banks, Tabung Haji, Employees Provident Fund (EPF) and others.

At glance, the jurisdiction of ARB is similar with the Land Office in the matters of intestate estate, movable estates and the letters of administration, but the Land Office can administer both movable and immovable estates under Section 8 (1) of Small Estates (Distribution) Act 1955.

Where the value of the estate is fifty thousand Ringgits, ARB has power under Section 17 (2) of the same Act [19] to direct the estate to be delivered to the petitioner based on the evidence if the Corporation is satisfied. This is where some rights of beneficiaries may be denied against *hukm shariah* if one can withdraw all the estate. If the estate exceeds RM 2 million, a notice of declaration for the summary administration of the estate may be made by ARB to transfer it to the Civil High Court, thus indicating limited jurisdiction and therefore the weakness of the process in ARB.

All assets will be collected and consolidated after the issue of letters of administration. For example, if the deceased has savings with a bank, ARB will produce a copy of the letters of administration to the bank to withdraw the savings. The bank will issue the cheque in ARB's name. The cheque will then be deposited into the deceased's account with ARB. The distribution of estates will be carried out after dealing with matters such as funeral expenses, liabilities, and properties held in trust, matrimonial properties, and the deceased's will. ARB then has to distribute the residue of the estates among the beneficiaries.

In the case of Muslims, distribution will generally be according to the rule of *faraid*. However, if the beneficiaries have collectively agreed to a particular scheme of distribution, and produce written proof thereof, estate distribution will be as per the collective agreement either in equal share or otherwise, when some beneficiaries withdraw from receiving the estates [9; 12; 20; 21; 26]<sup>13</sup>.

It is the responsibility of ARB to prepare a Statement of Account of the Estate to reflect the estate's state of affairs<sup>14</sup>. Once the estate has been distributed, estate administration is considered over and the registration

of title is required to be done in the relevant agencies such as Road Transport Department or Land Office.

Section 35 of the Public Trust Corporation Act 1995 [19] does not require the Corporation to give notice of its intention to distribute the estate or to require any person interested to send in particulars of his claim against the estate. Therefore, there is the possibility of some beneficiaries being not informed and left out. Though such beneficiaries, under the same section, could follow the property later through litigation, which might be unsuccessful or if successful, it might be costly.

Section 33 of The Public Trust Corporation Act 1995 [19] prescribes that fees and expenses can be charged by Amanah Raya Berhad by an approval of the Minister of Finance (Incorporated). Besides, Section 43 of the Probate and Administration Act 1959 [18] also allows "the executors or administrators a commission not exceeding five per centum of the value of the assets. This service fee<sup>15</sup> is high and may sometimes burden the heirs, which could cause reluctance among beneficiaries and hence delay distribution.

### 2.2.3 Civil High Court

This part describes the flow for the estates distribution process in Civil High Court. It can be divided into two: non-contentious probate proceedings and contentious probate proceedings. Probate proceedings refer to the application for the letters of administration in regard to intestate estate, or grant of probate in the case of testate estate or the letters of administration with the will annexed [2; 10; 16; 23].

#### 2.2.3.1 Non-contentious Probate Proceedings

In non-contentious probate proceedings, a claimant is required to file a petition in originating summons in Form 5 supported by an affidavit in Form 159, exhibits and the instrument of assignment under Order 71 Rule 5 and 20 of the Rules of Court 2012. The petitioner has to annex with the application of the certificate of death, a list of beneficiaries, assets and liabilities of the deceased, and for a Muslim, a certificate of *faraid* issued by the Shariah High Court stating the lawful beneficiaries of the estate and their respective shares under Islamic law<sup>16</sup>. On receiving the application the registrar shall give notice to the registrar of the principal registry in Form 158 and must notify the serial number of the application to the latter, who must enter that number in the Probate Book. Then, for the

<sup>13</sup> For Muslims, there exist two restriction in a will whereby it can be enforced only if it is limited to one-third of the whole estate [8; 9; 16], or, if the consent of other heirs under *faraid* is obtained by the donor about the will when it is made in favor of one who is entitled to a share in the estate under *faraid* law.

<sup>14</sup> Such an account would show the actual assets, liabilities settled and the balance remaining. It would also list down the beneficiaries, their respective share of the estate and the amount received.

<sup>15</sup> Service fee provided by ARB pursuant to Section 13 and 17 of the Public Trust Corporation Act 1995 and based on current rates of the value of the estate:

(i) 4.00 % of the 1<sup>st</sup> RM 25, 000  
 (ii) 3.00 % of the next RM 225,000  
 (iii) 2.00 % of the next RM 250,000  
 (iv) 1.00 % of the next 500,000  
 (v) 0.50 % of the remaining balance  
<http://www.arb.com.my/en/index>. Date of access: 21.01.2013.

<sup>16</sup> The jurisdiction of the Shariah Court seems to be wider than what is acknowledged by High Court. See *Rosdi Bin Haji Zakaria Anor Zamhari Haji Zakaria v Mohammad Nassir Bin Said* [2009] MLJU 1177.



purpose of determining the representation, a date for hearing must be fixed (Order 71 rule 38 (2) of Rules of Court 2012) [23].

The application for a grant of letters of administration or letters of administration with the will annexed under Order 71 and 72 of Rules of Court 2012 can be made by one or more of beneficiaries, a lawyer on behalf of the beneficiaries or a trust corporation. The first condition for such grant is that all beneficiaries must agree on the appointment of an administrator, in cases where application is made to that effect. If there is disagreement, the matter becomes contentious and hence can be referred to judge, the settlement of which may take years.

Where the application is for letters of administration, the applicant needs to provide personal bond, in Form 171 where the signature of the administrator and sureties must be attested by a Commissioner for Oaths, and two sureties under Section 35 (2) of the Probate and Administration Act 1959 [18]. This may prove to be difficult, and therefore an application to the court to reduce the amount of the bond or the number of sureties could be made through Order 71 rule 34 (3) (3) (a) of Rules of Court 2012 [23]. This in turn slows the process of obtaining the grant. It is said that it may take up to 10 years, which may be longer if there is dispute between parties.

The application for grant of probate, where there is a will, has similar process. The registrar has to make sure that all documents are valid in order to establish the existence of a valid will. During the hearing, the registrar inquires into all matters. He must determine the validity of the will according to the Wills Act 1959 [27]. In case of Muslims, this is apparently outside the jurisdiction of the Civil Courts. Shariah Courts would be the appropriate venue for the determination of validity of wills of Muslims. Contrary to the prevailing view<sup>17</sup>, wills and trusts, regardless of the legal terms used, that deal with the estates of deceased, should fall under wasiyah and hence under jurisdiction of Shariah courts. Shariah Court then should determine this matter before it issues certificate of faraid. The registrar, if satisfies and there is no dispute about the validity of will or other matter, can issue a grant of probate to the claimant. Otherwise, the registrar must refuse to issue the grant, consider the matter contentious and refer the case to the court by virtue of Order 71 rule 9 of Rules of Court 2012 [23].<sup>18</sup> This is one of the contested areas of estate distribution and has caused delays in terms of years and decades. Following the new practice direction of civil courts, which requires these courts to settle disputes within nine months, time will tell how much efficient they are.

Before extracting the grant, the applicant for grant of probate of will is required to file the lists of assets and liabilities, administer oath<sup>19</sup>, and submit copies of the will. By complying with all the requirements, and obtaining the grant then he may execute the will of a deceased person and distribute the estate among all the beneficiaries.

Once the letters of administration has been issued under Code 31<sup>20</sup> or probate under Code 32, the applicant or plaintiff is required to file a petition in the originating summons in Form 8A, affidavit in support and the instrument of consent pursuant to Order 89 Rule 2 and 3 of the same Act in order to obtain the distribution order for immovable estates which is under Code 24. Before hearing, the plaintiff or his lawyer should serve the originating summons on all defendants. Once a decision has been made during the hearing and payment for the court fees has been made, the final order for possession of estate in Form 195 in accordance with Order 89 Rule 6 is produced by the Registrar. Then, the registration of land title must be made in the land office.

The process may take one year to 18 months, and once probate is granted it will take another year for the executor to close the case. Minimum amount spent is two to five thousands and if the estate is Non-Small it might be more.

Non-contentious probate proceedings may be switched to contentious probate proceedings when other parties contest a grant or the validity of will, or a caveat and citation is entered. If such is the case, the proceedings may be stayed and a probate action may begin by a writ under Order 72 rule 2 of Rules of Court 2012, or the originating summons, filed earlier could be referred to and heard by the court.

Currently, there is no firm rule requiring claimants to file their petition within a short period of time. The law<sup>21</sup> only requires justification why an application for a grant was not filed within three years. Three years are a long period of time. Therefore the lack of obligation and penalty may be an excuse for delayed claims. Table 2 below shows how serious is the problem.

All cases in the Civil High Court of Kelantan between 2006 until 2013 can be grouped under delayed claims. The delay of disposal is not very serious but the delay in claiming the estate by beneficiaries needs serious attention.

### 2.2.3.2 Contentious Probate Proceedings

Contentious probate proceeding refers to an action by writ disputing the grant of probate of the will, or letters of administration of the estate of a deceased person, or the alteration or the revocation thereof, or

<sup>17</sup> See *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ at 119

<sup>18</sup> The Probate and Administration Act 1959 allows registrar to impose management fee exceeding five percents from the total estates [18]. See Appendix B1 for the table of High Court Fees [23].

<sup>19</sup> Administrator agrees to administer the deceased's estate by paying his debts and distributing the residue of the estate when lawfully required to do so.

<sup>20</sup> Judiciary uses specific codes now, indicating the type of application under court disposal.

<sup>21</sup> Order 71 Rule 6 of the Rules of Court 2012 which prescribe that "where an application for a grant is, for the first time, made after the lapse of three years from the death of the deceased, the reason for the delay in making the application shall be set out in the originating summons"

for declaration of a will as valid and otherwise, under Order 72 rule 1 (2) of Rules of Court 2012 and Section 2 of the Probate and Administration Act 1959. The action may be commenced in three situations: the petitioner's own initiative, the lodging of a caveat, or the issuing of a citation [2]. Proceedings may be treated contentious if there is a caveat entered and followed by entering an appearance in Form 166, as in case of warning or citation, which according to Order 71 rule 37 (11) of Rules of Court 2012 may be settled through summons for directions and new action be brought under Order 72 of Rules of Court [23]. An action by writ can be brought only after citation (a notice to anyone who has interest to appear) is made, before grant, or the Registry registers a grant of probate of will or letters of administration.

**Table 2** Time frame for application to Civil High Court Kelantan and distribution of estates

Year	Time Frame Date of death and application	Date of application and grant of Letters of Administration	Date of grant of Letters of Administration and Distribution Order
2013	2 months - 27 years	2 - 3 months	3 - 4 months
2012	2 months - 24 years	3 months - 1 year	4 - 6 months
2011	1 month - 11 years	2 months - 1 year 1 month	2 - 7 months
2010	2 months - 17 years 6 months	3 - 9 months	3-4 months
2009	9 months - 16 years 3 months	4 months - 1 year 1 month	2 - 7 months
2008	3 months - 20 years	2 months - 1 year 5 months	2 - 5 months
2007	6 months - 2 years 7 months	3 months - 1 year 2 months	4 - 7 months
2006	6 months - 9 years 2 months	10 months - 9 years 6 months	4 - 9 months

Pursuant to Section 33 of the Probate and Administration Act 1959, any person who wishes to ensure that no grant is made without notice to him may enter a caveat by filling the caveat in Form 158 (Order 71 rule 37 (2) of the Rules of Court). This is followed by a warning to the caveator in Form 165 (Order 71 rule 37 (8) of the Rules of Court), containing a statement about his interest, the date of the will if he claims under a will, and ask the caveator to give particulars of any contrary interest which the caveator may have in the estate [2].

The caveator may then enter an appearance to defend the action in Form 166 in the registry pursuant

to Order 71 rule 37 (9) of the Rules of Court [23]. In case of will, the caveator shall give particulars of the will and his interest, which is contrary to the caveatee's. If he has no contrary interest but wishes to show cause against the making of a grant to the caveatee, he may issue and serve a summons for directions. This summons is the procedural steps to be taken before hearing. Upon an appearance being entered, a judge may decide to bring the matter into open court for hearing. The court may either grant or refuse the petitioner's prayer or make such other order as may be just [2].

Contentious probate proceedings can become non-contentious if the time limit for appearance in Form 166 has expired, and the caveator has not entered an appearance, provided the affidavit shows that the warning has been duly served and that he has not received a summons for directions (Order 71 rule 42 (5) of the Rules of Court 2012). The caveat then ceases to have effect under Order 71 rule 37 (12) of the Rules of Court 2012 [23]. Then, the court may continue with the application for the grant as non-contentious matter and withdraw the caveat. Notice of withdrawal shall be served on the person warning and a copy of it shall be given to the registrar of the Principal Registry.

Occasionally, a citation, which is an instrument to call upon the person cited to enter appearance to the citation and to take the steps therein specified, may be issued. Each citation shall be in Form 167, supported by an affidavit, and it must be issued from the Registry.

Order 71, rule 42 (3) of Rules of Court 2012 [23] provides that a citation can take place where an executor has not taken the grant within six months of death. He may be cited by any person interested in the estate to take probate unless the proceedings of the validity of the will are pending. Citation to propound a will may also be petitioned for under Order 71 rule 43 (1) of the Rules of Court 2012 [23] when a person genuinely believes that a will which has not been proved is invalid, and he himself is interested under an earlier will or intestacy. The person may cite the executors and beneficiaries to propound it.

In the above circumstances, the citor must enter a caveat before the issue of the citations under Order 71 rule 41 (3) of the Rules of Court 2012 [23]. A citation cannot be issued unless and until the citor has entered a caveat. Then, the citee may enter an appearance within eight days of service of the citation. In the expiration of time for entering an appearance, the citor may apply *ex parte* by summons for an order [2].

Proceedings for the purpose of letters of administration with a will attached and the grant of probate may involve disputes on different issues. In the case of letters of administration, dispute may occur when one denies the interest of another in the estate or that he or she also has competing interest in the estate. The plaintiff may plead for revocation or an amendment to the grant of letters of administration. Dispute over the validity of will is another issue that can be challenged on grounds of being not executed,

testator was not of sound mind, and it was signed under undue influence and others. These therefore can be granted only after the dispute over the interest of the plaintiff and defendant or the validity of the wills resolved. This may involve extensive arguments, on the basis of civil and Islamic law, before the court, which may not only cost time and money but also may cause the court entertain arguments that are not within the jurisdiction of the Civil High Court.

The recent amendments of 2012 are not clear enough to remove the above possibility. A provision or a two reminding the court that decision of the court on contentious matters of letters of administration and validity of a will in the case of Muslims is made only after a certificate of faraid is issued by Shariah Court and is presented to the Civil High Court.

A will cannot be enforced if it is not proved under Section 5 of the Wills Act 1959, but the terms and validity of any such will shall be established to the Registrar's satisfaction in accordance with O71 R4 of the Rules of Court 2012.

In Civil High Courts, there could exist a dispute about the execution of will, its validity, the appointment of the executor, and his work, or the appointment of an administrator as in the case of intestate estates. Similarly, other parties such as caveator and intervener as well as citor could make claims and challenge any of the prayer attached to the applications made to the court or land administrator. All these issues would make the process of the distribution longer and costlier.

There exist several stages in the process leading to grant of probate and that after the grant being issued which could slow the distribution of the estate. Some of them could be (1) obtaining the grant of probate or letters of administration, (2) the collection of information about assets, and liabilities of the deceased, and (3) entitlement to the estate, and (4) taking their possession. To make it simple, dispute may arise about the entitlement to the estate, and over various aspects of legal representatives.

### 3.0 DISTRIBUTION OF ESTATE AND ITS DELAY

Before a grant of probate is issued by Civil High Courts or distribution order is made by Land Officer, it is the practice<sup>22</sup> that a Muslim has to get the certificate of faraid from Shariah Court whereby the entitlement of all deserving heirs to the estate is spelled out. This takes some time to get specially if there is any collateral dispute between heirs.

After the grant of probate of will or letters of administration the personal representative may proceed with the duties for the administration of the deceased's estate. The duties of the administrator or executor include the listing and collection or transmission of assets, payment of debts and liabilities,

distribution, and conversion of the properties. For these, he has to recover debts due to the deceased, power to dispose of property, power to postpone distribution and power to appoint trustees to minor's property [2].

Despite the list of assets being submitted with application for probate, the administrator or executor has the duty to make an inventory of assets and debts or liabilities of estate, including unpaid taxes and charges. He or she has to collect them then. The asset may comprise savings, vehicles, insurance policies, shares and securities, land and buildings. These will require dealings with various financial institutions, government agencies and individuals if any. The main institutions and agencies include banks, insurance companies, Land Office, Tabung Haji, EPF, trustees such as Amanah Raya Berhad, and the like where often ownership of goods and real estate is registered. To do the above will take more time.

The appointments of personal representatives could be subject of dispute between heirs. Other heirs might question the validity of will. The personal representative might lack knowhow of estate distribution, of information about the estate, or lacks time for administering the estate distribution and hence his appointment might be challenged.

There could be an executor who is uncommunicative, or could be slow and inefficient in the administration of the estate, or has fallen out with his co-executor or the beneficiaries [5]. In such a case the collection of the assets and their distribution would take even longer.

In case of immovable assets, if the estate distribution proceedings were not held in the Land Office, their transmission (an endorsement on the Issue Document of Title the name of personal under s 346 of National Code to the personal representatives would take place. This burdens the estate and delays the time for distribution even though it may be justified, i.e. facilitating the discharge of duties of the personal representatives by dealings in the estate, under the current framework of estate administration, which presupposes the acceptance, and unavailability of a prolonged term of administration of estates<sup>23</sup>.

<sup>22</sup> On this point the law is not clear. Even the Rules of Court 2012 do not mention whether or not such a certificate has to be produced before the court, and if needed when is the time for such a certificate to be required.

<sup>23</sup> See s 60 (4) of the *Probate and Administration Act, 1959*, which allows with permission of court lease of assets of an estate for term not exceeding five years.

There could be times, before the distribution of estate, when the sale of immovable assets is needed to repay debts, deduct expenses and distribute the residue among the heirs under Section 60 and 68 (1-2) of the Probate and Administration Act 1959. The executor, without sanction of court, can do this unless there exists restriction on its sale; the administrator, however, has to obtain the leave of court (s 60 (4), the Probate and Administration Act 1959). In practice, some land offices prolong the process by not accepting the sale of assets by executor unless the provisions in the will are permissive [4] or a court has sanctioned it. Further, there is the possibility of dispute between the personal representative and the beneficiaries over the purchase price of the assets and the possibility of the court not to grant such a leave, due to the fact that market price of the property was not right.

After the payment of debts and liabilities, the

is required to distribute the estate. The law allows him to distribute it within a reasonable time, looking at the efficiency of a competent man such as the personal representative who also runs his own business affairs [2]. This permissive law enables the personal representative to delay the distribution for years and may be for generations.

After the distribution of estate takes place, an application for vesting order to the civil high court, under section 72 of the Probate and Administration Act 1959, should be made. The order then should be annexed to the application for the transfer of the land to the beneficiaries in land office according to section 215 of National Land Code 1965. He has to sign the memorandum of transfer in Form 14A of the National Land Code 1965. This takes up to two years.

Things may get complicated if there is a dispute in civil courts regardless of whether it is originated in the

**Table 3** Time taken for application to high court and dispute resolution

No.	Plaintiff and Defendant	Types of dispute in estates distribution	Time of application & Time cases were resolved	Time taken
1	Majlis Agama Islam Negeri Pulau Pinang v. Zaitun bt Ramli [2008] MLJU 571	Conflict of jurisdiction between Shariah Court and Court of Appeal	Application to Appeal Court: 2002 Case resolved: 2008	6 years
2	Syed Hamid bin Syed Bakar v. Syed Mahadi bin Syed Hassan & Ors [2000] MLJU 570	Conflict of jurisdiction between Land Office and High Court	Application to High Court: 1976 Case resolved: 2000	24 years
3	Ungku Sulaiman Abd Majid & Anor v. Pengarah Tanah dan Galian Johor & Anor [2001] 6 MLJ 75 [2012] 2 CLJ 273	Acquisition of land was considered without the consent of the beneficiaries	Application to High Court: 1998 Federal Court: 2010 Case resolved: 2012	14 years
4	Syed Mohamed bin Syed Alwi & Ors v. Shariffah Badariah bt Alwi Al-Attas & Ors [2010] 6 MLJ 422	Hibah during marad-ul-maut is considered as wasiat	Application to High Court: 2002 Case resolved: 2010	8 years
5	Salmah Omar & Ors v. Ahmad Rosli Aziz (Pentadbir Harta Pesaka Osman Mohamed, Si Mati) & Anor [2012] 3 MLJ 567	The existence of wasiat in joint tenancy (1/3) and the rule of faraid (2/3)	Application to High Court: 1998 Case resolved: 2012	14 years

personal representative has the duty to distribute the residue according to the terms of a will, if any, and faraid law, unless the contrary is agreed among the legal heirs. Real estate then can be vested in the beneficiaries after a leave is obtained from court. This can be within one year, but may be prolonged for years as the personal representative has the power to postpone distribution of estate under section 77 of the Probate and Administration Act, 1959. There is no fixed term within which by law the personal representative

said courts or has come to them by way of appeal from the decision of land administrator. This would take years as illustrated by Table 3. Table 3 clearly shows the inefficiency of the process in terms of length of time within which civil courts have settled disputes. In brief, time is money and the disputing parties are required to pay all fees and expenses<sup>24</sup> [23] to the lawyer and judge for each service provided by them.

<sup>24</sup> Order 59 of Rules of Court 2012 (new Court Rules 2012 replacing Subordinate Courts Rules 1980 and Rules of the High Court 1980 starting 1 August 2012) provides:

i) Costs for interlocutory applications in Subordinate Courts (Magistrate: not exceeding RM 2, 500 and Session: not exceeding RM 8, 000).  
ii) Costs for interlocutory applications in High Court (Discretion of the Court).  
iii) Costs on judgment without trial in Subordinate Courts and High Court (Scale cost),

iv) Trial in the Subordinate Courts (Scale cost),  
v) Trial in the High Court (Discretion of the Court).  
Costs are substantially increased to reflect the present cost of living standards.

Pursuant to Order 91 of The Rules of Court 2012, the court fee is increased between 100-200 %.

i) Writ in High Court: RM 1000,  
ii) Writ in Subordinate Court: RM 500.  
<http://johor.kehakiman.gov.my/?q=system/files/files/Presentation%20Combined%20Rules.pdf> Date of access: 21.01.2013.



#### 4.0 A SINGLE TRIBUNAL OF ESTATES DISTRIBUTION AND ITS NEW PROCESS

The establishment of a single tribunal is seriously needed. A land tribunal or appeal board, similar to that under Town and Country Planning Act 1976 (Act 172), is considered by some to be the solution. Section 36 (10) Part VI of the Act 172 explains about the appeal board. The power of the appeal board is to: (a) hear the case involving the appellant and local planning authority, (b) summon and examine witnesses, (c) require any person to bind himself by an oath to state the truth, (d) compel the production and delivery of any document which is considered relevant or material to the appeal, (e) confirm, vary, or reverse the order or decision of the local authority, (f) award costs and (g) make any order. Section 36 (13) prescribe an order made by the Appeal Board on an appeal before it shall be final, shall not be called into question in any court, and shall be binding on all parties to the appeal or involved in the matter. Section 36 (14) provides the Appeal Board shall be deemed to be a court and every member shall be treated as public servant. Pursuant to Section 36 (15), in order to regulate the proceeding of the Appeal Board, as far as practicable follow the Subordinate Courts Rules 1980. Every decision of this Board shall be made by the Chairman after considering the opinions of the other two members, but in making the decision, the Chairman shall not be bound by or conform to the opinions of the other two members or either of them, but if the Chairman dissents therefrom, he shall record his reasons for dissenting.

This proposal however can be understood to be based on presumption that appeal from the decision of land administrator to be made to the proposed tribunal. The scope of this tribunal could be broad under which matters of estate distribution may fall. However, the Appeal Board under planning law is an appeal board. It does not have original jurisdiction. The contention of this paper is to propose a tribunal somehow in line with House Buyer Tribunal with original jurisdiction, except our proposed tribunal could be conferred with jurisdiction that is currently exercised by the Collector, the Shariah and Civil High Courts, and the Amanah Raya without putting limits on the amount of money claimed or the type of property or testate of intestate estates.

Previous researchers Kamariah Dzafrun [10] and Akmal Hidayah [2] have suggested a tribunal or one agency that is responsible to manage and distribute the estates of a deceased Muslims. Nonetheless, how it should function has not been proposed yet. Therefore, these authors agree with the above researchers and add the proposal for the organization, functions, and the process of distribution of estate by the proposed tribunal.

Kamariah Dzafrun [10] has examined the jurisdiction of agencies in Civil High Court and the land office. She suggested single organisation for settlement of all cases involving the estate of a deceased person which is "Mahkamah Pusaka". This idea has been

supported by the Khairiah Bt Awang Lah, the Assistant of District Officer in JKPTG Kelantan. She did not agree with the appointment of ARB and lawyer to be an administrator because they did not recognize the family tree of the beneficiaries and they only experts in the documentation. This proposal practically amounts to the creation of a special court something in line with that of commercial division of the civil High Court. Such a special court can only provide solutions to the efficiency of judiciary. But a court is a court, which requires the most formal and technical process of dispute resolution. The proposed tribunal under this paper is one that would have a mix of administrative and judicial functions, akin to arbitral tribunal and Land Office in terms of simplicity of proceedings, and finality as well as conclusiveness of its decisions. The details are given below.

#### 4.1 Tribunal of Estates Distribution

There ought to be a single tribunal in charge of all estates, testate or/and intestate, small and non-small, regardless of the beneficiaries being Muslims or non-Muslims. The demand for a single tribunal in the case of Muslims is however urgent, which is the focus of this paper.

This tribunal may serve as one agency for initiating claims, processing them, and distributing the claimed property faster, cheaper and effective.

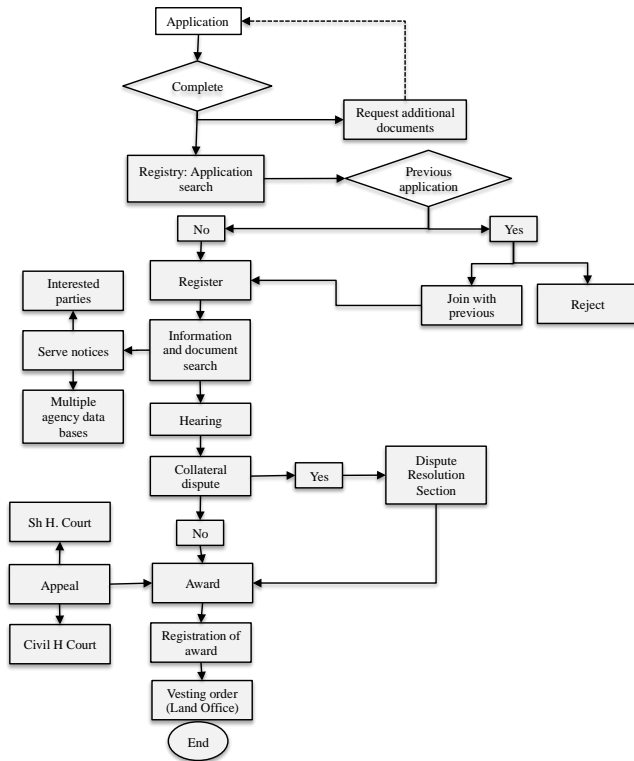
The tribunal may perform some functions of Civil High Courts, Shariah High Courts, Land Office and Amanah Raya Berhad. Yet, it cannot be totally divorced from any of them, as it has to work with these agencies along with others and the beneficiaries. Other agencies include Bank Negara Malaysia (BNM), insurance companies, Tabung Haji, Employees Provident Funds (EPF), Permodalan Nasional Berhad (PNB), National Registration Department and the like. These agencies and the Land Office, Amanah Raya Berhad will have to support the tribunal by providing property information to it, while Shariah and Civil High Courts will have the final say if there is an appeal from the decisions of the tribunal.

This tribunal could consist of three parts, led by a Director General: Registry, dispute resolution/ Judicial, and the Database Clearing House, each to be led by a different person. The functions and process for each of them explained below:

- (1) The Registry department could be in charge of monitoring the application and distribution unit. It could be instrumental for initiating claims, processing them, and distributing the estates. The Registry will have the functions of Principle Registry and the registry of Civil High Court or Shariah High Court as the case may be, the Small Estate Distribution of Land Office and that in the Amanah Raya Berhad. It will be responsible for the administration of the process and validation of required documents, asset and liabilities information, collections of assets, distribution of estate and order for sale, and transfers of assets. The applicable rules should be in the nature of



those of Civil High Court Rules but simple and easy to understand.



**Figure 3** Proposed process in a single tribunal for distribution of estates

Once an application for distribution is registered the registry should have the duty to disseminate the information to all relevant persons and agencies with effect of freezing the assets of the deceased unless they are specified for the maintenance of the dependents of the deceased. The registry could issue summons to all relevant persons to submit their claims, counter claims or defense and to appear at the hearing before the tribunal within specified time that is not less than one month and not exceeding three months with the discretion to postpone if needed so. The registry can also require all the agencies to provide the details of the assets and liabilities of the deceased. Additionally, the registry could post notices to all, in appropriate places, in print and electronic media. At the same, it could refer the pleadings record to the tribunal for their preliminary determination, which would have no binding effect at this stage.

The registry can issue letters of representation if needed. Normally, such would not be the case, as the registry would perform the function of the personal representative.

On the day of hearing the registry could offer the preliminary determination to the rightful heirs and other claimants. In case it is rejected it can

adjourn the process and refer the dispute to the dispute resolution tribunal. Where there is no dispute, the registry would make an order according to the facts of case and in line with determination of the tribunal.

- (2) Comparatively, the dispute resolution and judicial matters section will be the actual tribunal that resolves disputes according to the laws of land (Shariah and Civil). The Tribunal can consist of three or five members who are experts in the Shariah and Civil laws. In the case of Muslims, where the dispute involves shariah matters such as faraid, wasiat, hibah, waqf, jointly acquired property, and appointment of guardians and custodians it should be disposed by Shariah experts. Matters that involve civil law such as company law, contracts etc. could be assigned to civil law experts. In case of non-Muslims, Civil law experts should settle the cases, which are relevant to trusteeship, wills, guardianship and custodian, and company shares. In case of dispute between Muslim and non-Muslim (the Malaysian judicial paradox) can be settled by this tribunal, thus solving the dilemma of jurisdiction. The tribunal could determine the merit of case before the day on which the registry holds hearing. This will have the effect of qualified faraid certificate, which could be rejected by the claimants. If so a full hearing could be ordered where the dispute would be settled based on its merits in accordance with relevant law or laws.

A distribution order should be followed by a vesting order, which compels relevant agencies to transfer the asset to the beneficiaries as ordered. The award mad by this tribunal ought to have effect of shariah or civil court order, recognised and enforced by the relevant agencies.

- (3) The Database Clearing House has jurisdiction to receive new data and keep it in its own databases system, which is updatable from time to time. The data may comprise of the assets and liabilities of the deceased persons, the details of heirs, beneficiaries and anyone who has claimed interest in the estate of the deceased. This system may have the capability of "Virtual Information and Property Search System" (VIPSS) [24]. The Database Clearing House will have to help the registry to obtain, store and share the property information, check the validity of the individual registered property, avoid any duplicated application, and sending notices to the beneficiaries or other relevant parties to come forward to claim the distribution of estates without waiting for them to initiate the claim. This is possible if a notice in the form of death certificate is received from the Registration Department which could be considered as a triggering mechanism, as has been wished by the Malaysian Prime Minister reported by the electronic media [13]. "Virtual Information and Property Search System" (VIPSS) would be depending on an

important search key namely the single identification reference number (SIRN) of a deceased person. Whenever necessary, by entering the SIRN, all databases system regarding estates and liabilities could be found [24].

## 5.0 COMPARISON OF EXISTING AND THE PROPOSED FRAMEWORKS

The evaluation framework needs to be developed for the case of estates distribution in term of review process between the existing process and new process. The evaluation area comprises of institutional

and organizational arrangements, cooperation and communication between institutions, economic indicators, and customer satisfaction [7]. This evaluation method could be used for the estate distribution process conducted by multiple agencies and reported law cases in Land Office and Civil High Court.

Table 4 compares the existing process and the new process, which considers several aspects of their frameworks.

At the outset the replacement of the four mutually dependent agencies and consolidation of laws come to one's attention. By necessity one then is profiled to think such a move will benefit the society at large.

**Table 4** Comparison of the existing and new process of estates distribution

Evaluation Area	Existing Process	The Proposed Process
Institutional and Organizational Arrangements	Involves multiple jurisdictions and agencies (Land Office, ARB, Civil High Court and Shariah High Court).	Involves a single agency with single jurisdiction.
Jurisdictions, Cooperation and Communication between Institutions	Consist of contradictory, duplicate jurisdictions, weak cooperation and contact between Land Office, Shariah High Court, banks, EPF, National Registrar Department.	Free from conflicting and duplicate jurisdictions, possibility of strong cooperation and contact between all relevant agencies through "Virtual Information and Property Search System" (VIPSS) and notices.
Economic indicators	Include fees of Sijil Faraid <sup>1</sup> , ARB <sup>2</sup> , Land Office <sup>3</sup> , probate, letters of administration, and other court fees <sup>4</sup> .	May include an affordable administrative fee in one agency only.
Customer Satisfaction	Justice is questioned in case unqualified judge could decide a case involving Muslims	Justice might be seen to be done, as the experts in Shariah would adjudicate a Muslim's case.

<sup>1</sup> The service fees in Shariah Court = Application: RM 40.00 + affidavit: RM 3.00 + each chosen exhibit: RM 1.00 + wakalah: RM 10.00 (if any). See <http://www.esyariah.gov.my>. For lawyer charges = RM 5000 (maximum) [12].

<sup>2</sup> The service fees in ARB = Application: RM 50.00 + stamp duty: RM 10 [20]

<sup>3</sup> Fees in land office = 0.02 % from the value of the estate.

<sup>4</sup> The service fees in Civil High Court = Application: RM 160 + extract the grant: RM 400 + caveat: RM 20 (if any) + citation: RM 40 (if any) + appeal: RM 400 (if any). For lawyer charges = RM 5, 000 (minimum) excluding the disbursement [11].

## 6.0 CONCLUSION

The discussion above provides a hypothesis for a single tribunal of estates distribution. It can harmonize the process; make it shorter and eventually effective and efficient. The process can start immediately after the death of a Muslim, and being concluded within shorter time. There exist several problems for the establishment of this tribunal: the existing legal framework, the lack of an integrated databases system, and the lack of certainty about the willingness of policymakers to move forward with the given proposal. Further research is suggested in these areas.

To conclude, it is hoped that, a single tribunal may expedite the process of estates distribution. This tribunal may provide a cheap and fast distribution of estates. This may encourage beneficiaries to initiate immediate claims. Additionally it is envisioned that the existing procedural ineffectiveness and inefficiency that may have prevented estate distribution could be removed.

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