

WILL OF ENTRUSTMENT AS A MEANS OF PROTECTION OF THE CHILD'S RIGHT TO PROPERTY IN ISLAMIC LAW

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-Abstract-

Children are the future of a Nation. Due to vulnerability, they require protection in many aspects of their life. Parents are main supporters and sustainers of the children during their lifetime. After their death, their property left for their children may provide a continuous financial support for the children maintenance, education and welfare. The issue arises as to the protection and administration of the property, as children due to their deficiencies, are not able to manage them wisely. If a qualified person is not appointed to carry out the task, it will lead to misappropriation and embezzlement of property. Therefore, in order to protect the children's rights to property, it is very significant to appoint a person as a trustee, so that the children's property may be properly safeguarded and administered. This paper seeks to examine means of protection of child's right to property after the death of his parents in Islamic law through the instrument of will of entrustment (*al-wisoyah*). Examination extends to the provision of Islamic law in Malaysia which serves as a comparison. The research is basically a library research, undertaken on the premise that Islamic law has mechanism of providing a solution for protection of the child's right to property after the death of his parent.

Key words: will of entrustment, minor, property, executor

JEL Classification: K19

1. INTRODUCTION

Property is one of the basic necessities of life which is indispensable for human being. It is an important means of exchange and obtaining the necessities of life from dwelling places, clothing, foodstuffs, medicines and so on. (Abu Zayd, 1999: 145) Indeed, the property is one of the ornaments of life as the *Qur'an* clearly states, "Wealth and sons are the allurements of the life of this world." (Al-Qur'an,

al-Kahf: 46) Legally, property refers to everything that can be possessed and benefited as according to the *Shari'ah* principle. (Al-Khafif, n.d.: 25)

In principle, the owner of the property has full legal authority to utilize and dispose his property as he wishes within the limit prescribed by the *Shari'ah*. (Zaydan, 1989: 206) Except where there are legal hindrances that prevent its owner from carrying out the disposition such as the deficiency in legal capacity as in the case of minors or insane persons and other disabilities. (Shalabi, 1983: 339) A minor is one of the persons with limited capacity. This is of course due to age and its concomitant: physical weakness and mental immaturity. Accordingly, a minor who owns property is not allowed to dispose the property since he is incapable of managing it properly and cannot protect his own interest. (Majalle: 957) In other words, a minor is legally considered as an interdicted person. (Majalle: 941) As such, it is necessary to have someone else to act for him. Originally, the person who has legal authority over a minor's property is his father who is known in Islamic legal terminology as guardian. (al-Kasani, 1986:155) He is fully responsible for matters relating to the property of his minor children. However, a father may die before his children attained the age of puberty and are mature enough to act on their own behalf. He may also leave behind some property to his children. This fear is also addressed in the *Qur'an*, " Let those (disposing of an estate) have the same fear in their minds as they would have for their own if they had left a helpless family behind." (Al-Qur'an, al-Nisa':9) As such, Islam enjoins that a father should think about and provide for his children by appointing person who can be entrusted with the protection and administration of his minor children's property till they are able to protect and manage it themselves.

2. MINOR AND HIS LEGAL CAPACITY

2.1 Meaning of minor

A minor is a child who has not attained the age of puberty. (Al-Suyuti, n.d:387) The life of the minor before he reaches the age of puberty passes through two stages; the stage before the age of discernment and the stage at the age of discernment. (Abu al-Raysh, 1988:28)

The minor before the age of discernment is legally known as undiscerning child. Article 943 of The Majalle defines the undiscerning child as "a young person who does not understand selling and buying, that is to say, who does not understand that ownership is lost by sale and acquired by purchase, and who is unable to distinguish obvious flagrant misrepresentation, that is misrepresentation

amounting to five in ten, from minor misrepresentation.” Nevertheless, Mahamasani views that the definition is ambiguous and difficult for application. (1981:110-111) The reason is that such definition does not fix any age for the age of discernment. This result in the identification of a certain age as the age of discernment in some enactments of Arab countries, for instance the Muslim Personal Law of Egypt has laid down the age of seven as the age of discernment. This point is agreeable to the view of some Muslim jurists (al-Sarakhsi,1986:162; al-‘Ayni, 1990:96) and contemporary Muslim scholar (Al-Khafif, n.d:241)

Meanwhile, the minor at the age of discernment is legally called a discerning child. In principle, the discernment is the understanding of the meaning of the words and knowing what is good and bad, advantage and disadvantage, even though such understanding is not deep. In another word a discerning child is a child who has reached certain age which enables him to differentiate in general the meaning of the words of the contract, know its purpose as according to the custom and understand the basis of transaction in general. (Muhammad, 1993 :142)

The period of discernment will end when the child reaches the age of puberty. (Al-Khafif, n.d:241) Puberty refers to the strength that takes place in a person and drives him out from the stage of childhood to another stage. (Al-Khurashi, n.d:291) As this strength is a hidden quality that is not readily apparent to the senses, Islamic law has made some conspicuous symptoms as its indication. According to Muslim jurists, the indication of puberty is either by manifestation of some natural symptoms or by age. The Muslim jurists are unanimous that sexual dream is one of the symptoms of puberty in both boy and girl. (Hasan, 2005: 308) It is to be noted that the ejaculation of sperm rather than the sexual dream itself is the essential element; and it may occur in a dream or while awake or by intercourse or according to the Hanafis, by impregnating a woman. (Al-Kasani, 1986:171-172) Muslim jurists are also in agreement that menstruation and pregnancy are natural symptoms of puberty with respect to a girl. (Hasan, 2005:308)

In the case of the indication of those natural symptoms, as mentioned above, are delay, the puberty is to be determined by age. However, the Muslim jurists differ as to the age that a person attains puberty. Majority of the Muslim jurists are of the view that the age of puberty with respect to both a boy and a girl is upon the completion of his/her fifteen years of lunar year. (Hasan, 2005:308) Their argument is based on the *Sunnah* of the Messenger of Allah (PBUH) which is narrated by Ibn Umar. It apparently indicates that at the time when Ibn ‘Umar is

disallowed by the Messenger of Allah (PBUH) to go out for *jihad* when he was fourteen years old because he has not attained the age of puberty and later on when he was fifteen years old he is allowed because he has attained the age of puberty. (Sahih al-Bukhari) Another reason is that the ground or the basic obligation or responsibility of a person under Islamic law is the intellectual faculty i.e. the capability of a person to understand the law that is addressed to him and the law makes the sexual dream as the measure for the perfection of the intellectual faculty. Normally, the sexual dream does not delay till fifteen years. In the case if a person who does not experience the sexual dream till that age, it is understood that there is something wrong with his physical that may not affect his intellectual faculty. (Al-Kasani, 1986:172)

On the other hand, according to Abu Hanifah, the age of puberty with respect to a boy is the completion of eighteen years and with respect to a girl is the completion of seventeen years. (Al-Marghinani, n.d:284) His argument is based on the verse of the *Qur'an*, "And come not nigh to the orphan's property except to improve it until he attains the age of full strength ...". (Al-Qur'an, al-An'am:152) The full strength (*ashuddah*) of boy is eighteen year as based on the report from Ibn 'Abbas. The different is one year with respect to the girl since her development and understanding is faster than a boy so that one year is reduced from a boy. (Al-Marghinani, n.d: 284-285) The dominant view of the Malikis also agrees with the view of Imam Abu Hanifah that the age of puberty is the completion of eighteen years, however, they make no difference between a boy and a girl. ('Ulaysh, 1984:87) It seems that the view of the majority of Muslim jurists is preferable because their argument is solid and strong. In principle, Islamic law makes the sexual dream as a measure of indication of puberty which is possible before the age of fifteen years. Therefore, the age of fifteen years is a reasonable age to indicate the fitness of a person to bear responsibility which is agreeable in the factual situation of our life.

2.2. Legal capacity of minor

Legal capacity, in legal terminology, refers to the fitness of a person for receiving and exercising of rights or for bearing or discharging legal obligations. (Hassan, 1979: 320) Legal capacity is divided into two kinds: capacity for the inherence of rights and obligations and capacity for the exercise of rights and the discharge of obligation. The former may be described as receptive and the latter as the active legal capacity. Again, these two kinds of legal capacity may be perfect and imperfect. (Hasan, 2005: 296, 301-308) This is owing to the different stage that human life passes through which starts from fetus till the stage of intellectual maturity.

The Muslim jurists are in agreement on the fact that a discerning child possesses a perfect receptive legal capacity, since the basis of the existence of this legal capacity is life itself. Hence, an undiscerning child can receive all rights to which he is entitled to, for instance, he is entitled to own the property which is purchased for him or given to him as a gift. At the same time, he is subjected to certain legal obligations which can be discharged by him through his legal deputy. Most of the cases are concerned with his property, for instance, maintenance for the poor among his near relatives, liability for loss and payment of the price of the property purchased on his behalf. (Zaydan, 1989: 263)

On the other hand, the active legal capacity is completely not established in undiscerning child, since the basis of this legal capacity is discernment and intellectual maturity. Accordingly, the undiscerning child is not fit for the issuing forth of all kinds of the dispositions and contracts. Besides that, he is not bound to perform any acts of worship such as prayer and fasting. And lastly, he is not subjected to any physical punishment or any other type of punishment. (Muhammad, 1993:139) During this period, a guardian or executor is the person who acts on his behalf as deputy for the purpose of protecting, administering and disposing of his property according to the limitation prescribed by Islamic law. (Al-Khafif, n.d:241)

As to the legal capacity of the discerning child, majority of Muslim jurists view that it is established in the discerning child, beside a perfect receptive legal capacity, an imperfect or a deficient active legal capacity. The reason is that, although the minor in this stage is endowed with the faculty of intellect but it is still defective and weak. This makes him competent to dispose only some kinds of disposition. With regard to the performance of religious worship such as prayer and fasting, it is held valid but it is not binding on him like an adult.(Al-Kurdi, 1990:18-20) The management and disposition of his property during this period is still under the authority of guardian or executor. (Al-Khafif, n.d, 242-245)

2.3 Disposition of property by minor

In legal terminology, the disposition refers to any word or action that emanates from a person carrying legal consequences. It is of two kinds: the first one is verbal disposition. That is any word from a person which has legal consequences. Meanwhile the second one is actual disposition i.e. the action of a person which carries legal consequences. (Zaydan, 1993:333) It is to be noted that the discussion here, however, would focus on verbal disposition of the minor which concerns property.

The Muslim jurists are in agreement that the disposition of the undiscerning child with regard to his property is not valid. The reason, as stated earlier, is non-existence of the active legal capacity in him. Consequently, any word coming out from him has no legal consequences and is not binding. His transactions and dispositions are considered null and void. In short, the undiscerning child has no right to conduct any kind of disposition even such disposition as is purely beneficial to him such as the acceptance of gifts and

charity Nevertheless, his legal deputy i.e. guardian or executor has to act on his behalf in carrying out all kind of transactions and dispositions that are necessary for him. (Al-Khafif, n.d:241)

With respect to the disposition of the discerning child, the Muslim jurists differ. According to Hanafis, the disposition which is purely for his own benefit, for example the acceptance of a gift and present, it is valid even without the permission of his guardian or executor. This is because it brings benefit to him at any rate. On the other hand, the disposition which is purely for his own disadvantages such as the making of endowment, giving a gift or present and the like, it is invalid even with the permission of his guardian or executor. Lastly, the disposition which partakes both benefit and loss such as sale and purchase, it is valid but only with the permission of his legal guardians otherwise it is null and void.(Al-Kasani, 1986:171) The Maliki jurists are basically of the same view with the Hanafis. It is not permissible for the discerning child to dispose his property in charitable disposition i.e. the disposition without consideration such as giving a gift, charity and present even with the permission of his legal guardians. However, in the case of bequest, they regard that it is valid if it does not exceed one-third of his property. On the other hand, the dispositions with consideration such as sale and purchase are valid but depend on the permission of his legal guardians. If they find that such disposition is sound they ought to endorse, otherwise they ought to nullify it. (Al-Hattab, 1978:60-61)

According to the Shafi'i jurists, the disposition by the discerning child with regard to his property is not valid as the same as undiscerning child. This is because his word and authority are not acceptable. (Al-Bayjuri, 1935: 282-283) This means that even an imperfect active legal capacity is not established in the discerning child and his position, in this respect, is the same as the undiscerning child. However, some views of the Shafi'i jurists assert that the making of bequest by a discerning child is valid. The reason is that the ownership of property bequeathed is not transferred at the time of making but delayed till his death. (Al-Shirbini, 1933: 39) According to Hanbali jurists, the giving of a gift by a discerning child is not valid. The making of a bequest, on the other hand, is valid. (Al-Mirdawi, 1997:174-175, 282) With regard to the disposition which partakes both benefit and loss such as sale and purchase, there are two views in Hanbali school. The first view, the preferred view of the school, held that the disposition by the discerning child with regard to sale, purchase and the like is valid but subject to the permission of his legal guardians and within the limit of the permission given. As the discerning child is under interdiction, so that his disposition is valid subject to the permission of his legal guardians. Meanwhile, the second view is the same as the Shafi'i jurists, who regard that it is not valid till he reaches the age of puberty. (Ibn Muflih, 1980:348)

3. THE EMERGENCE OF WILL OF ENTRUSTMENT WITH A MINOR'S PROPERTY

The above discussion on the legal capacity of the minor and the disposition of the property by him reveals that a minor, in many circumstances, does not possess legal capacity to act on his own. In other words, although he owns property, he is legally incapable of managing such property. This results in the necessity of having a person to assist and act for him in the management of his affairs. Otherwise he cannot serve himself.

Originally, a person who has authority over a minor's property is his father who is known in legal terminology as guardian. (Al-Kasani, 1986:152) He is fully responsible in matters relating to property of his minor children. The legal authority of the father over the property of his minor children will come to an end upon his death. This legal authority cannot be inherited because it is a personal right. (Barraj, 1999: 81) So, if the father feels that the property of his minor children would not be properly managed or be afraid of misappropriation and embezzlement of such property might take place, he may, during his life time, entrust to someone to administer such property after his death. Such a situation would result in the emergence of will of entrustment for the minor's property which to be concluded by a contract. In brief, will of entrustment for minor's property arises, on the one hand, because of the lack of active legal capacity of the minor and on the other hand because of the need of a person who wishes to protect the interests of his beloved children after his death.

Will of entrustment in general is a concept whereby a person entrusts another person to perform certain deeds after his death (Al-Khin *et. al*, 1996:261) or in another words, it is a concept where a person delegates his legal authority to another person to carry out the disposition on his behalf after his death. (Abdul Aziz, 1986:113) It is concerned either with the administration of the deceased's estate such as, the execution of bequest, the settlement of debt, the returning of the trust property, and so on or the management of the property of deceased's minor children. (Al-Khin *et. al*, 1996: 261) It also concerns the disposition other than the property. (Al-Bahuti, 1982:335)

Based on the above discussion, it may define will of entrustment with a minor's property as "a contract where a person entrusts another person with the protection and management of the property of his minor children after his death." The former is called *musi* i.e. a person who entrusts another person, the latter is called *wasa mukhtar* i.e. a person who has been entrusted and the management of minor's property is called *musa fih* i.e. the subject matter of an entrustment.

4. THE CREATION OF WILL OF ENTRUSTMENT WITH A MINOR'S PROPERTY

Will of entrustment, like other types of contract, has four essential components: the testator, executor, subject matter and formation. (Al-Ghazzali, 1997: 483-487) The testator is a person who has the power to make entrustment. Every father has the power to make entrustment with respect to the administration of the property of his minor children after his death. (Al-Bahuti, 1982:398) The paternal grandfather may do so in the case when there is no father. (Al-Mawardi, 1994:190) Similarly with the mother, she may also make the entrustment with respect to her property which is to be inherited by her minor children. (Al-Jamali, 1982:84) But her entrustment is not considered if after her death, the father or paternal grandfather of her children are still alive and qualified as guardians since they are more deserving than the one entrusted by her. However, a person who is competent to make the entrustment must possess certain conditions which include Islam (when the minor is Muslim), puberty, maturity and sound mind. In addition, the testator must be a person who acts on his own free will and without coercion otherwise the entrustment is invalid (Al-Mawardi, 1994:190) and who is not prohibited from administering the minor's property because of untrustworthiness.

Executor is a person who is entrusted to protect and administer the property of one's minor children after his death. He may be appointed from among relatives or strangers, male or female. However, a person who is eligible to hold the office of such great responsibility has to fulfill certain conditions. These are puberty, maturity, sanity, Islam, moral integrity, capability of carrying out the disposition, not inimical to the minor and of known status and identity. (Al-Shirbini, 1933:74; Al-Dimyati, n.d:218) Such conditions have to be fulfilled at the time of the appointment till the death of the testator. (Al-Imrani, 2000:306) If those conditions are not fulfilled the appointment is invalid as the purpose of the entrustment is to protect and administer the property of the others.

The subject matter of will of entrustment with minor's property concerns only the disposition of the property of the minor and not a marriage. (Al-Nawawi, n.d:277)

Consent is the essential element of will of entrustment which is expressed by offer and acceptance. (Hassan, 1979:241) The offer can be expressed in any words which clearly indicate the intention of the creation of will of entrustment. (Ibn Abidin, 1966: 700; Al-Mawaq, 1978:388) It may be with the condition or for a limited period of time. (Al-Bahuti, 1982:395) Will of entrustment can be formed either by verbal expression or by writing for those who are capable of speaking

and writing. (Al-Hattab, 1978: 366) However, with regard to the mute person who is incapable of writing, it may be formed by gestures. (Al-Shirbini, 1933:77) Two males or one male with two females witnesses (The Qur'an, al-Baqarah: 282) are required in the formation of will of entrustment.

The acceptance of executor is indispensable, as he is the person who is going to carry out the responsibility. (Al-Ghazzali, 1997:489) It may be by word or by deed, (Hattab, 1978:404; Al-Shirbini, 1933:77) during the lifetime of the testator or after his death. (Al-Samarqandi, 1984:217; al-Khurashi, n.d:195) However, a person who is entrusted as executor is not obliged to accept the entrustment, he is at liberty either to accept or reject it (Al-Mawardi, 1994:184) except in the case if he feels that the minor's property would be lost by embezzlement of irresponsible persons and in the case where becomes obligatory to accept because of non availability of any other qualified person. (Al-Jamal, n.d:73)

5. CONCLUSION

Islamic law provides a mechanism for the protection of a minor's property after the death of his father through the instrument of will of entrustment. It provides a comprehensive rule with regard to the subject. The discussion reveals that Islamic law lays emphasis with respect to the qualification of a person who is to be appointed as executor. This is to ensure that the interest of the minor is well managed and protected. Thus Islamic law significantly gives emphasis to the protection of property of those who are unable to manage their property by themselves like minors. This is in line with its noble objectives in the protection and preservation of the property either public or private from any infringement and loss.

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