

ADMINISTRATION OF ESTATES IN MALAYSIA: STEPPING INTO THE SHOES OF PERSON UNDER LEGAL DISABILITY

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Abstract: *Administration of estate law in Malaysia uphold the interest of legal beneficiaries especially those who are categorised as a person under legal disability upon the death of a person. Their vulnerability is the key element that justifies the needs for legal protection. This question is relevant as persons under legal disability may become a subject of abuse. One question that needles this aspect of the law is to what extent the law protects the interest of a person under disability in administration of the estate. The discussion covered the issue of a person under a disability as beneficiaries and also personal representatives. For this purpose, the paper analyses relevant statutory provisions as provided by the Probate and Administration Act 1959, Rules of Court 2012 and other relevant statutes. An analysis of the decided cases is also made to identify the judicial approach in protecting the person under disability. This article infers that the law prescribes a regulation in terms of a person under disability rights in the administration of estates in Malaysia. However, the application is not consistent as regard to minor and unsound mind. The law put extra emphasis on minor but silent in terms of unsound mind. Therefore, to ensure the interest of a person under disability is comprehensively protected, the law should be improved accordingly.*

Keywords: *Administration of Estates, Law of Succession, Person under Disability, Malaysia*

Introduction

Vulnerability is one of the key elements that justify the need to protect estate beneficiaries upon a person's death. The doctrine is premised upon the belief that estate beneficiaries are generally inferior in power *vis-à-vis* the personal representatives (Mohd Noor, 2013). This is due to the fact that in the process of estate administration, estate beneficiaries only hold asset of the deceased's estate as equitable owner and stood at the mercy of personal. The estate beneficiaries have to rely on the personal representative to distribute the estate (Halim, 2013).

In the process of administration of estates, personal representatives are legally responsible for the estate beneficiaries' interests as they are the person whom the Civil High Court granted probate or letter of administration to manage the deceased's estate. The estate beneficiaries are incapable of assuming control over this matter as a result of their lack of authority pertaining to the ownership. The situation can be worst if the estate beneficiaries are those who are regarded as person under disability which may be due to their minor age or mental incapacity (Mohd Noor, 2013). The court in *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 held that whatever property came to the executor *virtue officii* came to him in full ownership without peculiarity between legal and equitable interests. The estate beneficiaries in actuality have basically a right which is a chose in action to see that the estate is properly administered and possess neither legal nor equitable interest in the estate (Clements & Abass, 2009).

One question that needles the administration of estates is to what extent the law protects the interest of person under disability in administration of estate. This question is relevant as persons under disability are the most vulnerable person during the estate administration as they may become a subject of abuse in the management of the deceased's estate. Hence, this paper objective is to examine the current legal framework that governs the protection of person under disability in the estate administration. The discussion will includes an analysis of relevant statutory provisions as well as decided cases in order to identify the judicial approach of Malaysian court in promoting the protection of person under disability.

Person under Disability

Disable can be define as incapacitate or disqualify. It denotes the absence of capability to do something or to declare lacking of competency and render a deprivation of legal rights or qualification. It is often used to indicate an incapacity for the full enjoyment of ordinary legal rights. The used of the terms of person under disability must be distinguished with the terms of person with disability as the latter signifies a wider scope of application.

General definition of person with disability can be found in United Nation Convention. Article 1 of United Nation Convention on the Rights of Persons with Disabilities provides that persons with disabilities to include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The Malaysian government had ratified the Convention in United Nations Headquarters in 2008. The definition has been virtualizing in Section 2 of Malaysian Persons with Disabilities Act 2008. The statutes provides that "persons with disabilities" include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society'. Although adopting the definition, Malaysian law omitted the phrase 'on an equal basis with others' (Abdullah, Hanafi & Hamdi, 2017).

However, the scope of legal disability in administration of states is not as wide as definition in the UN Convention and Persons with Disabilities Act 2008. The law limits the legal disability only to the mental and intellectual incapability. Person under disability is defined under Order 76 rule 1 Rules of Court 2012 to mean a person who is an infant or a patient. Though the word infant is used under Order 76, it refers to a minor. The law considers minors and person of unsound mind incapable of protecting their interest in legal proceedings (Backer, 2012). The term minor may be further understood from the section 4 Age of

Majority Act 1971. The minority of all males and females within Malaysia shall cease and determine at the age of eighteen years. In other words, every such person, either male or female attaining that age shall be of the age of majority unless expressly provided by any specific statutes.

The computations of age under this Act shall be reckoned according to the Gregorian calendar. Section 3 (1) and (2) further explain that in computing the age of any person the day on which he was born shall be included as a whole day, and he shall be deemed to have attained the age of eighteen years at the beginning of the eighteenth anniversary of that day. Patient in other hand is means to be a mentally disturbed person within the meaning of the Mental Health Act 2001. From the definition, it can be understood that there are two classes of legal disability; minor and unsound mind (McGee, 2010). Even though there is no express terms on person under disability stated in the Probate and Administration Act 1959, the statute constantly recognise them as minor and unsound mind.

Minor

Minority usually causes relatively few problems in the law as it is of the kind who possesses limited power to deal with their own affair. A person is under disability for the purpose of law when he or she is under the age of 18, that being the age of majority in Malaysia in pursuant to section 2 of Age of Majority Act 1971. The section provides that ‘the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age of majority’.

Minor or those who is under the majority age is also known as a child under Child Act 2001 whereby the Act defined child to be a person under the age of 18 years old. This definition is in line with Article 1 of the Convention on the Right of the Child which provides that for the purpose of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

Unsound Mind

An alternative ground for legal disability is person with mental disorder or person of unsound mind. The detail definition can be found in section 2 of Probate and Administration Act 1959 where “person of unsound mind” is defined as:

- (a) A person found under section 10 of the Mental Disorders Ordinance 1952 [Ord. 31 of 1952], to be of unsound mind and incapable of managing himself and his affairs;
- (b) A person certified insane by a medical practitioner and by an Asylum Medical Officer under section 4 of the Lunatics Ordinance of Sabah [Cap. 74]; and
- (c) A person found under section 5 of the Mental Health Ordinance 1961 of Sarawak [Ord. 16 of 1961] to be of unsound mind and incapable of managing himself or his affairs, and includes any other person of unsound mind incapable of managing himself or his affairs.

Section 2 of Mental Health Act 2001 defines mental disorder to means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired and “mentally disordered” shall be construed

accordingly. Section 51 of the same Act provides that “mentally disordered person” means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs. The same definition can be found in Section 3 of Trustee Act 1969 where a mentally disordered person is defined as any person found by due course of law to be of unsound mind and incapable of managing his affairs

Unsoundness of mind entails some unusual feature of the mind as to make it different from the normal and has in effect impaired the man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do. The court in *Wong v Loh* [2003] 6 AMR 317 quoted a comment on an unsoundness of mind made in *Joshi Ram Krishan v Rukmini Bai MR* (36) 1949 Allahabad 449. The appellate court made a comment that it is not to be confused with a mere mental weakness or lack of intelligence. A man may find it difficult to answer questions of a particular class but if he intelligently answers questions of various other sorts concerning himself, his family and property, he cannot be classed with men of unsound mind being unable to manage their affairs. If a man is able to understand and answer questions on various matters except those relating to arithmetical calculations, he cannot be regarded as mentally unsound, but he would be held as having a weak or undeveloped mind.

Appointment of Personal Representatives in the Estate Administration for Person under Disability

Disability has a number of significant procedural consequences, some, but not all, of which are relevant to limitation issues. A person under disability is not allowed to bring or defend an action on his own behalf. They may also not allow to make any claim in, to defend, to make a counterclaim in, or to intervene in any proceedings, or to appear in any proceedings under a judgment or order notice of which has been served on them.

However, this does not mean that no action can be taken to protect their legal rights but the action must be instituted by another person on their behalf. That other person is known to law as the litigation representative as provided under Order 76 rules 4 Rules of Court 2012. For minor, their statutory or testamentary guardian shall be entitled to be the litigation representatives (Order 76 rule 3 Rules of Court 2012) whilst for person of unsound minds, there will be three capable persons who may be illegible to act as litigation representative. They are either one of his next-of-kin or any other person as the Court may appoint (Order 76, rules 6 Rules of Court 2012) or any person who is authorized under the Mental Health Act 2001 to conduct legal proceedings in the name of patient (Order 76, rule 2 Rules of Court 2012). For non-Muslim, the Guardianship of Infant 1961 govern the guardian for the property of a minor whereas for Muslim, the law is governed by the family law statutes for each state.

Any person is qualified to be the litigation representative of a person under disability provided that he is competent and willing to act as such and has no conflicting interest in the action in question adverse to that of the person under disability (Order 76, rule 8 Rules of Court 2012). Furthermore, a person under disability may also be a defendant in civil suit as disability confers no immunity from any legal suit.

In Small Estate distribution proceeding, the Land Administrator may, by an order in writing, appoint some suitable and proper person to be the guardian of the minor or person of unsound

mind for the purposes of all proceedings for the distribution of the estate. For that purposes, all proceedings shall give effect and bind all persons concerned as if that person had not been a minor or person of unsound mind. This is in pursuant to section 10(1) Small Estate (Distribution) Act 1955 as follows;

Where any person, who is named in the petition as a beneficiary of or claimant to the estate or any interest therein or who appears to the Land Administrator to be interested in the distribution of the estate, is or appears to the Land Administrator to be a minor or a person of unsound mind the Land Administrator may, by an order in writing, appoint some suitable and proper person to be the guardian of the minor or person of unsound mind for the purposes of all proceedings for the distribution of the estate under this Act and all such proceedings shall be as effective and binding upon all persons concerned as if that person had not been a minor or person of unsound mind.

Generally, a person who has duties with respect of minor or infant in regard of their properties is known as guardian. For non –Muslim, the Guardianship of Infant 1961 govern the guardian for the property of a minor whereas for Muslim, the law is govern by the family law statutes for each state. As regard to this article, a reference to Islamic Family Law (Federal Territories) Act 1984 will be made as a bench mark for Islamic Law. The guardian may be a statutory guardian or a testamentary guardian. The appointment of the guardian may be based on the personal or customary law affecting the minor or the person of unsound mind. Section 19 Small Estate (Distribution) Act 1955 provides as follows;

‘If any difficult point of law or custom arises in any proceedings under this Act, the Land Administrator may (a) if the question relates to Islamic law or Malay custom or to native law or custom of Sabah or Sarawak, refer the matter for decision to the Ruler of the State in which his district is situated or to such other person or body of persons as the Ruler may direct; or (b) if the question relates to any other matter, may state a case for the opinion and directions of the High Court’.

The Guardianship of Infant Act 1961 provides that the father of a minor shall be the guardian of the minor’s property until the court think otherwise. Under Section 4, a guardian of the property of a minor has the control and the management of the minor’s property. In the course of dealing, the guardian must be careful as a man of ordinary prudence would deal with his own property. He must act in a proper and reasonable conduct for the realization or protection of minor’s property.

The above power grant of guardian is however subject to the rights and powers of any personal representative or trustee in whom the infant’s property is vested. The law had specified some restriction in granting letter of representation during an estate administration. In regard of the same property, the court will only appoint maximum of four people to be personal representative. The provision in section 4 of Probate and Administration Act 1959 provides that representation in estate administration in regard to the same property shall not be granted to more than four persons. If any beneficiary is an infant, or if a life interest arises under the will or intestacy, administration shall be granted either with or without an individual, to a trust corporation or to not less than two individuals. Where several executors

are appointed, grant of probate may be granted to them all simultaneously or at different times (Section 3 of Probate and Administration Act 1959).

Moreover, in special cases where one or more beneficiary of the estate consist of minor person, the court will grant the letter of representation to either a trust corporation (with or without an individual) or to not less than two individuals. Section 9 of Trustee Companies Act 1949 provides that ‘if at any time a trust company is appointed executor of the will of any testator, it shall be lawful for the company to apply to the Court for probate of the will and, if probate be granted, to exercise and discharge all the powers and duties of an executor’. Nevertheless the court reserved certain powers as follows;

(a) The Court may in its discretion and for such special reasons as it may think fit grant administration to one individual; and

(b) The Court in granting administration may act on such prima facie evidence, furnished by the applicant or any other person, as to whether or not there is a minority or life interest, as may be prescribed.

(3) If there is only one personal representative (not being a trust corporation) then, during the minority of a beneficiary or the subsistence of a life interest, and until the estate is fully administered, the Court may on the application of any person interested or of the guardian, committee or receiver of any such person, or of its own motion, appoint in accordance with rules of court one or more personal representatives in addition to the original personal representative.

Due the lack of legal capacity to own or hold property, the property of a person under disability is considered as an undistributed fund for the purpose of administration of estate in Malaysia. The law provides that if a minor is absolutely entitled under a will or intestate distribution to the deceased estate, the personal representative of the deceased’s estate may appoint a trustee to the minor. The law however only insert an express discussion on a minor with no reference made to a person of unsound mind. Based on section 75 of Probate and Administration Act 1959, personal representative empowered to appoint a trust corporation or two or more individuals not exceeding four to be the trustees of the minor’s portion to the deceased’s estate. By virtue of section 86 of Probate and Administration Act 1959, undistributed funds may be passed to the Public Trust Corporation. The section provides as follows:

Where upon the conclusion of the administration of the estate of a person dying testate or intestate, there remain in the hands of any personal representative funds of which he is unable to dispose immediately by distribution in accordance with law by reason of the inability of the person entitled to give discharge, through lack of legal capacity or otherwise, or by reason of any cause which to the Corporation shall appear sufficient, the personal representative may, if the Corporation consents to accept the same, pay the funds to the Corporation which shall not be required to make any inquiry whether the administration has been conducted in accordance with law, but may accept the same for the benefit of that person and may for the

purpose exercise all the powers conferred on the Corporation under section 19 of the Public Trust Corporation Act 1995.

Public Trust Corporation here refers to Amanah Raya Berhad, a corporation incorporated under Companies Act 1965 and given several jurisdictions in administering deceased's estate. Amanah Raya Berhad may be appointed as personal representatives that are executor or administrator, trustee, next of kin, agent, fiduciary of the deceased estate (Section 12 Public Trust Corporation 1995). In this case, the Amanah Raya Berhad will act as the personal representative of the minor and held their right to the portion in the deceased's estate until they reach the age of majority.

Grants on Behalf of Person under Disability

The present law acknowledge that some testator do appoint person under disability as their executor in the testamentary disposition. With regards to minor, section 20 (1) of Probate and Administration Act 1959 provides that;

No representation shall be granted to a person while he is a minor. However, if a minor would be entitled to representation, but for his minority, letters of administration with or without the will annexed may be granted either to the guardian of the person and property of the minor or to such person as the Court thinks fit and their power is limited until the minor shall obtain a grant himself.

Furthermore, section 21 of the of Probate and Administration Act 1959 provides provision for unsound mind as follows;

No representation shall be granted to a person of unsound mind. Nevertheless, in the case where any such person, if of sound mind, would be entitled to representation, letters of administration with or without the will annexed may be granted to the person to whom the care of his estate has been lawfully committed. The representation may also be granted to such person as to the Court seems fit. The grant is made only for the use and benefit of the person of unsound mind until he becomes of sound mind and obtains a grant to himself.

The issue is whether the appointment made is valid or *void ab initio*. In pursuant to Order 71 Rules 27 Rules of Court 2012, the law provides that;

Where the person to whom a grant would otherwise be made is an infant, administration for his use and benefit until he attains the age of majority shall be granted to both parents of the infant jointly or to the statutory or testamentary guardian of the infant or to any guardian appointed by a Court of competent jurisdiction. If there is no such guardian able and willing to act and the infant has attained the age of sixteen years, to any next-of-kin nominated by the infant or where the infant is a married woman, to any such next-of-kin or to her husband if nominated by her.

Furthermore, it is provided in the proviso of the above section that until the minor reach the age of majority the administration of estate may be given to other person assigned as guardian by Registrar. The proviso is as follows;

Notwithstanding anything in this rule, administration for the use and benefit of the infant until he attains the age of majority may be granted to any person assigned as guardian by order of the Registrar in default of, or jointly with, or to the exclusion of, any such person and such an order may be made on application by the intended guardian, who shall file an affidavit in support of the application and, if required by the Registrar, an affidavit of fitness sworn by a responsible person. Where an infant who is sole executor has no interest in the residuary estate of the deceased, administration for the use and benefit of the infant until he attains the age of twenty-one years shall, unless the Registrar otherwise directs, be granted to the person entitled to the residuary estate.

In the case where the infant is a co-executor or where one of two or more executors is an infant the court will grant the Probate to the executor who is not disabled under the law. Order 71 Rules 28 Rules of Court 2012 provides that;

Probate may be granted to the other executor or executors not under disability the order came with power reserved of making the like grant to the infant on his attaining the age of majority.

It is important to note that the administration for the use and benefit of the infant until he attains the age of majority may be granted under Order 71 Rules 27 Rules of Court 2012 if and only if it has been renounce by the executors who are not under disability or, he fail to make an effective application therefore even after being cited to accept or refuse a grant,. This order must be read together with section 20 and section 21 of Probate and Administration Act 1959.

Furthermore, the administration of estate for the use and benefit of person of unsound mind is provided by Order 71 Rules 29 Rules of Court 2012. In this event, where the Registrar is satisfied that a person entitled to a grant is by reason of unsoundness of mind or physical incapacity incapable of managing himself or his affairs, it is provides that;

The administration for his use and benefit in the case of unsoundness of mind, limited during his incapacity may be granted, to the person authorized by the High Court or in such other way as the Registrar may direct. In the case where there is no person so authorized, or in the case of physical incapacity, and the person incapable is entitled as executor, the administration may be granted to the person entitled to the residuary estate of the deceased.

However, if the person incapable is entitled otherwise than as an executor, the administration may be granted to two persons. Firstly, to person who would be entitled to a grant in respect of his estate if he had died intestate and secondly to such other person as the Registrar may by order direct. A grant of administration shall not be made unless all persons entitled in the same degree as the person incapable have been cleared off, unless the Registrar otherwise

directs. In the case of physical incapacity, notice of intended application for a grant shall be given to the person alleged to be so incapable unless the Registrar otherwise directs.

Conclusion

In administration of estate, the present law acknowledge the right of some testator to appoint person under disability as their executor in the testamentary disposition. However due to their disability they are not capable to conclude any relevant transaction within their disability period, i.e. minor until he reach the each of majority and the unsound mind until he become sober. In overcoming the vulnerability and disability, the law allowed for the appointment of guardian to act on behalf of the person under disability and to ensure that their interest is well protected. This article infers that the law prescribe a regulation in terms of person under disability right in administration of estates in Malaysia. However the application is not consistent as regard to minor and unsound mind. The law put extra emphasis on minor but silent in terms of unsound mind. Therefore, to ensure the interest of person under disability is protected, the law should be improved accordingly

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