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(IJLGC)**www.ijlgc.com**THE PRESERVATION OF PROPERTY IN MAQASID AL-SYARIAH: WITH SPECIAL REFERENCE TO THE APPOINTMENT AND DUTIES OF WASI IN ESTATE ADMINISTRATION**Siti Asishah Hassan^{1*}, Rusnadewi Abdul Rashid², Zeti Zuryani Mohd Zakuan³

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This work is licensed under [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/)**Abstract:**

In estate administration, the appointment of wasi is seen as one of the significant instruments because it may expedite the process of distribution of a deceased's estate. Hence, wasi plays a vital role as manager of the deceased's estate as he is responsible for collecting, maintaining, and protecting the estate pending on the final distribution. On the other hand, the estate should be properly administered, or otherwise to a certain degree it will contribute harm to the well-being of the community. Moreover, it should be comprehended that, in dealing with Muslims' estate this also should be consistent with Maqasid Al-Syariah or the objectives of Islamic law. Thus, the paper attempts to examine the appointment and duties of wasi in the context of maqasid al-syariah and the concept of hifz al-mal particularly. This study is based on a qualitative study and its approach is a content analysis methodology. The study discovers that the appointment and duties of wasi is consistent with the concept of Hifz al-mal as wasi is a person who is responsible to protect the property of the deceased from any possible harm or damage (mafsadah). The findings of the study provide insights for the importance roles and functions of wasi in managing Muslims' estate. The study concludes that the concept of preservation of property in Maqasid al-Syariah should be applied to the major players in estate administration such as personal representative, executor, administrator and trustee in order to protect the rights of beneficiaries and avoid hardship to the beneficiaries in wealth distribution.

Keywords:

Wasi, Executor, Trustee, Maqasid Al-Syariah, Hifz Al-Mal, Preservation Of Property

Introduction

When a person dies, he will leave everything behind, including a legacy of wealth that would become his estate which would be frozen until the administration for the estate is settled. Sometimes, a sad thing happens when it involves family disputes, bickering and battling over who should administer the estate of the deceased. Some of them might choose to take matters into their own hands. In addition, serious conflicts among family members over estates left by the deceased may occur and will trigger emotions reactions and subsequently create disorder in the Muslim family institution and society. Many beneficiaries also do not understand the process of administering the estate until misunderstandings, rejection and unwillingness arise. This dispute has been going on for years, leading to multiple deaths resulting to the increasing number of heirs entitled to the inheritance leads to the problem of frozen estates. In such cases, there needs to be more awareness that the heirloom is managed properly, otherwise to a certain degree, it will cause hardship to the beneficiaries and will create harm to the well-being of the community. In the above situation, it could be perceived that the appointment of a *wasi* could be considered as crucial because he is responsible for collecting, maintaining, and protecting the deceased's estate pending the final distribution. Thus, a *wasi* can only act as a trustee and manager and this must be dealt properly and efficiently. In Islam, estate distribution should be in accordance with *Hukum Syara'* and it must be consistent with *Maqasid Al-Syariah*.

Literature Review***Maqasid Al-Syariah and Hifz al-mal***

Maqasid Al-Syariah means the objectives of *Syariah*. *Syariah* is defined as a set of norms of God determines relationship between human and God, human and society, human and things, human and environment (Yeni Salma Barlinti, 2011). The term 'maqasid' comes from an Arabic word 'qasada' which is the plural to the word 'maqsid' and it refers to intent, goals objective and purpose (Mohd Hapiz Mahaiyadin, 2017) and when it refers to *Syariah* it specifically means the goals and purposes of *Syariah* (Sulaiman et al, 2017).

Maqasid Al-Syariah deals with the prioritisation to protect the purity of the religion, life, intellect, lineage and property of mankind (Ruslinda Sulaiman, 2011). *Maqasid Al-Syariah* ensures the preservation of public interest (*maslahah*) and to uphold the interest of the public at large in this world and the hereafter. The objectives of *Syariah* may be divided into three main levels of necessities mainly: Essentials (*Daruriyyat*), Complementary (*Hajiyyat*) and Embellishment (*Tahsiniyyat*). Essential or *Daruriyyat* means the most fundamental necessities for the physical and spiritual well-being of an individual and his family (Ruslinda Sulaiman, 2011). This protection consists of five values:

- i. Preservation of religion
- ii. Preservation of life
- iii. Preservation of intellect
- iv. Preservation of lineage
- v. Preservation of property

Hifz al-mal (preservation of property) is one of the requirements of human life, and human beings will not separate from it. Preservation of property means protecting the property from destruction and from transferring the property to others in a wrong way including prohibition against injustice, tyranny and so on (Mastura Razali et al, 2021). Although Islam encourages Muslims to acquire properties, there are certain restrictions on how the properties are acquired, and these must be in accordance with the Syariah principles (Halipah Hamzah, 2020). In principle, the owner of the property has the full legal authority to utilize and dispose of his property as he wishes within the limit prescribed by the Syariah (Abd al-Karim Zaydan, 1989).

There are some flexibilities in disposal of a property as mentioned in the Quran and Hadith; for instance, *wasiyyah*, *waqf*, *hibah* and others. Although property is something that is very valuable to human beings, it can lead to conflicts and disputes if not managed properly. Various cases and incidents have been reported due to problems in the estate management (Fatin Fazlina Yaakob, 2017; Ahmad Asmadi Ismail, 2020). Therefore, without proper management of the estate this creates difficulties to the legal heirs and at the same time leads to disputes among family members. Additionally, this conflict will cause entangled legal dispute, which may require long years of a court hearing and escalating legal fees, lead to the frozen assets or unclaimed property. This is contrary to the interests that are protected in Islam and does not achieve the purpose of *maqasid al-Syariah* itself (Nor 'Azzah Kamri & Mohd Zaidi Daud, 2011). It should be stressed that *hifz al-mal* includes protecting society's wealth from ruin and from the illegal transfer of property to others, including a prohibition against injustice and denial of rights.

The Position of Wasi in Estate Administration

In Islam, accepting the task and role as a *wasi* is considered as an act of worship that attains nearness to Allah (Salih Al-Fawzan, 2009). Nevertheless, it is permissible only for the one who has the capacity and the honesty to manage the estate accordingly. Allah said in the Holy Quran:

"...and cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty."

(Surah Al-Maidah (5):2)

Moreover, Prophet Mohammad peace be upon him said:

"...Allah helps a person so long as the person helps his (Muslim) brother."

Sahih Muslim, Hadith no 2699

Based on the practice of the Prophet's companions, they used to appoint a *wasi* to dispose of their properties after their death. For instance, a group of the Prophet's companions appointed Az-Zubayr Ibnul Awwam to be their *wasi* while Abu Ubaydah Ibnul-Jarrah appointed Umar Ibnul Khattab as his *wasi*. Umar Ibnul Khattab also appointed his daughter, Hafsa as his executor and assigned his eldest sons to take over her position successively after her death (Salih Al-Fawzan, 2009). Furthermore, in one of the Quranic verses:

"And let those [executors and guardians] fear [injustice] as if they [themselves] had left weak offspring behind and feared for them. So, let them fear Allah and speak words of appropriate justice. Indeed, those who devour the property of orphans unjustly are only consuming into their bellies fire. And they will be burned in a Blaze. (Surah An Nisa, 4:9-10)"

Although the above Quranic verses apply primarily to the *wasi* who involved with minor beneficiaries who had lost their parents as a trustee, this can be inferred that the *wasi* should carefully execute the *wasiyyah*, and it must be carried out properly and honestly with fear of Allah (Busari Jamiu Muhammad, 2018).

Under Islamic law, a *wasi* is considered as trustee based on the doctrine of *al-amanah*. In Islam, once trust is created, the *wasi* or trustee will administer and manage the trust property according to the terms and conditions of the trust. He is obliged with a great responsibility to protect the interest of the beneficiaries and to render back the property when required according to the terms of the trust. Accordingly, *wasi* is considered as a guardian or safe keeper who is entrusted to carry out certain duties and responsibilities. Al-Quran has expressly mentioned on the concept of 'amanah' or trust which may be applicable to the *wasi* who is considered as a trustee, and this can be supported by several verses in the Quran:

“Allah does command you to render back your trusts to those to whom they are due; and when you judge between man and man, that you judge with justice...”

(Surah An-Nisaa' (4):58)

“And if one of you deposits a thing in trust a thing with another let the trustee (faithfully) discharge his trust, and let him fear his Lord”

(Surah Al-Baqarah (2): 283)

“O you, who believe, do not betray God and His Messenger, and do not knowingly violate your trusts.”

(Surah Al-Anfal (8):27)

“And he who misappropriates shall come on the Day of Judgement with what he misappropriated.”

(Surah Al-Imran (3):161)

Interestingly, it is revealed that the absence of an appointed *wasi* may cause the beneficiaries to have delayed distribution of estate, as the task can only be carried out by the appointed executor or *wasi* (Muhammad Tahir Sabit Haji Mohammad, 2015). Mat Noor Mat Zain (2008) in his article entitled “Kuasa *Wasi* Dalam Pengurusan Harta Menurut Islam” has emphasised in detail on the duties and obligations of *wasi* according to the four *Mazhabs*. Although the authors confined the scope of discussion on the Islamic perspectives, there was no further discussions on the concept and theories underlying the duties of a *wasi*. Nurul 'Ain Nadiah Abd Razak (2015) in her article entitled “Konsep *Hifz Mal* Dalam Pengurusan Harta Pusaka Di As-Salihin Trustee Berhad” has discussed on the concept of *Hifz mal* in managing Muslims' deceased estate. Nevertheless, the study focuses only on the implementation of the concept of *hifz mal* in As-Salihin Trustee Berhad which is highly skilled in Islamic estate planning and administration. As-Salihin Trustee Berhad is the first trustee company in Malaysia which focused on Islamic Estate Planning and their property-related services based on Syariah principles. As-Salihin Trustee Berhad was set up to meet the needs of Muslims to preserve, protect and distribute their property for the benefit their loved ones after their death. Naziree Md Yusoff (2008) in his article has stressed on the exact role of a *wasi* in resolving disputes among family members through proper management of inheritance.

Although the appointment of wasi may curb or reduce the problem of frozen estates and avoid hardship to the beneficiaries but there was no further discussion in other literatures on the concept and theories underlying such appointment and duties of wasi in managing Muslims' estates. This paper attempts to examine the appointment and duties of *wasi* with the context of *maqasid al-syariah* and *hifz al-mal* particularly. Therefore, the research limits its scope of discussion on the Islamic perspectives only and no further discussion on the legal position of a *wasi* under Malaysian civil law. This research hopes to expand the scope of appointment and duties of *wasi* by applying the concept of preservation of property in *maqasid al-syariah* in order to fill the gap in the literature. Revealing the need and importance of the appointment of a wasi in the administration of estate had significantly brought to ignite the new knowledge particularly in administration of Muslims' estate.

Methodology

This paper is based on the qualitative research and the approach to be applied is a content analysis methodology. Content analysis is a type of secondary data analysis that is used to analyze text, including, books, manuscripts, newspaper, and websites to determine the frequency of specific words or ideas. Thus, this research involves library-based for the collection of secondary data, and it is known as doctrinal research. A doctrinal research deals with the law on a particular issue where the legal doctrine is analysed as to its development and applications (Nuraisyah Chua Abdullah, 2020). The appointment and duties of *wasi* will be elaborated by referring to the four *sunni* schools although the majority of Muslims in Malaysia practice the teachings of madhab al-Syafi'i. Since the appointment of *wasi* is considered as one of the important instruments in the administration of estate, the main theory of *maqasid syariah*, and the concept of *hifz mal* is further discussed.

Results and Discussion

Definition and Classification of Wasi

The word wasi وصى literally related to *wasiyyah* الوصية which originally means to link one thing with another. Technically, wasi is one who is requested, entrusted or ordered to take care of something (ISRA Compendium for Islamic Financial Terms, 2011). A *wasi* is defined as a person who is entrusted by another person (Al-Sharbini, 1933). A *wasi* or executor refers to someone who is legally responsible for administering a dead person's estate. These terms appear to be synonyms and are used interchangeably in our law. Although the precise legal term usually refers to a personal representative, executor or administrator, but for the sake of convenience the authors prefer to use the word '*wasi*' throughout this research as the term '*wasi*' is very closely connected from the Muslim's perspectives, including Islamic law, and it can be extended to other various types of Muslims disposition of property such as *wasiyyah* and *wisayah*.

Islamic law classified *wasi* into two categories. Firstly, a *wasi* appointed by the testator is a person who is selected by the testator to manage the property after his death. This type of *wasi* also may be appointed by the testator to administer the property of minor or disabilities (Mat Noor Mat Zin, 2008). Secondly, a *wasi* appointed by the court. In this situation, an executor or *wasi* has been named in the wills. However, the court may appoint another *wasi* or executor if the former executor is incapable of performing the necessary duties by virtue of a physical or mental disability, permanently missing, failed to administer an estate fairly amongst beneficiaries or mismanaged minors' property (Ibn Nujaym, 1985).

Appointment and Duties of Wasi

Wasi may be individuals or corporate bodies appointed by the testator, and where necessary, appointed by the court. An individual *wasi* may be appointed among family members of the testator such as a spouse, adult son or daughter, parents, siblings and relatives. A lawyer appointed as *wasi*, may not be close to the deceased, but he is a professional, legally trained in the area of law. He is usually well acquainted with the law of inheritance of property and has experience in managing the property of the deceased. A lawyer is subject to legal ethics and have professional indemnity insurance. The position of lawyer as *wasi*, conversely, is not permanent, and can change in the case of death or delegation. Normally, the appointment of a lawyer as *wasi* requires cost or fixed wages but is still negotiable. However, under certain situations, an individual *wasi* might not be able to administer the estate due to various reasons such as illnesses, death or lack of capacity, and under certain circumstances he may appoint another person to replace him. Other problems may also possibly arise when a *wasi* does not have sufficient experience and knowledge to manage the testator's property after his death.

Wasi also maybe appointed among Trust Corporations such as Amanah Raya Berhad (ARB), As-Salihin Trustee Berhad, *Wasiyyah* Shoppe, other institutions such Majlis Agama Islam Negeri (MAIN). These professional bodies have skilled and trained officers in the field of property management. There is no issue if an officer dies because the institution can have him replaced by other equally qualified officers. The cost of their wages is normally fixed by the corporations or institutions.

Under Islamic law, a *wasi* should be a Muslim, adult, sane, free of irreproachable character and a fit person to perform duties entrusted to him (Abu Zakaria Yahya, 1914). Thus, a non-Muslim is not allowed to become a *wasi* while a Muslim can be a *wasi* to the non-Muslim in a certain allowable activity (Salih Al-Fawzan, 2009). This can be supported by one Quranic verse:

O you who believe! Take not as, (your) Bitanah, [close friends, advisors, consultants, protectors, helpers] those outside your religion [pagans, Jews, Christians, and hypocrites] since they will not fail to do their best to corrupt you... (Surah Al-Imran, 3:118)

An appointment of a woman as a *wasi* is also acceptable, provided that she is capable of carrying out the responsibility (Salih Al-Fawzan, 2009). Importantly, if it involves children's welfare, appointing mothers as the *wasi* is better than others (Musa Fathullah Harun, 1994). A blind person is permissible to be a trustee or *wasi* as he is capable to appoint others to deal with (Al-Khin, Al-Bugha & Al-Syarbaji, 2009). A *wasi* should be a *mukallaf* (able to take any responsibilities), freedom, fair, trustworthy and capable to manage wealth (Salih Al-Fawzan, 2009). Furthermore, he must be just and able to manage or execute the bequest as stipulated by the testator (Musa Fathullah Harun, 1994). *Ibnu Rif'ah* argued that a *wasi* should not be appointed among those involved in a certain job, as it is difficult for him to implement the trust at the same time (Musa Fathullah Harun, 1994).

Under Islamic law, a *wasi* must ensure the estate will be distributed based on the testator's wishes and *faraid* laws. The *wasi* will collect all the assets, settle all debts and liabilities, and distribute what is left to the beneficiaries. On the other hand, payment of the funeral expenses and debts should be made before the estate is distributed according to *wasiyyah* and *faraid* rules

(Zakiah Samori et al., 2016). This can be illustrated in the following figure:

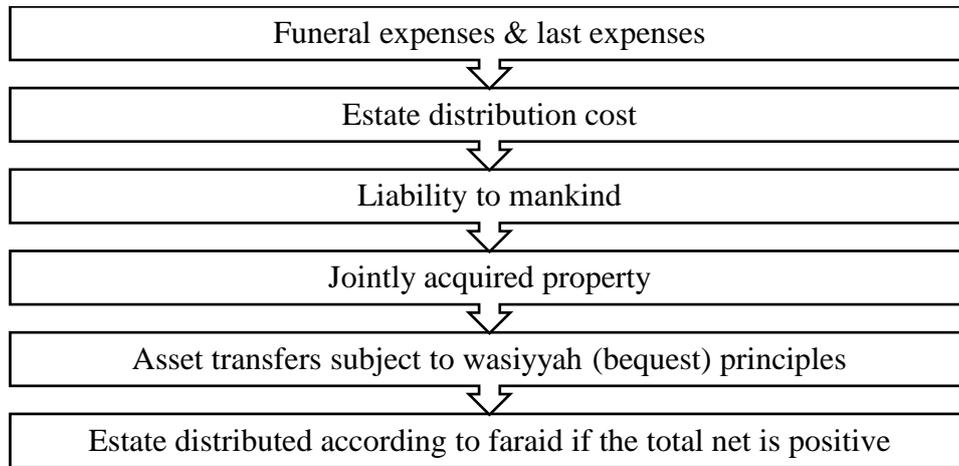


Figure 1 Duties of Wasi Upon the Death of Owner

Source: Rasban and Mohd (2006) and Al-Ma'amun (2010)

In disposal of property, a *wasi* should depend on the legal authority of the testator because the testator is the original owner and the *wasi* is the person who represents him after his death. Consequently, the *wasi* does not own what the testator does not actually possess (Salih Al-Fawzan, 2009). This includes paying debt, distributing the bequeathed property, looking after the welfare of children and others. Therefore, the powers of the *wasi* are limited to what the testator has specified. For instance, if the *wasi* is appointed to pay the testator's debts, he does not have the legal right to act as the guardian of the children.

On the other hand, regarding a minor, a *wasi* may sell immovable property belonging to a minor on necessity where it is at high value as where there is an advantage (Badruddin Ibrahim, 2006). Nevertheless, the Hanafi school views that the legal authority of the *wasi* is absolute where he must deal with the estate of the testator as well as the property of his minor children (Badruddin Ibrahim, 2006). Regarding the movable property, the *wasi* shall have the power to sell or pledge the goods and chattels of the minor, if he is in need of imperative necessities, such as food, clothing and nursing; and where the movable property of a minor is sold *bona fide* for adequate consideration, with the object of investing the proceeds safely and for an increased income, its sale shall be held valid. Muslim jurists view that the disposition of the property by a *wasi* is not subjected to the permission of the court (Badruddin Ibrahim, 2006).

In the administration of estate, normally the beneficiaries are relying on the specialized skills of a *wasi* to manage the deceased's estate. On the other hand, one of the contributory factors causing the problem and dispute in estate management is the misconduct of the *wasi* whereby he was dishonest and failed to properly allocate the deceased estate to the proper beneficiaries (Nor Azlina Mohd Noor, 2017). In that situation, there will be a probable cause that a *wasi* would be tempted to use the deceased's estate for his own interest rather than the beneficiaries's interest.

The preservation of property in *maqasid al-syariah* can be described into five dimensions mainly protection of ownership, acquisition and development, damage, circulation and value protection. (Dusuki & Bouheraoua, 2011). Hence, protection of ownership includes protection

of assets or property against destruction, theft, injustice and harm (Zailani et al, 2022). Based on the above discussion, the concept of *hifz al-mal* should be given emphasis to the persons or bodies who involved directly in the estate administration such as *wasi* because the concept of *hifz al-mal* does not mean to preserve the wealth per se, but the concept also covers the encouragement to generate, accumulate, preserve as well as distribute the property in a just and fair manner. The concept is also consistent with the duties and obligation of *wasi* which relates with the rule on fiduciary duties. Legally speaking, a *wasi* is liable to be sued for breach of fiduciary duty if he fails to discharge his duties and exercise his powers with reasonable honesty, diligence and prudence.

The principles of fiduciary obligations are demonstrated by the following verses of the Holy Quran:

1. Woe to the defrauders. 2. Those who, when they take a measure from people, they take in full. 3. But when they measure or weigh to others, they cheat. 4. Do these not know that they will be resurrected? (Surah Al-Mutaffifin (83): 1-4)

In addition, the Prophet Muhammad (PBUH) has said:

Every one of you is a caretaker, and every caretaker is responsible for what he is a caretaker of. (Sahih Al-Bukhari 6719, Sahih Muslim 1829)

Fiduciary duties under Syariah are more universal in nature because they are based on the fiduciary's accountability to Allah (Sharifah Zubaidah Syed Abdul Kader et al, 2018). In Islam, the fiduciary principles may involve the relationship between the guardian, the orphan and the orphan's property (Mohammad Fadel, 2017). Hence, the concept of fiduciary duties could be applied to *wasi* as he stands in the position as a trustee in Islamic law.

Conclusion

In the event of death, the role of a *wasi* is crucial in estate administration, as most beneficiaries do not possess sufficient knowledge about procedural and technical aspects of estate administration. For instance, in *wasiyyah* execution a *wasi* has a duty to administer the estate according to the will and distribute of rest of the residue of the estate to the beneficiaries. Furthermore, with the appointment of the *wasi*, it may prevent disputes between the deceased's family members, and this may speed up the process of the estate administration. However, it should be comprehended that in dealing with Muslims' estate, a *wasi* should have a great knowledge in Islamic law such as laws relating to wills and faraid laws. Likewise, this paper discloses that a *wasi* is given various duties in the administration of the deceased's estate. The roles carry with it several duties and consequently some potential liabilities. Remarkably, the concept of a *wasi* as a trustee is construed based on the doctrine of *al-amanah*. Once trust is created, the *wasi* or trustee will administer and manage the trust property according to the terms and conditions of the trust. This is evidenced in several quranic verses mainly Surah An-Nisaa' (4):58, Surah Al-Baqarah (2): 283 and Surah Al-Anfal (8):27. Moreover, the theories of *Maqasid al-syariah* and concept of *Hifz al-mal* could be applied to a *wasi*, as he is the main player who involves directly in the administration of estate and need to preserve the deceased's property and distribute it in a just and fair manner. In facing the issues of estate administration such as misconducts, fraud and disputes among the heirs, the application of *maqasid al-syariah* is a vital element that need to be considered in managing deceased's estate because its sole

purpose is to bring benefits to mankind and to prevent them from harm or *mafsadah*. Accordingly, a *wasi* should ensure the estate is not only distributed based on the testator's wishes, but it must also comply with Syariah principles and *maqasid al-syariah*. Since Islamic law is recognized under Malaysian law as main sources of law for Muslims, an executor must ensure that the administration and distribution of estate must be according to *Hukum Syara'*.

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