

Sole Matrimonial Property Division Through Joint Tenancy From Shariah Perspective

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ABSTRACT

Currently the division of matrimonial property after death of spouse is proportionated according to spouse's contribution in acquiring the property. The share of deceased then be distributed to deceased heirs according to the legal portion provided by faraid law. This practice apparently could affect the interest of deceased spouse in the circumstance where the property of the spouse is only one asset particularly matrimonial home. The wife might lose the ownership of the home which resulted to the deceased wife lose her home to live. Moreover, the existing methods of distributions seem rigid and might take longer period to be settled. Thus, this study aims to examine the position of joint tenancy as a distribution of sole matrimonial property after spouse death from Shariah perspective and its practices in Malaysia. The study adopts qualitative methods where the data is collected from library resources including fiqh books, legal provisions and reported cases. The data was analysed using content analysis methods. The finding showed that joint tenancy is one of the instruments of estate planning for Muslims

objectively to safeguard the interests of deceased spouse after the death of the spouse. The process of ownership and transfer of property will be implemented through the right of survivorship principle as well as facilitate the process of claims in shariah courts. It seems in line with the principles of maqasid syariah which prioritizes the maslahah of couples and children as well as avoiding disputes on the property between the deceased's heirs and the surviving co-owners.

Keywords: *Division of Property, Joint Tenancy, Muslims, Sole Matrimonial Property*

INTRODUCTION

Islam recognizes the rights and responsibilities of each individual in a family institution including the maintenance aspect and any contribution of the parties involved. Currently situation in Malaysia, the search for a living maintenance has been carried out by both married couples to obtain assets in various forms of physical and evaluation as well as the manner of ownership. The properties should be properly managed to avoid any difficulties and disputes when the situation of divorce, polygamy or death happened.

The concept of Islamic property management aims to acquire virtues in the world and in the hereafter based on complete and systematic guidelines (Alias Azhar et.al, 2014). In addition, the systematic property management is aimed to avoid any difficulties that can weaken the economic activities of society in a country. It gives ownership rights to individual or group to enable property transactions to be expanded and the scope of circulation and wealth can be enjoyed by the community (Rusnadewi Abdul Rashid & Nor Hisyam Ahmad, 2013).

Management of property during life and after death is significant to avoid disputes and struggles in the division of property after divorce or death of one of the spouses. It not only involves *waqaf*, *hibah*, *sadaqah*, inheritance and *wasiah* but also need to include matrimonial property acquired throughout the marriage. Ownership of property during the marriage depends on the economic level and income of a family members.

It exists in the form of a single property or joint property which can be distributed through various instruments mentioned earlier. However, this study emphasizes on matrimonial home which is a sole property and the most important asset in marriage. When the spouse and family reside together in the house during the subsistence of marriage, it is considered as a matrimonial home (Wee Wui Kiat, 2014).

Upon the death of a husband or wife, the sole property is categorized under a division of matrimonial property, *hibah* or *faraid* mechanism depends on owner's will. However, each of these instruments has certain methods and implications that could affect the deceased spouse and beneficiaries. Each party involved in the claim are required to present proof of contribution to acquire disputed property. Lack of knowledge relating to ownership of an asset or absence of proof of ownership is presented as well as the long proceedings period seen as a cause of delay in the division of property in Malaysia. This claim is known as *masalah* which does not contradict to *syarak* and safeguard the justice and welfare for spouse and reject the harms in the future (Suhaimi Abdullah, 2004).

Through the joint tenancy method, the division of a sole property of the husband and wife after any deceased couple can take care of the interests of the surviving spouse as the sole asset is no longer subject to distribution through the *faraid* method. Joint tenancy is a joint property ownership concept that each owner has equal rights regardless of personal contribution (Suhaimi Mustar & Nasrul Hisyam Nor Muhamad, 2013). Ownership of joint property when equal distribution is made on the property of a house which belongs to the husband and wife that is the buyer and the percentage of ownership between the two is on ratio 50:50 (Idham Halid, 2010). In addition, joint tenancy affects each owner from the aspect of both parties having an equal stake in full ownership authority and the total amount of payment to the asset is not a benchmark to the right to ownership of the assets. Moreover, joint tenancy is an agreement when two or more people together owning a property either in the form of immovable property, such as homes and land or movable properties such as savings accounts or unit trusts. In Singapore, the joint tenancy method applies only to immovable property such as homes, land or commercial property (Sadali Rasban, 2015).

Therefore, this study discusses the joint tenancy method according to the shariah perspective in the division of sole matrimonial property in Malaysia. The discussion also focusses on the implementation and legal aspects of joint tenancy practiced in Singapore.

LITERATURE REVIEW

Planning and management of property in Islam during someone's lifetime could be implemented through *hibah*, wills, *waqf*, charity and *nazar*. On the other hand, management of property after death shall be distributed according to law of inheritance which is subject to *faraid* (Rusnadewi Abdul Rashid & Nor Hisyam Ahmad, 2013). In the event of death, the property of the deceased must be properly managed according to the specified hierarchy where priority is given to the payment for settling creditors' debts and sectary property out of the deceased property.

Hibah is one of the instruments of estate planning according to Islamic law. It must be concluded during the life of the *hibah* giver, voluntarily pronounced using *ijab* and *qabul* or the like and it is encouraged in Islam (Mohd Zamro Muda, 2008). It is also considered as a gift on the basis of affection without any return and it is the giving by the *hibah* giver to the *hibah* recipient (Rabi'ah Muhammad Serji, 2018). As regards to the implementation, the *hibah* is effective only after the death of the parties who owned the property and it is applied normally to resolve the dispute of the estate division which is normally difficult to be settled (Alias Azhar et.al, 2014) as well as hindered the goal of helping the needy relatives (Mohd Zamro Muda, 2008). This is due to the absence of specific laws relating to *hibah* in Malaysia.

Hibah is one of matters included in property and trust for Muslims besides *waqf*, will and *zakat* which is a statutory provision embodied in the Ninth Schedule, List 2, of a Federal Constitution. The list clearly indicates the matters to be governed under the jurisdiction of the Syariah Court (Rabi'ah Muhammad Serji, 2018). In addition, the community's understanding of the *hibah* should be enhanced to avoid the issue of giving *hibah* without transferring the ownership of property to the legal recipient. After the death of the *hibah* giver, the beneficiary will begin to dispute on

the ownership of the *hibah*. The complexity of *hibah* verification procedures is also due to the involvement of two legal and administrative systems such as *shariah* and civil law where it's also seen as a difficult factor in the distribution of inheritance (Alias Azhar et.al, 2014).

Another aspect of *hibah* is related to the withdrawal of *hibah* from the giver. In *syariah* only a father is allowed to withdraw the *hibah* for his child. On the other hand, the husband's *hibah* to his wife cannot be withdrawn. If there is an occurrence of domestic upheavals causes divorce, the wife cannot be forced to return *hibah* property to the husband. If the husband performs a single property (residential house) to his son or family member, then the wife has no rights over the house after the husband's death. Thus, this will cause difficulties to the wife and affect her welfare to continue their life where she is also entitled to the property as it is their property acquired throughout their marriage.

In Malaysia besides *hibah*, the deceased property is also can be distributed through inheritance according to *faraid* law which is also an Islamic property management system for deceased's property. According to the law of *faraid*, the heirs to the deceased entitled to receive inheritance with a stipulated proportion of share. It also stipulates a method of calculating or dividing the property of the deceased to the rightfully entitled heirs (Alias Azhar et.al, 2014). Any property of the deceased in the form of property, movable property or savings will be divided into beneficiaries at the prescribed rate. The distribution also affects to sole property acquired during their marriage for example matrimonial home.

Although the method of *faraid* normally invokes when distributing the deceased estate, the solution for division normally faced difficulty when there is mismanagement due to not properly understood on the inheritance matter. The inheritance arrears cause problem to the adverse implications from an economic, legal, religious and social perspective. Among the factors identified are less effective of administrative system and the attitude of beneficiaries (Rusnadewi Abdul Rashid & Nor Hisyam Ahmad, 2013).

The constraints and obstacles that implicated to the process of division of inheritance among the heirs is difficult to distribute through the existing method (Naziree Md Yusof, 2013) among others caused by the phenomenon

of society who frequently involved in debt. The deceased property which still in debt liability to the financial institutions which put the assets to the state of sale and purchase transactions, *hibah*, waqf, will, *zakat* and *faraid* distribution. This phenomenon will make it difficult for beneficiaries to identify the amount or status of a debt, list of creditors and property positions that are still in the liability of an individual or financial institution. In addition, the problem also derived from the unclear document on the status of the property, the list of valid beneficiaries is uncertain, the dispute among family members, the name of the tiered owner with several generations is seen as the cause of the difficulties for property to be properly distributed.

In managing the distribution of inheritance, there are several matters to be followed. Once the deceased's debts are amortized, the status of a property is identified, the return of the loan item and the right of the deceased's transaction is settled, the welfare of the person under the liability of the deceased is protected, the determination of the legal beneficiaries and the distribution of the property can be carried out. The process of identifying legitimate beneficiaries should be done carefully to avoid the occurrence of lies and fraud (Naziree Md Yusof, 2013). This process takes a long time and high cost depends on the cooperation of the beneficiaries and documents required. In case the spouse only owned a single property, ownership status of the sole property of the couple's residence during the marriage period should be specified to avoid the dispute on ownership at later day. The source of acquisition of the property must be proved by valid documents so that the distribution after the death of the owner could be managed accordingly to safeguard the welfare of other parties involved.

Apart from the practice in deceased's property distribution according to laws of *faraid* and *hibah*, the distribution of assets acquired during marriage also been implemented in Malaysia. This is also agreed by Md. Ghazali Ibrahim (2009) that the practice of division of assets to the wife after the death of a husband is a justifiable action and provides an advantage to the deceased wife compared to the normal practise of distribution through inheritance. For instance, in certain case, the share of a sister to the deceased husband is more than the entitlement of wife though the wife has lived longer with the deceased. However, this claim does not deny the rights of other beneficiaries but for fair and just division to the wife who spend her life with the deceased husband and put effort to acquire property

collectively during their marriage life and build their life (Miszairi Sitoris & Akmal Hidayah Halim, 2010).

Islamic Family Law in Malaysia has recognized claims of matrimonial property due to divorce, polygamy or death (Miszairi Sitoris & Akmal Hidayah Halim, 2010). Nur Shafiqqah Mudran & Zuliza Mohd Kusrin (t.t), opined that the claim can be initiated if the marriage is breakdown through divorce, death of either husband or wife or during the application of husband for polygamy. However, claims for deceased property normally faced complicated process due to disputes arouse from the beneficiaries of the related deceased property (Miszairi Sitoris & Akmal Hidayah Halim, 2010).

There is an absence of specific provision in The Islamic Family law in Malaysia regarding claims of matrimonial property after death. The practice of distribution is only can be found in Practice Direction No.5 of No. 4 of the Year 2003 JKSM which stipulates the time when the claim for matrimonial property can be enunciated after divorce or after the death of any party (Zaini Yusnita Mat Jusoh, 2016). This is reinforced by the Selangor State Fatwa Committee 2005 which states the permissiveness of the distribution of sects after death before the deceased's property is divided according to *faraid*. Sectary claims after death are allowed for indirect denial of such rights resulting in injustice especially when it can be proved that the surviving party has contributed to the property unless the surviving party subsided on the omission of the deceased's property and did not raise its rights to the property (Norliah Ibrahim, 2007).

The method of distribution of matrimonial assets after death in Malaysia is similar to the distribution of matrimonial assets due to divorce. The power of the court rules the distribution of matrimonial assets depends on the extent of contribution of each parties to marriage either the property is acquired directly or indirectly. The Syariah Court through the discretion and wisdom of the judges should be more attentive and in-depth scrutiny and take into account other relevant factors in determining the level of contribution of the claimant such as the wife's level of education and potential to work if given the opportunities (Miszairi Sitoris & Akmal Hidayah Halim, 2010).

In order to carry out court duties, there are several stages that a judge should go through in determining the proportion of the parties against the

claims of such property submitted (Noorul Huda Sahari, 2015). The first stage is the need to identify the asset as a contingent property primarily by evaluating the date of acquisition of the assets where the provisions specifically state the assets acquired during the marriage period for both parties or the sole effort of one party. However, there are exceptions to the general rule where the assets in the possession of any party acquired prior to their marriage will be subject to division provided there are improvements to the assets made during the marriage by either party or both.

The second stage is to identify and determine how the acquisition of such properties is either through joint efforts or sole efforts of the parties (Noorul Huda Sahari, 2015). According to Zaini Yusnita Mat Jusoh (2016), the contribution directly refers to the efforts given by the husband and wife to acquire an asset or property. This contribution includes contributions in the form of finance or any effort given directly to acquire the property. In this regard, if it is proven that there is a contribution either in the form of money, property or work, the assets in which they are identified as joint venture properties. The third stage is to determine the net valuation of the asset after deducting the mortgage, the debts are agreed upon by one of the parties agreed to mutual benefit and the needs of the young children in marriage (Noorul Huda Sahari, 2015). Valuation of assets is determined up to the date of hearing which is considered the most conducive date and valuation of the property will be based on the present value of the property or the value of rental and sale.

A dispute in the distribution of sectary assets occurs when the property is acquired solely by one-party efforts (Norliah Ibrahim, 2007) and usually the wife who will raise the issue of indirect contributions (Zaini Yusnita Mat Jusoh, 2016). Indirect contribution refers to small ventures compared to revenue or contribution benefits in producing a substantial property that has been contributed by any spouse in marriage. It means that one of the couples has contributed indirectly through ideas, encouragement, advice, comfort, order etc. to another couple who strive and succeed in securing the property (*Harta Sepencarian: Konsep Dan Amalan*, 2019). The statement was also supported by Zaini Yusnita Mat Jusoh (2016), who stated that indirect contributions were referring to the housework undertaken by the wife in managing the household including ideas, encouragement and comfort achieved by the husband to enable her to work and find property.

In order to carry out the division acquired through a single effort, the court should consider the extent of contributions made by the party who did not acquire the assets for the welfare of the family by keeping the household or taking care of the family and the needs of the minor children from the marriage, if any (Noorul Huda Sahari et al., 2016). This provision gives the judges the right of discretion on the need to expand any general determination based on a variety of specific facts in ensuring fair division can be achieved. Therefore, indirect contributions only relate to assets of the divisions acquired through single efforts. The asset assessment is based on the actual contribution of husband and wife. In other words, the court assesses the contribution of each asset separately to determine the proportion of each asset because the contributions of husband and wife may not be the same (Noorul Huda Sahari, 2015).

The distribution rate of non-working spirals of wives are $\frac{1}{2}$, $\frac{1}{3}$, $\frac{1}{4}$, and $\frac{2}{3}$, depending on the point of indirect contribution given (Mohd Anuar Ramli, Mohd Norhusairi Mat Hussin & Mohammad Aizat Jamaludin, 2012). The spouse is eligible to receive $\frac{1}{3}$ of the claims of matrimonial property as an indirect contribution such as managing housework, or if the wife is employed but has contributed financially in purchasing the daily needs (Miszairi Sitiris & Akmal Hidayah Halim, 2010). Besides that, the indirect contribution of the wife in accommodating family needs such as rhythms, equipment and clothing through her income also entitles her to a division of $\frac{1}{3}$ of the matrimonial property (Ruzman Md Noor, 2019). Scrutiny of the welfare and existence of children during the marriage period was also taken into account by the courts. According to Ruzman Md Noor (2019), in the case of Mohamad Ainuddin Mohamad Nasurdin vs Rohani Ismail (2006) 21(I) JH 55, Shah Alam Syariah Appeal Court set's $\frac{1}{3}$ of the value of houses and cars after receiving the service to take care of the household and children contributed by wives.

There was a court ruling giving the wife a $\frac{1}{6}$ from the property for indirect contribution. In the case of Md. Yusof Abd. Rahman vs Norlia Abd. Aziz (2005) 20(i) JH 122, the husband, appealed against a Syariah High Court decision giving $\frac{1}{3}$ rights to the wife. The wife's failure to prove indirect contribution resulted in the Panel of Judges of the Terengganu Syariah Appeal Court ruling that the wife failed to get part $\frac{1}{3}$ of the property claimed as usually obtained by the wife who was a full-time housewife. In

this case, the wife contributed to acquiring the disputed house, therefore the panel of judges gave a rate of 1/6 of the value of the house taking into account direct contributions when purchasing the house (the direct contribution rate was 1: 26) and a slight indirect contribution as the wife (Ruzman Md Noor, 2019).

Thus, a comprehensive discussion and evaluation should be done by the married couple to enable the distribution of sects to be made fairly and to take into account the needs and contribution aspects of the parties. This can prevent the duration of the trial to be long and burdened with high costs (Norshahzura Mat Zuki, 2016) in addition to taking care of the rights of the spouse after his death if the heir disagrees. Looking at the decided distribution of sectary assets, properties in the form of residential houses will be broken down by selling the assets. Valuations will be made based on current valuation and sales revenue will be divided at the rate of portion determined by the court. As a result, living couples need to find a new residential home to continue survival.

RESEARCH METHODOLOGY

The study adopts qualitative methods where the data is collected from library resources including fiqh books, legal provisions, existing acts, state fatwas and reported cases. Data from books were collected from Islamic literature of traditional and contemporary scholars in order to get a majority stand on the issue. Statutes, fatwas and court cases were referred to involving common law or Islamic law pertaining to division of matrimonial property. The data was analyzed through content analysis methods in order to examine the accurate opinion in the distribution of a sole matrimonial property according to the joint tenancy method. In addition, analysis of existing practices relating to division of matrimonial property after death of spouse practiced in the country is also discussed. As a result, this study analyzed the meaning and relationship of concepts, provisions of law and fatwas to produce accurate and comprehensive conclusions on the issue.

RESULTS AND DISCUSSION

This study highlights matters to achieve the objectives and answers of predetermined questions. The discussions cover the following:

Joint Tenancy Concept

Matrimonial property can be considered as joint ownership (joint tenancy) in the context of a couple's residence which is the only asset of marriage available during the death of a husband or wife (Noorul Huda Sahari et al. 2014). Today's scenario shows the importance of matrimonial homes as a symbol of family pleasure and it is used for family accommodation especially when the house is the only asset acquired throughout marriage.

In the event of the death of one of the parties, the house which was originally owned as sole property with a spouse, will be subject to its distribution according to the ruling of *faraid*. Distribution will be done to the beneficiary of the deceased and the married spouse. As a result, the house needs to be sold and the profit of the sale to be divided in accordance with inheritance law. On behalf of the strings, there is difficulty in obtaining new homes especially of non-working wives due to arising property prices nowadays. Therefore, in Singapore, shared ownership (joint tenancy) married house is a practical solution to safeguard the interests of living couples in terms of securing for shelter after the death of one spouse in accordance with Singapore legal practice. This action is seen as significant as a solution to married couples in dividing the house.

The terms of joint tenancy in Malaysia have been established specifically in the National Land Code Act 1965 (Luqman Hj. Abdullah et al., 2018). It may be referred to in section 344 (1) of Act 56 which clarifies that a property may be transferred to the trustee by order of the court or land administrator and the Registrar shall record it. Then section 344 (2) explained that the co-founder may apply to the Registrar to be registered as a trustee, and the Registrar should record in the registration memorial (Jasni, Mohd Marbawi & Asjad, 2017). The important principle of joint tenancy, the right of survivorship also exists in the National Land Code Act, which is in section 345 (1) which states that when a co-owner dies, the ownership of the deceased will move to the surviving co-owner exclusively.

Based on this method, the “Right of Survivorship” principle applies to ownership of the property. It is a self-reluctant ownership right if one of the owners died, the interest of the deceased is deemed non-existent and the deceased share will automatically transfer to the surviving co-owner. One of the co-owners cannot sell the assets alone and family members of the owner will lost their entitlement to the share of the deceased property through inheritance (Sadali Rasban, 2015). The practice is supported by Suhaimi Mustar & Nasrul Hisyam Nor Muhamad (2013), stated the rights of the deceased will move to the owner living automatically, even if the deceased leaves a will. A living spouse cannot distribute to his beneficiaries any rights in the property because according to this method the rights of the deceased are missed at the time of his death and do not form part of his property.

Joint tenancy is included in the Statutory Disposition category which is the distribution of inheritance in accordance with the law and it is bound by the CLPA act (Suhaimi Mustar & Nasrul Hisyam Nor Muhamad, 2013). This statement is also supported by Luqman Hj. Abdullah et al. (2018), which states that in Singapore the joint tenancy contract and its implications for ownership are clearly enshrined in the Conveyancing and Law of Property Act (CLPA) 1994, cap 61 as follows: “Joint tenancy is a form of ownership where all co-owners have the same interest. In joint tenancy, there is a right of survivorship. It means that after the death of one of the co-owners, his interest in the flat will automatically be passed on to the surviving co-owner, regardless of whether the deceased co-owner has left a will or not.” Through this method, it could reduce legal and administrative costs and avoid the occurrence of complexity in the process of transferring property later on. According to this *akad*, contributions and payments made by both parties are not taken into account as their agreement has been recorded in this category. In consequences to the agreement, the either parties cannot raised any questions and disputes relating to the financial contributions issued against the monthly instalment payments of the house (Idham Halid, 2010).

The provisions of the joint tenancy and right of survivorship also exist in the National Land Code (Penang and Melaka Titles) Act as described in section 47 (1)(C) of “In two or more persons as joint tenants, such person shall be registered in the Interim Register as co-proprietors thereof, with a right of survivorship”. In this regard, both Malaysian and Singaporean

countries are seen to have existed provisions with respect to joint tenancy, and the provision clearly states that the right of survivorship doctrine applies (Luqman Hj. Abdullah et al., 2018).

Joint Tenancy according to Islamic Law

Every decree in Islam are according to the *Maqasid of Shariah* have its own objectives and wisdom (Hasliza Talib et. al, 2016). This is seen in accordance with the concept of joint tenancy which is an instrument for Muslim property planning according to the current situation. Discussion on the concept of joint tenancy according to *Maqasid Syariah* should be done to realize the application of *al-Kulliyat al-Khams*, as well as to celebrate *maslahah* and reject *mafsadah*.

One of the main *maqasads* in the investigation of the ruling on property management of Muslims is to safeguard the interest of family members in terms of property that can help the life of his family members, or from the point of care of family relationships or relationships among relatives, as well as one is responsible for the care of his family while still alive. *Syarak* also emphasized on responsibility and emphasis on the care of the family members after death as well. In a *hadith* narrated by Sa'd bin Abi Waqqash RA, the Prophet PBUH said;

“Indeed, if you leave the warism in the rich situation it is better for them than you leave them in poor condition, until they ask others.”

Sahih Bukhari (0673)

The creation of *shariah* according to the purpose of divine is for the benefit of slaves in the world and in the hereafter through the responsibility of Islamic law (Nora'inan Bahari, 2015). The *Maqasid Syariah* which is intended is either fundamental (basic), necessity (*hajiyyat*) or perfection (*tahsiniyyat*). The aspect of need and perfection is complementary to the fundamental needs. Among the *maslahah daruriyyah*, *hajiyyah* and *tahsiniyyah* are categorized as *ammah* and special. In the event of contradiction between the two *maslahahs* that have the same type in the same position, it should be prioritized by *maslahah kubra* or *maslahah* which is more important on the *maslahah of sughra* or less importantly (Ridzwan Ahmad, 2008).

Joint Tenancy Application based on Fiqh and Usul Fiqh Methods

In order to realize this goal, certain standards need to be refined, which is to prioritise *maslahah* which has a worse effect when ignored on *maslahah* which is less of an adverse effect. Giving full home ownership rights to living spouse, is a bigger *maslahah* compared to dividing the house through inheritance laws to the heirs of the deceased. Taking care of the welfare of the couple to pursue life with the deceased should be given priority. If left behind, it invites harm to the living couple for having to go through the difficulty of getting a new and comfortable place to raise the children left with him.

Discussion on this issue is extended by looking at the application of *qawa'id fiqh* which states:

يتحمل الضرر الخاص لأجل دفع الضرر العام
«Lifted specific harm for refusing general harm.»

In the context of joint tenancy, general harm needs to be rejected which is the property of the deceased's relics, will not be inherited by the next of kin of the deceased to lift the more specific harm that is the harm borne by the wife and the children of the deceased from living in a state of detachment and difficulty obtaining accommodation if the house is distributed according to *faraid* to other beneficiaries. Other Islamic jurisprudence is:

إِذَا تَعَارَضَ مَفْسَدَتَانِ رُوِيَ أَعْظَمُهُمَا ضَرَرًا بِأَزْيَتِكَابِ أَحْفَاهِمَا
“When the two *mafsadahs* collide, they are sustained (rejected) the greatest harm by doing lighter harm” (<https://muftiwp.gov.my>).

The selection of lighter *mafsadah* is also stated by Imam al-Syafie in his book:

ولكن العاقل الذي يدفع بين الشرين فيختار أيسرهما
“But the wise man pushed between the two damage, and chose the lightest of the two.”

Islamic jurisprudence further states:

الضرر الأشد يزال بالضرر الأخف

“A large harm is removed with a mild harm”

Sometimes there is a clash between two *mafsadahs* in a state that cannot be celebrated unless it is forced to choose one of the *mafsadah* (Ridzwan Ahmad, 2008). Therefore, when there is a clash between lightweight and heavy *mafsadah* then preferred heavier rejection of *mafsadah*. In the issue of distribution of a single property through the joint tenancy method, there is a clash between two interests involving the co-owner and the beneficiary of the ownership part of the deceased. Such interest if left behind will cause harm to the parties. For example, the co-owner (living spouse) is forced to release the deceased's share on the property (house) to be divided *faraid* to the beneficiary of the deceased, thus causing him to lose their place of residence. Whereas for the beneficiary of the deceased, if their right is granted to the co-owner then the beneficiary will lose the right to inherit the estate left by the deceased.

Based on this method, the importance of maintaining the welfare of the living spouse as well as the children under his dependents through the principle of joint tenancy should be prioritised rather than giving the deceased's beneficiary the right to the property. This provides space and opportunities for co-owners to continue their survival and fulfil the responsibility of caring for the welfare of the children. Therefore, it is appropriate that if the pro part of the deceased recorded under the principles of joint tenancy is granted to the co-owner automatically and discharged the rights as inheritance. Furthermore, the property is a stakeholder's property throughout their marriage.

Scholars are of the opinion that the original ruling of a new *akad* is permissible. Al-Kasani of *madhhab* Hanafi is of the opinion that *akad* that developing a property is permissible. Imam al-Shatibi in his book also gives the same opinion that if it is found that an *akad* can preserve the benefit of man, it is permissible as long as there are no *syarak* obstacles contained in a contract, such as the objectives of the contract that is unclear of its purpose, the *syubhah* thereon, there is a mistreatment (*zulm*), there are fraudulent elements (*gharar*), so that the contract is considered valid and the conditions specified on the contract are valid conditions (www.muis.gov.sg).

Based on the above opinion, by choosing a joint ownership contract the owners have expressed a desire for the home they own will remain wholly owned by the surviving co-owner after his death. Additional documents such as *hibah ruqba* are no longer required because the owners have noticed that the share of the asset (home) will fall after his death. The pair's consent to this ownership contract is one of the executors in property planning in preparation in the future.

CONCLUSION

Based on the above discussion, there are difficulties to face in planning a property for the survival of a spouse or heir after the death of the property owner. It involves the knowledge, procedures, costs incurred and the attitude of the parties involved. The joint tenancy method is seen as an alternative method in the distribution of a single property in the form of a marital home after the death of one party to ensure that each claim can be settled quickly and fairly against all parties. Matrimonial property should be managed in line with the *Maqasid Syariah* which requires *maslahah* to family members if the couple's marriage is faced with a living divorce or the death of one of the parties. On this basis, shared ownership of the marriage house and accepting the right of survivorship principles should be considered according to *maslahah*. In this context, the relics of the deceased will be given entirely to the living spouse as well as discharged the rights of the beneficiaries against it are desirable despite the opposition of other beneficiaries for looking at the needs usually more required by the spouse and children of the deceased.

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CONFLICT OF INTERESTS

This article does not conflict with interest of any parties and stakeholder.

AUTHORS' CONTRIBUTIONS

Hanizad Ramlan and Noorul Huda Sahari designed the study and gathered the literature on joint tenancy concept and matrimonial properties. Azhar Abdul Aziz and Rafeah Saidon gathered the literature on *fiqh* and *usul fiqh* methods.

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