



The *Locus Standi* of Heirs in Claiming Matrimonial Property (Jointly Acquired Property) After Death Among Muslims in Malaysia

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Abstract

The right to claim matrimonial property (jointly acquired property) is an exclusive entitlement of the husband or wife that could be pursued in the event of a divorce, polygamy, death or conversion to another religion. In cases where such claims arise following a death of either spouse, the Syariah Court has allowed heirs to continue the claim for matrimonial property on behalf of the deceased, provided that the deceased had initiated such a claim while the deceased was still alive. However, complications arise when heirs attempt to file such claims even though the deceased never pursued any claim during the deceased's lifetime. This article explores the legal standing, or *locus standi*, of heirs who adduce claims on matrimonial property after the death of a relative, based on Syariah Court decisions in Malaysia. This qualitative study employed document analysis, presented descriptively through the case study methodology, involving Syariah Court proceedings. Findings indicate that, in principle, heirs, other than the husband or wife who is still living, do not automatically possess the legal standing to claim matrimonial property on behalf of the deceased, as they do in matters of inheritance under Islamic estate law, unless the deceased had explicitly delegated such authority to them. Nonetheless, it is essential to first determine why eligible parties had failed to file the claim during their lifetime. Given the absence of clear textual evidence from Islamic sources either permitting or prohibiting such claims by heirs, and the lack of specific provisions addressing this issue in state-enacted Islamic family law, judges have exercised their discretion in varying ways when deciding these cases.

Keywords: *Locus standi*, heirs' claims, matrimonial property after death

Abstrak

Hak untuk menuntut harta bersama (harta yang diperoleh bersama) merupakan hak eksklusif suami atau istri yang dapat diajukan dalam peristiwa perceraian, poligami, kematian, atau perpindahan agama. Dalam kasus di mana tuntutan tersebut muncul setelah kematian salah satu pasangan, Pengadilan Syariah membolehkan ahli waris untuk melanjutkan tuntutan atas harta bersama atas nama almarhum, asalkan almarhum telah memulai tuntutan tersebut semasa hidupnya. Namun, permasalahan timbul ketika ahli waris mencoba mengajukan tuntutan meskipun almarhum tidak pernah mengajukan klaim selama hidupnya. Artikel ini membahas kedudukan hukum (locus standi) ahli waris yang mengajukan tuntutan atas harta bersama setelah kematian kerabat, berdasarkan putusan Pengadilan Syariah di Malaysia. Studi kualitatif ini menggunakan analisis dokumen yang disajikan secara deskriptif melalui metodologi studi kasus, melibatkan proses persidangan di Pengadilan Syariah. Temuan menunjukkan bahwa pada prinsipnya, ahli waris selain suami atau istri yang masih hidup, tidak secara otomatis memiliki kedudukan hukum untuk menuntut harta bersama atas nama almarhum, sebagaimana dalam perkara warisan menurut hukum waris Islam, kecuali almarhum secara tegas telah memberikan kuasa tersebut kepada mereka. Namun demikian, penting untuk terlebih dahulu menentukan alasan mengapa pihak yang berhak tidak mengajukan tuntutan selama hidupnya. Mengingat tidak adanya bukti tekstual yang jelas dari sumber Islam yang secara tegas membolehkan atau melarang tuntutan oleh ahli waris, serta ketiadaan ketentuan khusus dalam undang-undang keluarga Islam negara bagian yang mengatur isu ini, para hakim menggunakan kebijaksanaan mereka secara beragam dalam memutuskan kasus-kasus tersebut.

Kata kunci: *Locus standi, klaim ahli waris, harta bersama setelah kematian*

Introduction

Matrimonial property refers to property that has been acquired, accumulated, or developed by a husband and wife during their legally recognized course of marriage according to Islamic law, whether through direct or indirect contributions. For Muslims in Malaysia, the right to claim matrimonial property (jointly acquired property) is an exclusive entitlement of the husband or wife that could be pursued in the event of a divorce,¹ polygamy,² death³, or conversion to another religion.⁴

¹Noorul Huda Sahari and A. M. Siti Khadijah, "Post-Marriage Division of Matrimonial Property (Harta Sepencarian) in Malaysian Syariah Court," *Global Journal Al-Thaqafah* (2019), p. 49–50.

²Md Yazid Ahmad et al., "Significance Of Provision For Harta Sepencarian In Polygamy In Islamic Family Law Of Malaysia," *International Journal of Advanced Research* 8, no. 8 (2020), p. 1156-1160; Siti Marlina and Haris Mubarak, "Joint Property After Divorce In Polygamous Marriage: Comparative Research in Indonesia and Malaysia," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 22, no. 2 (2022), p. 276-278.

³Miszairi Sitiris & Akmal Hidayah Halim, "Tuntutan Harta Sepencarian dalam Kes Kematian," *Kanun* 22, no. 1 (2010), p. 36.

⁴Subsection 119 (11), Negeri Sembilan Islamic Religious Administration Enactment 2003.

Therefore, property jointly acquired by the wife and the husband during the course of their marriage is considered jointly owned and should be divided according to the extent of each party's contribution in acquiring it,⁵ without disregarding individual ownership rights.⁶ The division should not be done equally by default without a comprehensive consideration of justice.⁷ In the context of the wife's "indirect contribution" to jointly acquired property, most contemporary Islamic scholars agree that the wife has a rightful claim to it.⁸ However, there are views suggesting that the "indirect contribution" concept should be reassessed, as it may lack a strong foundation pertaining to the application of Shariah principles and Islamic legal frameworks.⁹ Nonetheless, effective and well-managed handling of jointly owned property is essential to ensure the economic and social stability of both parties as it would facilitate their navigation of life's challenges.¹⁰

Matrimonial property is also known by various terms such as *gono-gini*, *campur-kaya*, *harta suarang*, *cakara*, *barang perpantangan*,¹¹ *carian laki bini*, *pencarian*, *pencurian*, *hareuta sihareukat*, and *drube-garbo*.¹² According to Sumatran custom, *gono gini*, or joint property, is also referred to as '*harto sekutu*', which refers to property jointly obtained by the husband and wife during their course of marriage.¹³

⁵Jefry Tarantang et al., "Rereading the Concept of Joint Property: Fiqh Literacy in the Book of Sabail Muhtadin and the Genealogy of Sheikh Arsyad's Thoughts," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 3 (2024), p. 1840; Abd Rouf, Mufidah Ch, and Zaenul Mahmudi, "Joint Property Division in Indonesia: A Gender Equality Viewpoint," *De Jure: Jurnal Hukum Dan Syar'iah* 15, no. 2 (2023), p. 247.

⁶Hani Sholihah, "Pembagian Harta Bersama Menurut Hukum Islam," *Al-Manahij: Jurnal Kajian Hukum Islam* 1, no. 2 (2007), p. 180.

⁷JM. Muslimin and Yulia Fatma, "The Actualization of Justice in the Settlement of Joint Assets Due to Divorce: Comparative Analysis of Decisions of the Religious Courts," *De Jure: Jurnal Hukum Dan Syar'iah* 12, no. 2 (2020), 189.

⁸Hafizha Harts, "Perspektif Ulama Kota Langsa Terhadap Pembagian Harta Bersama Bagi Istri Yang Tidak Bekerja," *El-Usrah: Jurnal Hukum Keluarga* 5, no. 2 (2022), p. 385; Jumni Nelli, "Analisis Tentang Kewajiban Nafkah Keluarga dalam Pemberlakuan Harta Bersama," *Al-Istinbath: Jurnal Hukum Islam* 2, no. 1 (2017), p. 40.

⁹Amir Fazlim Jusoh Yusoff, "Reassessment of Islamic Legal Bases for Matrimonial Property in Malaysia," *El-Usrah: Jurnal Hukum Keluarga* 7, no. 2 (2024), p. 553.

¹⁰Nurnazli Nurnazli et al., "Productive Dowry and Women's Economic Empowerment and Their Influence on Marital Assets in Bandar Lampung," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8, no. 2 (2024), p. 975.

¹¹Kholil Nawawi, "Harta Bersama Menurut Hukum Islam Dan Perundang-Undangan Di Indonesia," *Mizan: Journal of Islamic Law* 1, no. 1 (2018), p. 1.

¹²Abdullah Abu Bakar, *Harta Sepencarian Mengikut Perspektif Islam*, Ahmad Ibrahim & lain-lain (pnyt.), *Al-Ahkam: Undang-Undang Harta dalam Islam*, Jld.3, Cetakan Pertama, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), p. 142.

¹³Pokok-Pokok Adat Pucuk Jambi Sembilan Lurah, Vol. II, *Hukum Adat Jambi*, Lembaga Adat Sumatera Selatan, 2003), p. 23.

Generally, matrimonial property (jointly acquired property) is deemed as a customary legal practice among the Malay communities of the Nusantara,¹⁴ including Malaysia. It was later recognized under Islamic law through the principle of *'urf* (custom), *maslahah mursalah* (public interest),¹⁵ *syirkah* (partnership) and *al-'adah al-muhakkamah* (custom may be upheld as law).

This practice does not contradict Islamic law, especially in cases involving the upholding of justice and the welfare of parties in a marriage.¹⁶ The division of matrimonial property may also be determined through *musyawarah* and *muafakat* (mutual agreement),¹⁷ Syariah Court judgements and according to customary practices that do not contradict Islamic legal principles.¹⁸ The Syariah Court should also consider the element of *maslahah* (public interest) when determining the division of such assets.¹⁹

The term *locus standi* is a Latin phrase that literally means 'place to stand', whereas from a legal aspect, it means 'standing in court'.²⁰ Bryan A. Garner had briefly defined it as 'the right to bring a case to court or the right to be heard in court'.²¹ The term *locus standi* can be used to explain two situations. First, it refers to an individual's right to file a claim or demand (when referring to the *locus standi* of a claimant in court). Second, it refers to the right to be sued or demanded (when referring to the *locus standi* of the defendant) (*Amnah bt Shaari v Roderick John Brooks*).²² This doctrine ensures that only parties with a legitimate legal interest may initiate or maintain legal proceedings.²³ This principle is integral to the

¹⁴Mohd. Norhusairi Mat Hussin, "Sejarah Dan Perkembangan Amalan Pembahagian Harta Sepencarian Dalam Masyarakat Islam Di Malaysia (History and Development of Harta Sepencarian Distribution Practice in Muslims Society in Malaysia)," *Journal of Al-Tamaddun* 15, no. 2 (2020), p. 110.

¹⁵Elimartati and Elfia, "Kritik Terhadap Kompilasi Hukum Islam Tentang Ketentuan Harta Bersama Dalam Perkawinan," *Juris: Jurnal Ilmiah Syariah* 19, no. 2 (2020), p. 233; Hayatullah Laluddin et al., "An Analysis of Maslahah's Development through Al-Ghazali Pre and Post Al-Ghazah Periods," *International Business Management* 6, no. 2 (2012), p. 193.

¹⁶Abdullah Abu Bakar, *Harta Sepencarian Mengikut Perspektif Islam*, dlm. Ahmad Ibrahim & lain-lain, (pnyt.), *Al-Ahkam: Undang-undang Harta dalam Islam*, Jil. 3, Cet. 1, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), p. 138.

¹⁷Abidin Nurdin, "Pembagian Harta Bersama Dan Pemenuhan Hak-Hak Perempuan Di Aceh Menurut Hukum Islam," *El-Usrah: Jurnal Hukum Keluarga* 2, no. 2 (2020), p. 150.

¹⁸Pidayan Sasnita, "Pembagian Harta Warisan Akibat Perceraian Menurut Hukum Adat Di Kecamatan Tanah Kampung Kota Sungai Penuh Ditinjau Dari Kompilasi Hukum Islam," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 14, no. 01 (2018)p. 84.

¹⁹Zaiyad Zubaidi, "Maslahah Dalam Putusan Hakim Mahkamah Syariah Di Aceh Tentang Perkara Harta Bersama," *El-Usrah: Jurnal Hukum Keluarga* 4, no. 1 (2021), p. 198.

²⁰Nasser Hamid and Hamid Ibrahim, *Malaysian Law Dictionary*, (Selangor: Gavel Publications, 2007), p. 501.

²¹Garner, B. A., *Black's Law Dictionary (7th ed.)*, (Minnesota: West Group, 1999), p. 952.

²²(2007) 24 JH 33

²³Nor Azlina Mohd Noor and Ahmad Shamsul Abd Aziz, "'Standing' Room Only: A Vintage Issue In Estate Administration Claims," *UUM Journal of Legal Studies* 10 (2019), p. 2.

administration of justice, as it prevents the courts from being burdened with actions brought by individuals or entities who lack a legitimate legal interest in the dispute.²⁴

The importance of *locus standi* in the context of heirs' claims (other than the husband and wife) pertaining to the division of matrimonial property after death can be seen in *Awang bin Abdul Rahman v Shamsuddin bin Awang & Another*,²⁵ *Wan Nor Azlin binti Wan Mohd Husain & 3 Others v Wan Mohd Husain bin Wan Ibrahim*²⁶ and *Mohd Azmi bin Mohamad Jamil & 2 Others v Mohamad Jamil bin Khair*,²⁷ whereas identifying the *locus standi* of the heir is usually determined during the trial in court.

Specific provisions regarding the power of the court to hear and decide cases regarding matrimonial property after death are not clearly enshrined in any Islamic Family Law in Malaysia,²⁸ thus, leading to the existence of different interpretations in some states in terms of its implementation. For example, matters related to matrimonial property after death in the state Selangor was only able to be heard after the existence of Practice Directive No. 5 of 2003 compared to the states of Kelantan and Terengganu, which already had the jurisdiction to hear claims for matrimonial property after death.²⁹

Hence, claims for matrimonial property after death do not only receive attention from the surviving spouse (*Rahmah bt Mohd Lazim v Rosnani bt. Husin & 6 Others*,³⁰ *Rohani bt Awing & 3 Others v Maimon bt. Awing & 2 others*).³¹ Moreover, it has become a tendency among the heirs (other than the husband and wife) who act as claimants to matrimonial property on behalf of the deceased to determine the extent of their right to make a claim for matrimonial property after death on behalf of the deceased³² prior to the commencement of the formal estate distribution process.³³

Therefore, the question arises as to what the position of the heirs (other than the husband and wife) is when laying claim to matrimonial property after death in

²⁴Jack Tsen Ta Lee, "A Place to Stand to Move the Earth: Standing and the Rule of Law," *Singapore Journal of Legal Studies* 2020 (2020), p. 367.

²⁵(1997) 11 JH 193

²⁶(No. Kes: 10400-017-0094-2013)

²⁷(No. Kes: 10400-017-0153-2016)

²⁸Miszairi Sitoris & Akmal Hidayah Halim, "*Tuntutan Harta Sepencarian dalam Kes Kematian*," *Kanun* 22, no. 1 (2010), p. 26.

²⁹Kamar Ainiah Kamaruzaman, "*Pemakaian Hukum Harta Sepencarian dalam Mahkamah*," Tajul Aris Ahmad Bustami, Farid Sufian Shuaib & Mohd Hisham Mohd Kamal (pnvt.), *Harta Sepencarian Prosiding Ex-Parte Perintah Injuksi*, (Gombak: Universiti Islam Antarabangsa Malaysia, 2003), p. 74

³⁰(2009) 29 JH (2) 161

³¹(2013) 36 JH 106

³²Miszairi Sitoris & Akmal Hidayah Halim, "*Tuntutan Harta Sepencarian dalam Kes Kematian*," *Kanun* 22, no. 1 (2010), p. 36-37.

³³Md Yazid Ahmad, Nor Yani Isa, and Anwar Fakhri Omar, "Analysis of Heir Pre-Investigation Mechanism: According to Shari'ah Perspective," *Mediterranean Journal of Social Sciences* 5, no. 29 (2014), p. 107-112.

Malaysia if there was no claim submitted by them (husband or wife) before their demise³⁴ and there are no indications of the owner's (husband or wife) right to lay claim before either party's demise.³⁵

Thus, based on the cases concerning claims on matrimonial property after death filed by the heirs on behalf of the deceased, it is clear that what is meant by the term *locus standi* refers to the right of the heirs of the deceased (other than the husband and wife) to take action to submit claims on matrimonial property after death on behalf of the deceased through the legal process by considering the testimony and evidence presented by the next of kin during the trial and not at the beginning of the case registration process.

This qualitative study is divided into three sections, namely study design, data collection and data analysis. The study design was a content analysis because data collection did not involve the testing of numerical data³⁶ but rather an investigation process based on a clear investigation methodology aimed at examining a problem,³⁷ mainly by observing, explaining and interpreting the background in its true and natural state.³⁸ Meanwhile, data collection for the content analysis approach involved a document analysis that referred to theses, journal articles, and authoritative books related to matrimonial property after death in Malaysia for the purpose of collecting detailed information related to this issue. References from a legal perspective were made by referring to cases related to matrimonial property, including matrimonial property after death. For example, the Hukum Journal (JKSM), legal statutes, especially Islamic Family Law Enactments from various states (Selangor Islamic Family Law Enactment 2003) and State-level Syariah Court Administration Enactments. The data obtained were descriptively analysed because as this approach is appropriate for identifying issues regarding the position of matrimonial property after death and the *locus standi* of heirs' rights when laying claims related to matrimonial property after death according to Islamic family law in Malaysia.

³⁴Daud Muhammad, "*Harta Sepencarian dalam Hukum Syarak*". Dlm. Akmal Hidayah Halim, Badruddin Ibrahim & Farid Sufian Shuaib (pnyt.). *Siri Isu-isu Mahkamah Syariah Undang-undang Harta & Amanah*", (Jabatan Undang-undang Islam: Universiti Islam Antarabangsa Malaysia, 2009), p. 8

³⁵Abdullah Abu Bakar, *Harta Sepencarian Mengikut Perspektif Islam*, Ahmad Ibrahim & lain-lain (pnyt.), *Al-Ahkam: Undang-Undang Harta dalam Islam*, Jld.3, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), p. 146

³⁶Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research (3rd Ed.): Techniques and Procedures for Developing Grounded Theory*, *Basics of Qualitative Research (3rd Ed.): Techniques and Procedures for Developing Grounded Theory*, 2012, p. 5.

³⁷J W Creswell, "Research Design Qualitative Quantitative and Mixed Methods Approaches," *Research Design Qualitative Quantitative and Mixed Methods Approaches*, 2003, p. 75.

³⁸Othman Lebar, *Penyelidikan kualitatif – Pengenalan kepada Teori dan Metode*, (Tanjong Malim: Penerbitan Universiti Pendidikan Sultan Idris, 2009), p. 7.

Normally, this issue usually arises when a husband enters into a polygamous marriage. Thus, in this context, Miszairi Sitiris and Akmal Hidayah Halim³⁹ classified it into two situations. First is when the husband dies and later, one of his wives also died without submitting any claim for matrimonial property during her lifetime. In the second situation, one of the wives dies while her husband is still alive. Therefore, the question arises as to whether the heirs of the deceased wife can lay claim to matrimonial property after death on her behalf when during her lifetime no claim for matrimonial property was submitted by her?

A Brief Discussion of the Concept Matrimonial Property

Matrimonial property is defined as property acquired jointly by a husband and wife during the course of marriage⁴⁰ or property from a joint effort between a husband and wife after marriage,⁴¹ including movable and immovable assets acquired jointly by a husband and wife during the course of marriage⁴² (*Zailan bin Abas and 3 Others v. Zaiton binti Abdullah*), either through direct contribution and the joint effort of both parties (*Rogayah binti Ismail v. Abd Razak bin Sulung*)⁴³ or material and/or capital support (*Hazlina binti Hamidin v. Muhammad Zaidi bin Majid*),⁴⁴ which has monetary value (ringgit), or a sole effort by the husband with an element of indirect contribution from the wife (*Norayah Bakar v. Mohd Adnan Mohd. Amin*),⁴⁵ such as moral support (*Boto' bin Taha v Jaafar bin Mohamed*),⁴⁶ advice, aristocratic status (*Tengku Anun Zaharah v Dato' Dr Hussien bin Mohamed Yusuf*)⁴⁷ and domestic service (*Rokiah v Mohamed Idris*)⁴⁸ including assets expanded or developed during marriage involving property owned before marriage (*Hujah Lijah bte Jamal v Fatimah binti Mat Diah*)⁴⁹ or assets attained from various types of work carried out by the husband and wife (*Piah binti Said v Che Lah bin Awang*)⁵⁰ or property registered in the husband's name (*Rahmah binti Mohd Lazim v Rosnani binti Husain & 6 Others*),⁵¹ according to the conditions stipulated in Islamic law. However, it is undeniable that the party that has acquired the assets through one's

³⁹Miszairi Sitiris & Akmal Hidayah Halim, "Tuntutan Harta Sepencarian dalam Kes Kematian," *Kanun* 22, no. 1 (2010), p. 26-46.

⁴⁰M.B. Hooker, *The Personal Laws of Malaysia*, (Oxford University Press: Kuala Lumpur, 1976), p. 77.

⁴¹M.B. Hooker, "The Interaction of Legislation and Customary Law in Malay State," *Comments the America Journal of Comparative Law*, Vol. 16 (1968), p. 421.

⁴²Mimi Kamariah Abdul Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal, 1998), p. 197.

⁴³(2005) 20 JH (2) 342

⁴⁴(2005) 20 JH (2) 217

⁴⁵(2006) 21 JH (1) 81

⁴⁶(1985) 2 MLJ 98

⁴⁷(1980) 3 JH 125

⁴⁸(1989) 6 JH (2) 272

⁴⁹(1950) MLJ 65

⁵⁰(1983) 2 JH 220

⁵¹(2009) 29 JH (2) 161

own effort or contribution, which is greater than the other party, should receive a larger share (*Hamidah binti Abdullah v Mohd Johanis bin Busu*).⁵²

Matrimonial property claims can be made either during or after a divorce⁵³ or demise⁵⁴ (*Bukhari Mohd Noor v. Aisyah Ismail*;⁵⁵ *Hujah Lijah bte Jamal v. Fatimah binti Mat Diah*;⁵⁶ *Bunga bt Ibrahim v Ila@ Zila bt Abdullah and Others*)⁵⁷ or while the marriage is still ongoing, i.e. during the application for polygamy or after polygamy has occurred (*Mat Atan bin Mansor v Normah binti Amazid*;⁵⁸ *Zaiton Binti Adam v Ismail Bin Mamat*)⁵⁹ and also if there is a change in religion (apostasy) by one of the parties in the marriage⁶⁰ (Subsec. 119 (11), Negeri Sembilan Islamic Religious Administration Enactment 2003).

As for provisions in Islamic family law in the respective states, matrimonial property is defined as "*property acquired jointly during the course of the marriage in accordance with the conditions stipulated in Islamic law*" (Sec. 2, Johor Islamic Family Law Enactment 2003 En.17/03). Moreover, matrimonial property is interpreted as "*property jointly acquired by husband and wife, either directly or indirectly during the course of marriage in accordance with conditions stipulated by Islamic law*" (Sec. 2, Selangor Islamic Family Law Enactment 2003 Mr. 2/03). Whereas for Perak (Sec. 2, Perak Islamic Family Law Enactment 2004 En. 6/04) and Pahang (Sec. 2, Pahang Islamic Family Law Enactment En. 3/2005), matrimonial property is defined as "*income or property acquired through the joint efforts of the husband and wife, including income accruing from capital acquired through their joint efforts*".

In Indonesia, matrimonial property, also known as jointly acquired property, is defined under Article 35, Paragraph (1) of Law Number 1 of 1974, as property acquired during the course of a marriage. Article 1 of the Compilation of Islamic Law (KHI) also states that jointly acquired property refers to any asset acquired, either individually or jointly, by the husband and wife during the course of their marriage, regardless of under whose name the property is registered.⁶¹ This jointly

⁵²(2008) 2 JH (26) 182

⁵³Suwaid Tapah, *Harta Perkahwinan (Harta Sepencarian)*, Ahmad Hidayat Buang (pnyt.), *Undang-Undang Islam di Malaysia: Prinsip & Amalan*, (Kuala Lumpur: Universiti Malaya, 2007), p. 64.

⁵⁴Miszairi Sitiris & Akmal Hidayah Halim, "Tuntutan Harta Sepencarian dalam Kes Kematian," *Kanun* 22, no. 1 (2010), p. 44.

⁵⁵(2006) 21 JH 26

⁵⁶(1950) MLJ 65

⁵⁷(1999) 9 JH 198

⁵⁸(05100-011-0332-2014)

⁵⁹(11100-017-0137-2014)

⁶⁰Md Yazid Ahmad et al., "Significance Of Provision For Harta Sepencarian In Polygamy In Islamic Family Law Of Malaysia," *International Journal of Advanced Research* 8, no. 8 (2020), p. 1155-1160.

⁶¹Harts, "Perspektif Ulama Kota Langsa Terhadap Pembagian Harta Bersama Bagi Istri Yang Tidak Bekerja." p. 375.

owned property also includes assets that may take the form of rights or obligations, as outlined in Article 91 (1).⁶² However, any asset brought into the marriage, including inheritances, wills or gifts received by either party, are considered personal property and remain fully under the control of the individual, unless both parties agree to classify them as jointly acquired property.⁶³ Therefore, jointly acquired property is closely linked to any agreement or arrangements made between the husband and wife, if such an agreement exists.⁶⁴

Therefore, all assets acquired before the date of marriage, in an invalid marriage, or those materializing after the date of divorce (*Ningal @ Yang Chik v Jamal*),⁶⁵ and property acquired during the course of marriage through inheritance, gift, grant or gift of life (*Che Abdullah Che Kob v Wan Jarah Wan Daud*)⁶⁶ is not considered as matrimonial property but rather, individually-owned property. Hence, even if a property is acquired during the couple's course of marriage but there is a release agreement signed by one of the parties stating that the said party will not claim the property as matrimonial property in the event of a divorce and this is documented as a Court Order, then the property is not included in the matrimonial property category (*Rahima Baba v Abu Hanifah Bachik*).⁶⁷

The Position of Matrimonial Property After Death

Although a specific discussion or text regarding matrimonial property after death is not found in the al-Qur'an and Hadith, it has been discussed by contemporary Islamic scholars who took into account the views of *fiqh* scholars found in scriptures, such as *Bughyat al -Mustarsyidin*, *al-Turuq al-Hukmiyyah fi al-Siasah al-Syariyyah*, *al-Furuq*; *I'alah al-Talibin*, *al-Umm*; *Fiqh al-Sunnah*, and *al-Fatawa al-Hindiyyah*, to ensure that this claim is consistent with Islamic law. Based on the views and arguments expressed by the researchers, it clearly indicates that the time for claiming matrimonial property should be expanded to include claims for matrimonial property after death.

Ab. Kadir Muhammad⁶⁸ stated that Islamic law recognizes the ownership of matrimonial property based on the contribution factor. Thus, if a property has been determined to be matrimonial property, then they (husband and wife) are still entitled

⁶²Asni Asni, "Idealisasi Perlindungan Istri Dalam Penerapan Hukum Harta Bersama Di Pengadilan Agama," *Al-Manahij: Jurnal Kajian Hukum Islam* 9, no. 2 (2015), p. 290.

⁶³Muhamad Beni Kurniawan, "Konsep Pembagian Harta Bersama Berdasarkan Kontribusi Dalam Perkawinan," *AHKAM: Jurnal Ilmu Syariah* 17, no. 2 (J2017), p. 358.

⁶⁴Nurunnisa Nurunnisa et al., "Implications of Annulment of Marriage on the Distribution of Joint Assets According to the Compilation of Islamic Law and National Law," *Syariah: Jurnal Hukum Dan Pemikiran* 23, no. 1 (2023), p. 20.

⁶⁵(1989) 5 JH (1) 186

⁶⁶(2005) 20 JH (2) 200

⁶⁷(2005) 19 JH (1) 171

⁶⁸Ab Kadir Muhammad, "*Harta Sepencarian: Konsep dan Pelaksanaannya di Malaysia*", *Jurnal Syariah* 4, no. 1 (1996), p. 105.

to the property⁶⁹ regardless of whether it involves a divorce or the death of either party. Whereas in Indonesia, Article 96 of the Compilation of Islamic Law (KHI) states that in the event of a divorce due to death of either party, half of the jointly acquired property belongs to the surviving spouse, unless otherwise specified in a prenuptial agreement.⁷⁰

Meanwhile, Miszairi Sitiris and Akmal Hidayah Halim⁷¹ evaluated this issue based on the aspects of benefits and wisdom in the practice of distributing matrimonial property after death, especially to the wife. This distribution is seen as being consistent with the concept of justice in Islam because if the husband's inheritance is divided according to *faraid*, then the wife will only get a small share (1/4 or 1/8). For example, in the case of the deceased leaving only a male sibling, then that sibling will get a bigger share (*asabah*), although when the husband was alive, it was the wife who shared the joys and sorrows, provided care and helped ease the husband's burden.

Ibrahim Lembut,⁷² who relied on the views of Abd al-Karim Zaydan, stated that it is necessary to apply the *usul fiqh* method when expressing views on this issue. According to him, if the court has the authority to order the distribution of matrimonial property when the couple is divorced, then if the *mafhum mukhalafah* concept is applied, which is based on the *mafhum al-shart*⁷³ concept, there is a reversal of the law on something that is linked to a condition if that condition is not present in it. This means that matrimonial property claims can also be made in the event of the death of one of the parties or both, and not only after a divorce.⁷⁴

Ibrahim Lembut categorized a divorce in Islamic family law as a special pronouncement (*lafaz*), while death as a general pronouncement⁷⁵ when determining the position of claims on matrimonial property after death. This refers to the *usul fiqh* method, as mentioned by Abd al-Karim Zaydan,⁷⁶ whereby when these two pronouncements contradict, the majority of scholars opined that there is no conflict between the two because they adhere to the special pronouncement law when referring

⁶⁹Kurniawan, "Konsep Pembagian Harta Bersama Berdasarkan Kontribusi Dalam Perkawinan." p. 360.

⁷⁰Muslimin and Fatma, "The Actualization of Justice in the Settlement of Joint Assets Due to Divorce: Comparative Analysis of Decisions of the Religious Courts." p. 179.

⁷¹Miszairi Sitiris & Akmal Hidayah Halim, "*Tuntutan Harta Sepencarian dalam Kes Kematian*," *Kanun* 22, no. 1 (2010), p. 32.

⁷²Ibrahim Lembut, *Kaedah dan Keceragaman Pembahagian Harta Sepencarian dalam Harta Pusaka Islam*, Konvensyen Perwarisan Harta Islam 2007, (Kuala Lumpur: Amanah Raya Berhad, 2007), p. 20.

⁷³Abd al-Karim Zaydan, *al-Wajiz fi Usul al-Fiqh*. Cetakan Pertama, (Beirut: Muassasah al-Risalah Nashirun, 2011), p. 291

⁷⁴Abu Bakar Ahmad, "Harta Sepencarian", *Jurnal Hukum* 18, no. 1 (2004), p. 8.

⁷⁵Ibrahim Lembut, *Kaedah dan Keceragaman Pembahagian Harta Sepencarian dalam Harta Pusaka Islam*, Konvensyen Perwarisan Harta Islam 2007, (Kuala Lumpur: Amanah Raya Berhad, 2007), p. 20

⁷⁶Abd al-Karim Zaydan, *al-Wajiz fi Usul al-Fiqh*, (Bayrut: Muassasah al-Risalah Nashirun, 2011), p. 291.

to matters which he indicated. Conversely, the scholars will adhere to the general pronouncement rule when referring to matters that are not indicated by the special pronouncement because the special pronouncement is *qat'i*, while the general pronouncement is *zanni*.

In this regard, Abdullah Abu Bakar⁷⁷ stated that the court can hear a claim for matrimonial property after the death of either party if the claimant successfully presents strong and convincing evidence that the property was acquired during their marriage. However, the requirement is that this claim should be in accordance with the established procedures, namely, the presence of the heirs or testators of the claimed party. The claimant must take an oath to swear to prove that he has never received, reduced or handed over any part of the claimed property to the claimant or anyone else.

Matters related to matrimonial property in Malaysia are enshrined in the respective states' Islamic family law or enactments and have almost identical provisions. For example, in Selangor, this provision is found in Section 122 of the Selangor Islamic Family Law Enactment (Selangor State) 2003 which relates to the power of the court to order the distribution of matrimonial property:

1. The court has the power to allow the pronouncement of *talaq* or when making a divorce order to order that any asset acquired by the parties during the course of their marriage, based on their joint efforts, be divided between them or that any asset acquired by the parties during the course of marriage, based on their joint effort, be divided between them or the proceeds of any asset that is sold to be divided between the parties.
2. In exercising the powers conferred by Subsection (1), the Court shall regard to-
 - a. the extent of the contributions made by each party in the form of money, property, or work towards acquiring the assets;
 - b. any debts owing by either party that were contracted by their joint benefit;
 - c. the need of the minor children in the marriage, if any, and subject to those considerations, the Court shall incline toward an equality of division.
3. The court shall have the power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties any assets acquired during the marriage by the sole efforts or the sale of such assets and the division of the proceeds of the proceeds of sale.
4. In exercising the powers provided in Subsection (3), the Court shall take note of the extent of the contributions made by the party that did not

⁷⁷Abdullah Abu Bakar, *Harta Sepencarian Mengikut Perspektif Islam*, Ahmad Ibrahim & lain-lain (pnyt.), *Al-Ahkam: Undang-Undang Harta dalam Islam*, Jil.3, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), p. 146-147.

acquire the asset, towards the welfare of the family by looking after the home or caring for the family; needs of the minor children of the marriage, if any, and subject to these considerations, the Court may divide the assets or the proceeds of the sale in such proportions as the Court deems reasonable, but in any case, the party whose efforts were acquired shall receive a greater proportion.

5. For the purposes of this section, references to assets acquired during the marriage include assets owned by one party prior to the marriage that have been substantially improved during the marriage by one party or by their joint efforts.

Hence, when examining the provisions in Section 122, Selangor Islamic Family Law Enactment 2003 above, there is no specific provision that mentions matrimonial property after death. In fact, specific provisions regarding the court's authority to hear and decide cases related to matrimonial property after death are also not clearly stated in any of the states' Islamic Family Law Acts or Enactments.⁷⁸ This leads to different interpretations in some states regarding the implementation of this provision. For example, as for the implementation of Practice Directive No.1 of 2001 in Selangor, claims for matrimonial property after death cannot be tried in the Selangor Syariah Court due to the absence of specific provisions in the Selangor Islamic Family Law Enactment 1984, as in *Tuan Haji Mustapha Kamal bin Haji Abu Bakar v Abd Kadir b. Endut: Rokiah bte Baba (f) (Third Party)*,⁷⁹ where Judge V.C George in his judgment stated that:

"The doctrine of *Harta Sepencarian* only applies to a divorced spouse who claims against the other spouse during his or her lifetime. Therefore, it is inapplicable in this case".

This means that the doctrine of matrimonial property only applies when a party in a divorce claims his/her rights from the other party while they are still alive. Therefore, a claim for matrimonial property cannot be adduced if it is due to death. Moreover, there have been several decided cases that have rejected the application for the division of matrimonial property after death.⁸⁰

In Selangor, the Selangor State Syariah High Court does not have jurisdiction to hear matrimonial property claims in relation to the property of deceased persons because there is no specific provision regarding the court's authority in this regard, unlike other states that have allowed claims after death.⁸¹ This situation is further

⁷⁸Miszairi Sitiris & Akmal Hidayah Halim, "Tuntutan Harta Sepencarian dalam Kes Kematian," *Kamun* 22, no. 1 (2010), p. 32 ; Abdul Walid Abu Hassan, *Amalan & Permasalahan dalam Urusan Pentadbiran Pusaka/Faraid di Mahkamah Syariah & Mahkamah Sivil, Faraid & Perancangan Perwarisan: Isu Harta Beku & Penyelesaian di Malaysia*, (Kuala Lumpur: Institusi Kefahaman Islam Malaysia (IKIM), 2016), p. 136.

⁷⁹(1993) 2 AMR 44:3215

⁸⁰For example, *Saemah v. Sulaiman* [1948] MLJ 108

⁸¹Kamar Ainiah Kamaruzaman, *Pemakaian Hukum Harta Sepencarian dalam Mahkamah*, Tajul Aris Ahmad Bustami, Farid Sufian Shuaib & Mohd Hisham Mohd Kamal (pnvt.), *Harta*

strengthened by the view of legal practitioners, such as Abdul Hamid Muhammad,⁸² who opined that Section 58 of the Islamic Family Law Act does not provide for an order regarding the claim for matrimonial property after death because the Quran and Hadith have mentioned the interpretation of “inheritance” and how the distribution of inheritance property should be carried out in case of a death. Thus, if the claim for matrimonial property after death is provided, this means that customary practice has prevailed over Sharia.

Ahmad Ibrahim was of the view that although there is no law that clearly states the right to distribute matrimonial property after death, there are cases that have been decided in Kelantan and Terengganu that allow such claims to be made after death.⁸³ This can be seen in *Hujah Lijah bt Jamal v Fatimah binti Mat Diah*,⁸⁴ *Hajah Nek Maimunah bt Salleh*,⁸⁵ *Hajah Saudah bt Che Mamat v Hanafi bin Haji Daud*,⁸⁶ *Bukhari Mohd Noor v Aisyah Ismail*,⁸⁷ *Zaiton binti Abdullah v Zailan bin Abas & 6 Others*⁸⁸ and *Rahmah binti Mohd Lazim v Rosnani binti Husin & 6 Others*.⁸⁹

In a similar vein, opinions expressed by other researchers, such as Abdullah Abu Bakar⁹⁰ and Abu Bakar Ahmad,⁹¹ mention that claims after death can be accepted if the claims are based on clear evidence and involve the rights of the parties involved. Whereas in the case of a divorce or death, claims can be made after a lapse of a lengthy period because the law does not provide a specific time frame for making a claim.

Hence, matters related to matrimonial property after death could only be heard after the existence of Practice Directive No. 5 of 2003 JKSM (Malaysian Syariah Justice Department)⁹² compared to the states of Kelantan and Terengganu,

Sepencarian Prosiding Ex-Parte Perintah Injunksi, (Gombak: Universiti Islam Antarabangsa Malaysia, 2003), p. 74.

⁸²Abdul Hamid Muhammad. *Penambahbaikan dalam Pelaksanaan Undang-undang Harta Pusaka Islam di Malaysia*, Kertas Kerja Seminar Undang-undang Pentadbiran Harta Pusaka Islam Malaysia 2014, (Bangi: Selangor, 2014), p. 3.

⁸³Ibrahim Lembut, *Kaedah dan Keseragaman Pembahagian Harta Sepencarian dalam Harta Pusaka Islam*, Konvensyen Perwarisan Harta Islam 2007, (Kuala Lumpur: Amanah Raya Berhad, 2007), p. 16.

⁸⁴(1950) 16 MLJ 63

⁸⁵(1996) 8 KANUN (2) 187

⁸⁶(1997) 11 JH 21

⁸⁷(2006) 21 JH 26

⁸⁸(2006) 27 JH 299

⁸⁹(2009) 29 JH (2) 161

⁹⁰Abdullah Abu Bakar, *Harta Sepencarian Mengikut Perspektif Islam*, Ahmad Ibrahim & lain-lain (pnyt.), *Al-Ahkam: Undang-Undang Harta dalam Islam*, Jil.3. (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), p. 147.

⁹¹Abu Bakar Ahmad, “*Harta Sepencarian*”, *Jurnal Hukum* 18, no. 1 (2004), p. 9.

⁹²Rabi'ah Muhammad Serji, et. al., “Harta Sepencarian: Isu dan Konflik Perundangan dalam Tuntutan Selepas Kematian dari Perspektif Undang-undang Tanah di Malaysia,” *Islamiyyat* 43, Isu Khas (2021), p. 43.

which already had the jurisdiction to hear claims for matrimonial property after death.⁹³ Until now, specific legal provisions regarding matrimonial property after death have not yet been drafted and gazetted. However, this *lacuna* was accommodated through the existence of Practice Directive No. 5 of 2003 of the Malaysian Syariah Justice Department (JKSM). This was further supported by the issuance of fatwas in some states, such as the fatwa gazetted in the State of Kelantan by the Conference of Ulama' of the Council for Islamic Religion and Malay Customs of Kelantan on 18 August 2002 and by the Selangor State Fatwa Authority on 18 April 2005, which touched on the necessity to distribute matrimonial property after death of one of the parties.⁹⁴ The fatwa regarding the position of matrimonial property after death issued by the Selangor State Fatwa Committee dated 18 April 2005 is as follows:

1. Matrimonial property after the death of one of the parties in a marriage in the state of Selangor can be divided between the husband and wife before a *faraid* (probate), including after the deceased's debts are discharged.
2. The distribution of matrimonial property shall be carried out according to the extent of contribution, either directly or indirectly, from both parties.
3. The distribution agreement must be made by a court order.

The Conference of the Ulama' of the Council of Islamic Religion and Malay Customs of Kelantan on 18 August 2002 discussed fatwas related to claims regarding matrimonial property and decided the following:

1. Matrimonial property claims by the heirs of the deceased (wife) such as children or other heirs who claim from the husband, are permitted, whether this claim is related to a divorce or death.
2. The quantum of claim for this property right by the deceased or the heirs depends on the decision of the Syariah Court.
3. The quantum of claim for this property right by the deceased or his heirs depends on the decision of the Syariah Court.

According to these fatwas, in the event of the death of one of the parties, the surviving party is required to apply for a declaration of matrimonial property in the Syariah High Court before the property is distributed according to *faraid*. In addition, in the State of Kelantan, it is specifically stated in the fatwa that claims for matrimonial property after death can be made by the heirs of the deceased spouse (wife), such as children or other heirs, who can claim from the husband. Therefore, when referring to the views and arguments expressed by these studies, it shows that

⁹³Kamar Ainiah Kamaruzaman, Pemakaian Hukum Harta Sepencarian dalam Mahkamah, Tajul Aris Ahmad Bustami, Farid Sufian Shuaib & Mohd Hisham Mohd Kamal (pnyt.), *Harta Sepencarian Prosiding Ex-Parte Perintah Injunksi*, (Gombak: Universiti Islam Antarabangsa Malaysia, 2003), p. 74.

⁹⁴Mohamad Ali Roshidi Ahmad, "Permasalahan Tuntutan Harta Sepencarian dalam Pembahagian Harta Pusaka," *Jurnal Pengurusan dan Penyelidikan Fatwa* 24, no. 2, Edisi Khas (2021), p. 118-131; Md. Yazid Ahmad, *Hak Tuntutan Harta di Mahkamah Syariah*, (UKM: Penerbit UKM, 2021), p. 130.

claims to matrimonial property should be expanded to include claims for matrimonial property after death.

Nevertheless, one opinion expresses ambiguity regarding the position of matrimonial property after death, namely that by the Hon. Abdul Hamid Mohamad (former Chief Justice), that needs clarification in order to be able to fully comprehend the fundamentals that determine this matter. He was of the view that the Qur'an and Hadith have clearly stated how property belonging to a deceased Muslim should be distributed. Therefore, it is inappropriate to distribute matrimonial property after death, which is basically customary practice that overrides distribution according to the *faraid*, which is based on Islamic law.

Hence, it is possible that Section 58 of the Islamic Family Law Act (Federal Territories) 1984 only provides for the division of matrimonial property in two situations, namely when the court confirms the pronouncement of divorce and when the court makes a divorce order. This is evident in *Hajah Saemah v Haji Sulaiman*⁹⁵ when the court rejected the distribution of matrimonial property after death submitted by the plaintiff because the court did not have jurisdiction to hear the case. In relation to Practice Direction No. 5 of 2003 JKSM regarding when a claim for matrimonial property can be made, which is either during a divorce claim, after a divorce or after death, he was of the view that the Practice Direction, which is usually issued by the Chief Judge, Judge or the Registrar of the High Court, is not binding and does not have the force of law, let alone establish the jurisdiction of the court.⁹⁶

In summary, although matrimonial property is recognized by Syariah, there is confusion regarding the determination of the order for the distribution of matrimonial property after death because there is no specific provision under the court's jurisdiction to hear and decide cases concerning claims to matrimonial property after death. However, all states in Malaysia have now adopted and allowed the claim for matrimonial property after death.

The *Locus Standi* of Heirs' Rights in a Claim for Matrimonial Property After Death

In reference to the interpretation of matrimonial property contained in the Acts and Enactments of Islamic Family Law of the respective states in Malaysia, it clearly shows that matrimonial property refers to property obtained as a result of the joint efforts of the husband and wife, without involving contributions from other parties that allow them to lay a claim. It is the exclusive right of the husband and wife that allows them to lay a claim. However, when matrimonial property is based on Syariah, then the right to claim can be exercised by the heirs because the right

⁹⁵(1948) MLJ 108

⁹⁶Abdul Hamid Muhammad. *Penambahbaikan dalam Pelaksanaan Undang undang Harta Pusaka Islam di Malaysia*, Kertas Kerja Seminar Undang-undang Pentadbiran Harta Pusaka Islam Malaysia 2014, (Bangi: Selangor, 2014), p. 3.

will be transferred to the heir if the owner of the right passes on.⁹⁷ However, if the party submitting the claim is not a legal heir of the deceased, they do not possess the legal standing to assert such a claim.⁹⁸

In line with that, there are also claims submitted by the heirs, especially in the case of matrimonial property after death. According to al-Sarakhsy⁹⁹, if the husband or wife dies, the deceased's heirs are not prohibited from laying claim to the matrimonial property and this opinion was shared by Miszairi Sitiris and Akmal Hidayah Halim.¹⁰⁰ Daud Muhammad expressed his opinion referring to scriptures by *Bughyah al-Mustarshidin*¹⁰¹ and Wahbah al-Zuhaily¹⁰², which mentions that heirs have the right to lay claim because a person's right is not lost unless he waives or rejects the right.¹⁰³

However, Suwaid Tapah¹⁰⁴ refuted the statement that heirs have the right to claim matrimonial property after death on the grounds that there is no basis for heirs to make a claim on behalf of the deceased because the term 'joint effort' exclusively refers to the husband and wife. This view was also agreed upon by Azlina Abdul Latiff¹⁰⁵ with reference to the decision in *Awang bin Abdul Rahman v Shamsuddin bin Awang*.¹⁰⁶ When passing judgment, Yang Arif Dato' Ismail Yahya debated the issue of the heirs' *locus standi* when laying claim to matrimonial property after death on behalf of the deceased (wife). He posited that the Plaintiff as an heir has no basis to claim the matrimonial property on behalf of his mother while his mother, who is the party owning the exclusive right to claim the matrimonial property, did not even do so. In addition, he also disputed the heir's ability to present strong evidence and testimony to ensure that the Court is satisfied with the allegations made.

⁹⁷Ibrahim Lembed, *Kaedah dan Keseragaman Pembahagian Harta Sepencarian dalam Harta Pusaka Islam*, Konvensyen Perwarisan Harta Islam 2007, (Kuala Lumpur: Amanah Raya Berhad, 2007), p. 21.

⁹⁸Analiensyah Analiensyah and Rudanto Rudanto, "Perlawanan Eksekusi Pihak Ketiga Terhadap Perkara Harta Bersama (Analisis Putusan Mahkamah Syaria'ah Banda Aceh Nomor 0257/Pdt.G/2015/MS.Bna)," *SAMARAH: Jurnal Hukum Keluarga Dan Hukum Islam* 1, no. 2 (D 2017), p. 372.

⁹⁹al-Sarakhsy, Shams al-Din, *al-Mabsut*, vol.3. (Bayrut: Dar al- Ma'rifah, 1978), p. 213.

¹⁰⁰Miszairi Sitiris & Akmal Hidayah Halim, "Tuntutan Harta Sepencarian dalam Kes Kematian," *Kanun* 22, no. 1 (2010), p. 32

¹⁰¹Abd Rahman Muhammad, *Bughyah al-Mustarshidin*, vol. 3, (Bayrut: Dar al-Fikr, 1997), p. 159.

¹⁰²Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuhu*, vol.4, (Damsyik: Dar al-Fikr, 1997), p. 39.

¹⁰³Daud Muhammad, *Harta Sepencarian dalam Hukum Syarak*, Akmal Hidayah Halim, Badruddin Ibrahim & Farid Sufian Shuaib (pnyt.), *Siri Isu-isu Mahkamah Syariah Undang-undang Harta & Amanah*, (Gombak: Jabatan Undang-undang Islam, Kuliyyah Undang-undang Ahmad Ibrahim, Universiti Islam Antarabangsa Malaysia, 2003), p. 3.

¹⁰⁴Suwaid Tapah, "Harta Sepencarian dan Wang Simpanan KWSP: Suatu Perbincangan dari Sudut Sumbangan Secara Tidak Langsung," *Jurnal Syariah* 11, no. 2 (2003), p. 4.

¹⁰⁵Azlina Abdul Latiff, *Harta Sepencarian: Pelaksanaan Dan Penilaian Menurut Hukum Syarak*, Master Thesis, (Faculty of Islamic Studies: Universiti Kebangsaan Malaysia, 2004), p. 66.

¹⁰⁶(1997) 11 JH 193.

Hence, in a situation where there are no indications that the owner of the right (the deceased) wants to lay claim or delegate the claim to the matrimonial property to the heir, then the heir does not have the right to represent himself on behalf of the deceased (wife) to claim the matrimonial property. This is because, according to Yang Arif Dato' Ismail Yahya, there are situations where parties in a marriage have reconciled and do not wish to claim matrimonial property registered in either the wife's or husband's name in the event of the death of one of the parties. Therefore, the Plaintiff, as an heir, has no basis to lay claim on the matrimonial property on behalf of his mother because his mother, who actually possess the right to claim the matrimonial property during her lifetime, did not even do so.

This view strongly suggests that issuance of a right to a remedy, claim or allegation, depends on the question of right. Thus, if the right does not exist, then a claim or allegation cannot be made. In this case, the deceased's (wife) right to claim matrimonial property from her spouse has already ended with her death, as provided in Section 22 of the Syariah Court Property Procedure Enactment (Selangor State) 2003. Therefore, the right to make such a claim cannot be inherited by the heirs of the deceased (wife) because the deceased (wife) never delegated or bequeathed the right to the heirs. Moreover, the right to lay claim to matrimonial property after death cannot be inherited automatically by the heirs as is the right to inherit property when the deceased (wife) dies.

This view was supported by Daud Muhammad because when one of the parties die, the distribution of matrimonial property becomes a very difficult problem to solve especially when both parties fail to reach an amicable settlement regarding the property and appease all the interested parties, including the heirs.¹⁰⁷ This is consistent with the view of Abdul Hamid Muhammad¹⁰⁸ who disagreed with the claim of matrimonial property after death, i.e. if the position of the claim to matrimonial property after death has not yet been completed, not to mention the issue of the heirs' position to claim the matrimonial property of the deceased's husband or wife. In addition, there is a case of a claim for matrimonial property after death by the heirs which was rejected by the court due to insufficient evidence of the existence of a custom. The claim could have been permitted if it could be proven that the wife also worked (joint effort), namely in the case of *Hajah Saemah v Haji Sulaiman*.¹⁰⁹ This is further supported by a case decided by the Selangor State Syariah High Court (*Mohd Azmi bin Mohamad Jamil & 2 Others v Mohamad Jamil bin Khair*),¹¹⁰ which

¹⁰⁷Daud Muhammad, *Harta Sepencarian dalam Hukum Syarak*, Akmal Hidayah Halim, Badruddin Ibrahim & Farid Sufian Shuaib (pnyt.), *Siri Isu-isu Mahkamah Syariah Undang-undang Harta & Amanah*, (Gombak: Universiti Islam Antarabangsa Malaysia, 2003), p. 3.

¹⁰⁸Kamar Ainiyah Kamaruzaman, *Pemakaian Hukum Harta Sepencarian dalam Mahkamah*, Tajul Aris Ahmad Bustami, Farid Sufian Shuaib & Mohd Hisham Mohd Kamal (pnyt.), *Harta Sepencarian Prosiding Ex-Parte Perintah Injunksi*, hlm, 66-75. (Gombak: Universiti Islam Antarabangsa Malaysia, 2003), p. 3.

¹⁰⁹(1948) MLJ 108.

¹¹⁰Case No.: 10400-017-0153-2016

strongly suggests that it is doubtful to state that the heirs have the right to inherit the right to claim matrimonial property from the deceased because there is no clear Islamic law pertaining to this issue. This matter is further consolidated by the argument that the necessity to lay claim to matrimonial property is based on law, but there is no legal provision stating that heirs can claim matrimonial property after death on behalf of the deceased. Moreover, there is no provision in Islamic law which states that the right to make a claim can be inherited, as the existing provision mentions that only the rightful person who can lay claim unless represented. This provision coincides with the maxim, "confidence is not lost because of doubt".¹¹¹

Meanwhile, in the case of the death of both parties, such as in the case of an earlier claim for matrimonial property made by the wife after the death of her husband, the heirs can claim matrimonial property on behalf of the deceased (wife) since the claim was earlier made by the deceased (wife), but had since died before the case could be tried, as in *Wan Chik bin Wan Abdul Kadir v Esah Zakaria and 5 Others* (2006).¹¹² In passing judgment, the Court held that this claim involved matrimonial property between the deceased (Wan Abdul Kadir bin Wan Hassan) and the late Jeriah binti Mat Hassan and it did not dispute the position of the heir's right to make a follow-up claim for matrimonial property on behalf of the mother.

Similarly in *Rohani bt Awing & 3 Others v Maimon bt Awing & 2 Others* (2013),¹¹³ the Appellants had made a claim for matrimonial property after death on behalf of their mother (Wan Kuntum binti Ngah), in relation to three plots of land owned by their late father (Awing bin Minal). This claim is a follow-up to a claim made by their late mother before she died. The Defendant in this case is the son of the deceased from his marriage with his former wife. In this case, the Court did not question the Appellants' *locus standi* to make a follow-up claim for matrimonial property on behalf of his mother and it was never raised at any stage of the trial. However, the Appellants' appeal was rejected because they could not prove whether the disputed land had been developed before or during the marriage of the Appellants' parents.

Findings from cases such as *Wan Chik bin Wan Abdul Kadir v Esah Zakaria & 5 Others* (2006) 22 JH 235 and *Rohani bt Awing & 3 Others v Maimon bt Awing & 2 Others* (2013) 36 JH (2) 106 indicate that when there are signs that the holder of the right has not accepted the division of the property and is further consolidated by the existence of a claim filed by the person who is really entitled to this matrimonial property, who is the Plaintiff's mother, but has died before the case could be decided, then the heirs inherit the right of the deceased and continue to either lay claim to the matrimonial property or otherwise abstain. Hence, the heir's *locus standi* is not disputed by the judge in these cases.

¹¹¹al-Suyuti, Jalaluddin Abd al-Rahman, *al-Ashbāh wa al-Nazāir Kaedah Usul Fiqh Imam al-Syafi'i*, translated by Abu Ezza al-Mubarak & Sonip Priadi, (Johor Bahru:Perniagaan Jahabersa, 2010), p. 85.

¹¹²22 JH 237

¹¹³36 JH (2) 107

In a situation where the heirs have *locus standi* to claim matrimonial property after death on behalf of the deceased, as long as the heirs have an interest in the property claimed as matrimonial property of the deceased, then they have *locus standi* to make a claim on behalf of the deceased. This is because the decision on this matrimonial property claim case will have an impact on the amount of inheritance that will be obtained by the heirs.

This is apparent in *Hajah Sulong binti Abu Bakar v Mamat bin Mat Amin*,¹¹⁴ where the Court decided that the claim presented by the heir can be accepted and found that it is not necessary for the property that is registered in the heir's father's name to be solely the father's property. The wife's contribution (joint effort) towards the acquisition of the property was also taken into account by the Court to enable the matrimonial property claim to materialize. Besides that, the distribution was also made taking into account the welfare of the deceased's children since the Plaintiff's father was polygamous. Since the deceased's right to the property still existed, hence, the heirs have *locus standi* to lay claim and obtain rights to the matrimonial property after the deceased's passing. However, if the Plaintiff as an heir is not allowed to claim the right to matrimonial property on behalf of his deceased mother, then certainly the said property will be distributed to the Defendant, who is the heir to his father's first wife. Therefore, this matter will affect the surviving heirs of the deceased because it is possible that the heirs will need the property to sustain their survival.

Similarly, in *Bukhari Mohd Noor v Aisyah Ismail (2006)*,¹¹⁵ the Judge in the case opined that the Plaintiff is an heir who has the right to inherit the deceased's estate. Therefore, the heir also has *locus standi* to inherit the right to make a claim for matrimonial property after death on behalf of the deceased on the grounds that the heir has an interest in the property as long as the heir does not waive the right.

The plaintiff in this case is the biological son of the defendant (Aisyah binti Ismail). While the Plaintiff's late father (Mohd Noor bin Kadir) was alive, he transferred all his property (worth RM 1.7 million) to the Respondent as a condition that the late father be allowed to remarry. Therefore, when her husband (Mohd Noor bin Kadir) died, the Defendant never made any distribution of the property to the heirs of the deceased including the Plaintiff because the Defendant/Respondent was convinced that her husband gave the property to her voluntarily. However, the Plaintiff/Appellant denied the Respondent's statement and claimed that the property was handed over to the Respondent as a trust to be later distributed to the heirs. The defendant in his counterclaim demanded that the plaintiff repay the land repossession compensation amounting to RM757,000, who had made a written agreement and sworn statement not to claim any property from the Defendant after receiving the compensation money. The court dismissed the Plaintiff's claim based on the pledge that had been made and the Defendant's claim was withdrawn. The Kelantan State

¹¹⁴(1983) 3 JH (2) 206

¹¹⁵21 JH 26

Syariah High Court Judge ruled that the Appellant failed in his claim of matrimonial property on behalf of his father.

The plaintiff/appellant filed an appeal at the Kelantan State Syariah Court of Appeal. After examining all the testimony and evidence presented by both sides, the Court ruled in favour of overruling the decision made by the Syariah High Court Trial Judge and decided that the Appellant can apply and claim matrimonial property on behalf of his late father. The court had ordered the Respondent to swear-on-oath to deny that there was no oath of trust mentioned by the deceased requiring the Respondent to divide the property among his children. The Defendant/Respondent had sworn denial and thus, the court rejected the appellant's claim. However, this failure is not because the Appellant as an heir had no *locus standi* to claim the property, rather, it stems from an affidavit signed by the Appellant in front of the Commissioner of Oaths admitting that he would not claim any property from the Respondent. The entire argument used by the trial Judge in this case revolved around the inheritance rights of the heirs to the deceased's estate. As the heir has the right to inherit the deceased's estate, the Judge was of the opinion that the heir also has the right to claim matrimonial property on behalf of the deceased because the deceased's matrimonial property accords rights that can be inherited by the heir.

After examining the views of judges who had decided on cases pertaining to matrimonial property claims after death filed by the next of kin on behalf of the deceased, this study agrees that only the next-of-kin can lay this claim if the deceased had filed the matrimonial property claim first before passing. However, if no claim was filed by the deceased during his/her lifetime and there are no indications that the deceased wished to claim this matrimonial property, then the heirs do not have *locus standi* to do so. This is because, there is no provision in Shariah law or strong legal provisions that can be relied upon regarding this matter.

Therefore, if the heir continues to be prohibited from making such a claim on behalf of the deceased on the basis that the matrimonial property is the exclusive right of the husband and wife only, regardless of the reasons why the deceased did not make a claim for matrimonial property after the death of his/her spouse during his lifetime, then this is akin to the rights of the deceased being continued to be denied. It is noteworthy that the deceased might have been plagued by an illness or other extenuating circumstance that prevented him/her from making the claim. In the context of polygamous marriages, this will affect the surviving heirs of the deceased because it is likely that the heirs will need the property or proceedings from the property to continue their sustained survival.

Conclusion

Claiming of matrimonial property is basically the exclusive right of the husband or wife regardless of whether the claim is after a divorce, recent polygamous marriage by the husband or death of either party. Matrimonial property rights can be categorized under property rights that depend on the wishes of the deceased. Therefore, in order to determine the heir's *locus standi* pertaining to the right to claim

matrimonial property after death on behalf of the deceased, it is necessary to look at indications whether the owner of the right (the deceased) wished to claim or delegate the claim of the matrimonial property to his/her heirs. Therefore, it is necessary to convincingly ascertain the will of the deceased and whether the deceased wished to claim or waive the right because sometimes the deceased would not want to claim his/her right because the property has been released and there are also situations where the deceased does not want to give up his/her right and wants to hold on to the right but was prevented from making the claim during the lifetime due to unforeseen circumstances. However, due to the absence of comprehensive legal provisions for deciding cases regarding the *locus standi* of heirs pertaining to claims on matrimonial property after death, the Courts have ruled on cases like this differently based on their consideration and discretionary powers. Therefore, in order to avoid confusion among legal practitioners and facilitate judges to make references when deciding on cases related to the *locus standi* of heirs pertaining to claims for matrimonial property after death, it is recommended that law makers amend and create a comprehensive legal provision in the Islamic Family Law Enactment of the respective states in Malaysia.

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