

An Analysis of *Harta Sepencarian* Cases in the Syariah High Court of Ipoh

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Abstract

Disputes over matrimonial assets, or *harta sepencarian*, as it is commonly known in Malaysia, are among the financial cases filed in the Syariah High Court of Ipoh. Although there are specific provisions in the Islamic Family Law Enactment (Perak) 2004 on the division of *harta sepencarian*, there are some questions, particularly regarding the judicial approach used by judges in determining which parties are entitled to make claims, categories of assets that are considered to be part of *harta sepencarian*, the interpretation of matters related to the direct and indirect contribution, as well as the proportion of distribution of the assets. This study applies document analysis techniques by referring to the files of the related cases recorded from 2011 - 2016 at the Syariah High Court of Ipoh, and also cases that were reported in law journals as a basis for comparison to clarify the issues discussed. The findings show that although the decisions of the Syariah High Court of Ipoh on issues raised in such cases are not much different from what is decided in the cases reported in the law journals or other Syariah Courts in Malaysia, there are several other aspects, namely on the matter of EPF savings, gratuity, and insurance compensation, where the decisions held by the Syariah High Court of Ipoh are different from existing *fatwas* (legal opinions on Islamic law) and approaches taken by other Syariah Courts in Malaysia. The different approaches are also noted in cases where the disputing parties have children. Although the rights of disputing parties are properly considered in deciding the cases, in certain cases priority is given to the welfare of the children, and the Court grants property rights to the children.

Keywords: Marital Property; Islamic Family Law; Syariah High Court

Abstrak

Pertikaian harta sepencarian adalah antara kes pertikaian aspek kewangan yang kerap dikemukakan di Mahkamah Tinggi Syariah Ipoh. Walaupun terdapat peruntukan undang-undang yang khusus dalam Enakmen Keluarga Islam (Perak) 2004 mengenai harta sepencarian, namun terdapat beberapa persoalan khususnya mengenai pendekatan kehakiman yang digunakan oleh hakim dalam menentukan antaranya pihak yang berhak membuat tuntutan, bentuk-bentuk aset yang dianggarkan termasuk dalam kategori harta sepencarian, tafsiran mengenai takat sumbangan langsung dan sumbangan secara tidak langsung serta kadar pembahagian. Kajian ini menggunakan kaedah analisis dokumen dengan merujuk kepada fail-fail kes di Mahkamah Tinggi Syariah Ipoh dari tahun 2011-2016 dan laporan kes-kes dalam jurnal undang-undang sebagai perbandingan bagi menjelaskan isu yang dibincangkan. Dapatan kajian menunjukkan walaupun keputusan berkenaan dengan isu-isu yang dikaji yang diputuskan di Mahkamah Tinggi Syariah tidak jauh bezanya dengan apa yang diputuskan dalam kes-kes yang dilaporkan dalam jurnal hukum dari mahkamah-mahkamah syariah lain di Malaysia, namun terdapat beberapa aspek lain contohnya antara lain melibatkan kedudukan wang KWSP, gratuiti dan pampasan wang insurans hakim menggunakan pendekatan yang agak berbeza dengan fatwa dan pendekatan yang digunakan oleh mahkamah lain di Malaysia. Walaupun, hak-hak pihak-pihak yang bertikai diambilkira, namun dalam keadaan tertentu kepentingan anak-anak turut diambilkira dengan memberikan hak pemilikan hartanah kepada anak-anak.

Kata Kunci: Harta Sepencarian; Undang-undang Keluarga Islam; Mahkamah Tinggi Syariah

1.0 INTRODUCTION

Harta sepencarian, or a matrimonial property/asset, means property acquired from a joint effort of a couple during the period of their marriage, other than by inheritance or gift or any properties acquired without involving joint efforts. Matrimonial property can be movable or immovable property acquired by husband and wife through joint effort either directly or indirectly during the period of a valid marriage under Islamic law (Mohamad Ali Roshidi Ahmad, 2021; 119; Zaleha Kamaruddin, 2009: 46; Siti Zalikha Md Nor, 1996: 16). According to Section 2, Islamic Family Law Enactment (Perak) 2004 (IFLEP 2004), *harta sepencarian* is defined as the property acquired by the husband and wife during marriage by the conditions determined by Islamic law. The rule of *harta sepencarian* originated from Malay custom or Malay adat and has been acknowledged as part of Islamic law based on the principle of Islamic jurisprudence which accepts *'urf* (custom) that is compatible with Islamic principle (Ibrahim, 1997:307; *Isa Abd. Rahman v Fatimah Mohammad* [2006] 1 CLJ (Sya) 273). In the case of *Yang Chik v Abdul Jamal*, [1985] 6 JH 146, the judge defined *harta sepencarian* as “marital property acquired during a marriage with each husband and wife contributing effort or money to obtain the property.” Despite the emphasis that matrimonial property only involves property acquired during the period of legal marriage, the fact is any property acquired before marriage or during a period of legal marriage through inheritance, gift, or will, but if the property develops with efforts joint efforts, then the property can also be considered as conjugal property (Islamic Family Law Enactment (Perak) 2004, s.122 (5)).

There is no specific definition of *harta sepencarian* or matrimonial property in Islamic jurisprudence books since it is a customary practice of the Malay community. This is because generally, it is the husband who went to work to support the family, while the wife stayed at home to take care of household affairs. In the Malay community who is living in the Malay world such as in Indonesia, Singapore, Brunei, Pattani, and Malaysia, usually, the husband and wife both are working together toiling on the agricultural land to support their family together. Thus, if a divorce occurred then the property will be divided between them. This kind of arrangement is a form of appreciation for the contribution of both of them towards the acquisition of the property while they were still married (Ahmad Ibrahim, 2001: 212; Mimi Kamariah Majid, 1997: 366; See also Mohd Norhusairi Mat Hussin & Mohd Zaidi Daud, 2020).

The issues that need to be addressed here are, what are the Islamic justifications to accept *harta sepencarian* as a part of *hukum syarak* (Islamic rulings)? Firstly, it was argued that the contribution made by both husband and wife should be acknowledged. Islam recognized the efforts of a person, not only on matters related to acts of worshipping Allah but also on efforts resulting from a certain job. There is a warning against transgression of other's rights as mentioned in al-Baqarah 188, “*And do not eat up your property among yourselves for vanities, nor use it as bait for judges with intents that ye may eat up wrongfully and knowingly a little of (other) people's property.*” The jointly acquired property is also included as properties that are acknowledged in Islam. Thus, a divorced couple should not utilize illegal means to obtain property that was jointly acquired by both of them during the subsistence of their marriage. The recognition of woman's rights, as well as man's right, is mentioned in al-Nisa' 32, “... *to men is allotted what they earn, and to women what they earn.*” According to Ibn 'Ashur, referring to the above-mentioned verses, “... *both man and woman have their shares of something, thus, each of them entitles to a share of property resulted from their efforts.*” (Ibn Ashur, 1984: 31).

Secondly, *harta sepencarian* is a form of a custom practiced by the Malays. Custom or known in Arabic as *al-'urf* or *al-'adah* is recognized in Islamic law as an authority upon which judgments can be based. The importance of customs is mentioned in the prophetic saying, “*What is seen by Muslims as something good, then in the eyes of God it is also seen as good.*” (Ibn Hanbal, vols 6: 84). One of the legal

maxims relates to the customs is “*al-‘adab muhakkamah*” which means “*custom is authoritative.*” When custom is recognized as good and given legal recognition, then it turns into a rule that must be followed. Thus, when a custom is good and not contradicting Islamic principles, then it is applicable as a part of rules in the daily lives of a Muslim or as laws implemented in one’s country (al-Zarqa’, 1989: 219; See also Mualimin Mochammad Sahid *et. al.*, 2020:).

Thirdly, it was asserted that *harta sepencarian* is a part of *hukum syarak* because it is within the realm of *maslahah mursalah* which means “*consideration of public interests.*” According to al-Bugha, the interests or benefits referred to the benefits of preserving religion, life, reason (mind), progeny, and property (al-Bugha, 2007: 28). The principle laid down by the Quran and prophetic traditions are basically for the benefit of humankind. It is mentioned in al-Anbiya’ 107, “*And we have sent you (O Muhammad S.A.W.) not but as a mercy for the whole world.*” As long as *maslahah mursalah* is not in conflict with definitive proof of the Quran and prophetic traditions, then it is permissible. *Harta sepencarian* acceptance as a part of *hukum syarak* can preserve the right of women upon divorce or death of their husbands. Women who serve full-time to take care of the household ensuring comfortable lives for their husbands and children should be appreciated. They are entitled to the properties acquired during the marriage period whether they contribute directly or indirectly (See also Mualimin Mochammad Sahid *et. al.*, 2020).

Fourthly, the acceptance of the *harta sepencarian* as *hukum syarak* is based on *qiyas* – analogical reasoning as applied to the deduction of juridical principles from the Quran and Sunnah. There were a few court cases such as *Ramah v Laton* (1981- 1983) 2 JH 21 that indicates *harta sepencarian* is comparable to *harta syarikat* based on analogical reasoning utilized in *usul al-fiqh* (the principles of Islamic jurisprudence). Another comparison is that *harta sepencarian* is a form of *harta musya’* - the property that has been mixed and cannot be identified as belonging to whom. This opinion is based on the discussion regarding *harta sepencarian* by Abdul Rahman bin Muhammad in his work titled *Bughyat al-Mustarshidin fi Talkhis Fatawa Ba’dh al-Aimmah min al-Ulama al-Muta’akhirin*. This opinion was referred to in a few courts cases such as *Kalthom v Nordin* (1994) 9 JH 178, *Rokiah v Mohamed Idris* (1988-1989), 6 JH 72, and *Jaliah v Abu Bakar* (1990-1991) 7 JH 72.

Lastly, an indirect contribution in acquiring *harta sepencarian* is asserted as a form of *upah* or in Arabic known as *al-ajr* – payment for services provided by the wife for managing the household. This argument is noted in the classical jurisprudence book of *I’anah al-Talibin* (al-Dumyati, n.d, vols 4: 87) which was referred to in the case of *Semek Mamat v Zubaidah Yasim*, (1997) 11 JH 153; See also Mualimin Mochammad Sahid *et. al.*, 2020).

2.0 PROBLEM STATEMENT AND OBJECTIVES

Disputes regarding the rights of the *harta sepencarian* are among cases that are frequently submitted to the Syariah Court following the dissolution of marriage either by divorce or death of either party or both parties in a marriage and also involving polygamous marriage. Although there are provisions of the law on *harta sepencarian*, there are several confusions in some aspects.

Firstly, is it permissible for the children of the deceased, who were entitled to a *harta sepencarian*, to file a claim for the property? Are the children, for instance, eligible to obtain the declaration of the *harta sepencarian* of their deceased mother and, consequently, eligible to receive their shares as beneficiaries according to Islamic inheritance law? The second concern is whether particular types of assets fall under the category of *harta sepencarian*. There are new issues raised in Court regarding the forms of property that are considered as *harta sepencarian*, such as contributions to the Employees Provident Fund (EPF), stocks, and bonds. It is also uncertain from the legal point of view whether jewelry, a car, or any other possessions purchased by a husband for his wife to wear

or use constitute gifts or property that must be divided using the *harta sepencarian* formula (Idham Halid Romli, 2010). Thirdly, how did the judge interpret the terms "direct contributions" and "indirect contributions"? The purpose of this study, which is based on analyzes of the *harta sepencarian* cases adjudicated by the Syariah High Court of Ipoh from 2011 to 2016, is to provide answers to these questions and to clarify any ambiguity regarding the issues raised in the case of *harta sepencarian*.

The objectives of this research are; 1) to identify conditions for claims and qualified parties to apply for *harta sepencarian*; 2) to identify the claimable forms of properties for *harta sepencarian*; and 3) to analyze types of contribution and proportions of distribution in *harta sepencarian* cases.

3.0 RESEARCH METHODOLOGY

This study applies document analysis referring to primary sources and secondary sources. Primary sources refer to cases that were decided by the Syariah High Court of Ipoh and report cases in law journals. The case files referred to the Syariah High Court of Ipoh were filed between 2011 - 2016, with 11 cases in 2011, 29 cases in 2012, 40 cases in 2013, 60 cases in 2014, 57 cases in 2015, and 45 cases in 2016. To add to the collected data, interviews with the judge who was in charge of these cases also applied.

4.0 FINDINGS AND DISCUSSIONS

The research on *harta sepencarian* cases heard and decided by the Syariah High Court of Ipoh between 2011 and 2016 served as the basis for this discussion. The names of those involved have been abbreviated since those cases have not yet been formally documented in any publications.

4.1 The Conditions for Claims and Qualified Parties to Apply for *Harta Sepencarian*

The competent parties are allowed to file a claim for a *harta sepencarian* under three circumstances. First, a claim is typically brought up following a divorce. The majority of those who claimed *harta sepencarian* under these circumstances were the wives, according to a study on cases reported in the Syariah High Court of Ipoh between 2011 and 2016. For example in *JMJ v NAH*, (Civil Case: 08100-017-0215-2015). In this case, the plaintiff (wife) and defendant (husband) had been married for 29 years, during which time they had also purchased a home and a car. However, on October 9, 2013, their divorce was officially formalized, and the wife subsequently filed a claim of *harta sepencarian*. The court determined that the alleged assets belonged to the couple as a *harta sepencarian*.

In *ZAO v. AKAH* (Civil Case: 08100-017-0763-2015), it was the wife who filed the lawsuit. The facts indicated that the plaintiff and defendant married on April 5, 1986, and had divorced on March 3, 2015, which marked the end of their 19-year marriage. In Lahat, Perak, they had acquired a home as their marital residence during their union. Because the house was acquired during their legally binding marriage, the plaintiff (wife) filed a claim against the *harta sepencarian*, and the court decided that the property was deserving of being proclaimed to be the *harta sepencarian*.

However, it should be noted here that husbands also have rights to claim for distribution of *harta sepencarian*. In *SR v ZS*, (Civil Case: 08100-017-0636-2012), the husband after the divorce applied to *harta sepencarian* claiming that he was the only one who contributed directly to the acquisition of the properties without any contribution from the defendant. The Court issued an order after the parties agreed to settle through the *sulh* (amicable settlement) process, that the relevant properties were *harta sepencarian* because they were acquired during their marriage. The properties in dispute were divided according to an agreed-upon ratio, whereby a house was given to the plaintiff after the plaintiff paid RM10, 000 to the defendant, a car (kancil model) was given to the plaintiff, and another car (wira model) was also given to the plaintiff subject to the lump sum payment of the

balance of the price of the car by the plaintiff. All the furniture in the house such as a television set, refrigerator, washing machine, kitchen cabinet, television shelf, sofa set, dining table set, and all movable electronic appliances belong to the defendant.

Another case that was initiated by the husband was *MBJ v SNSA* (Civil Case: 08700-017-0376-2011). The parties in this case married in 1992 and were divorced in 2011. They have four children. They had bought a house in Ulu Kinta; a Proton Waja car; and a motorcycle. The plaintiff (husband) alleged that they had purchased the aforementioned properties involving cash payments and loans made by both of them. The defendant alleged that he had paid RM21,000 which was taken from EPF's savings and made loans totaling RM30,000 for home improvement, which was paid through deductions from the defendant's salary. The plaintiff also alleged that he contributed to the acquisition of the house, for which he had taken out a loan for home improvement purposes and made salary deductions totaling RM351.00 a month. For the purchase of the motorcycle, the defendant (wife) paid a sum of money as a down payment and the monthly payments were made by the plaintiff, and covered the cost of maintaining the motorcycle. The Court ruled that the properties in question were *harta sepencarian*, and they were both prohibited from disposing of the properties to third parties. All properties were ordered to be handed over to the children when they reach the age of 18, and in the meantime, the parties were only acting as temporary owners of the relevant properties. And regarding claims against cars and motorcycles, both parties agreed not to make any claims.

Secondly, a *harta sepencarian* could also be claimed after the death of a husband or wife. The surviving party can claim his/her share, and only the deceased's share of the property could be divided as an inheritance. In *RMS v RK and Five Others* (Civil Case 08100-017-0367- 2014), the disputes were between the plaintiff (widow of the deceased) and her mother-in-law (the deceased's mother), and the plaintiff's children. In this case, the properties of the deceased were distributed to the beneficiaries without consideration of the plaintiff's share in *harta sepencarian*. The plaintiff applied for a declaration that the said properties were *harta sepencarian*, and claimed for 1/2 of her share. The Court ruled that the assets were *harta sepencarian*, thus, 1/3 of the assets were given to the plaintiff and the remaining 2/3 was the share of the deceased to be distributed to the heirs according to Islamic inheritance law.

There was also a case involving a claim between an ex-wife and the new wife of the deceased, for example, the case of *NMJ v RU and Five Others*, (Civil Case: 08100-017-0184-2013). The plaintiff (ex-wife of the deceased) asserted she and the deceased were able to acquire a family house in Ipoh, Perak. Therefore, the plaintiff demanded that the house is declared as a *harta sepencarian* of the plaintiff and the deceased. Thus, the first defendant (the second wife of the deceased) did not have the right to claim the house as a *harta sepencarian*. This is because the house was bought within their marriage period. The division of the *harta sepencarian* between the plaintiff and the deceased must be finalized before the properties are divided according to Islamic inheritance law to the heirs. The distribution of inheritance is only taken from the deceased's share. The Court declared the property as the *harta sepencarian* of the plaintiff and the deceased after being satisfied with the evidence that the house was obtained within the period of their marriage.

The study also found that there was a case lodged by a husband after the wife's death against the deceased's siblings as well as his children from the marriage with the deceased wife. An example is the case of *ARNA v JG and Others* (Civil Case 08100-017-0704-2014) which involved claims on assets in the form of shares in ASB (Amanah Saham Bumiputera), savings, and, a car. The plaintiff claimed that he gave RM30,000 to the plaintiff to purchase the car and also deposited RM10,000 into the deceased's savings in ASB. The plaintiff also claimed that he had contributed directly and

indirectly to those properties. However, the defendants (the siblings) did not agree with the plaintiff's claim that RM10000 in the deceased's ASB account was the plaintiff's money due to the lack of evidence from the plaintiff. The case was resolved through *sulh* (amicable settlement), and the Court ordered that those properties were properties acquired and developed within the period of the marriage, therefore the properties were considered as *harta sepencarian*. The savings in the ASB account of RM 181,275.00 and RM 10,000 in Tabung Haji were divided between the plaintiff and the deceased. The deceased's share was then distributed according to the Islamic inheritance law. The car was handed over to the plaintiff.

The plaintiff in *HK v NY and Seven Others* (Civil Case: 08100-017-0416-2011) was a widow whose husband died on 8.6.2011. During their marriage, they acquired the following assets: a house, a motorcycle, savings, and insurance. The house in Lahat was purchased before they married, but the deceased continued to pay for it during their marriage, and the plaintiff also claimed that she had incurred all house renovation expenses totaling RM4000 and paid for the house's maintenance and related bills. For the motorcycle, the installment was made by the deceased, however, the plaintiff was the one who paid RM2000 as an advance payment. In addition, besides working, the plaintiff had also fulfilled her duty well as a wife to her husband. The plaintiff applied for an order that the properties be declared as *harta sepencarian* between the plaintiff and the deceased, and obtained 1/2 of the properties. The court ruled that the properties were *harta sepencarian* of the plaintiff and the deceased. The court stated that since the plaintiff had contributed directly and indirectly to the acquisition of the house and the motorcycle, therefore the properties were *harta sepencarian*. Although the properties were bought before they were married, the properties had grown after and during their marriage through the reduced mortgage debt incurred by the deceased. Concerning other properties, namely money, and insurance, the court was satisfied that the deduction of the deceased's wages had reduced the deceased's wages from RM1,200 to RM320.80. The deceased's net wages alone would not have been enough to support their family's life. As a result, the Court was satisfied that the plaintiff had contributed to the household expenditure. Similarly, if the deceased had not contributed to the insurance, the insurance company would not have paid the house's balance. As a result, the court concluded that these properties were also *harta sepencarian*. Although, it is obvious that there was a direct contribution towards the house and motorcycle, other properties (money and insurance) were only granted after the death of her husband. It demonstrates that the plaintiff did not make a direct contribution, but only contributed indirectly. Therefore, it was ordered that the plaintiff is entitled to 1/3 of the house and 1/3 of the Honda motorcycle. The plaintiff also had the right to earn 1/4 of the deceased's deposit of RM30, 348.20; 1/4 of MCIS insurance amounted to RM5000; and 1/4 of Great Eastern Life Assurance insurance amounting to RM30, 000.

The plaintiff in *NY v MNA* (Civil Case: 08700-017-0113-2014) was the defendant's second wife; the defendant's first marriage took place on July 19, 1978. However, after losing his first wife, Salasiah Sulaiman, on March 11, 1989, the defendant married the plaintiff on October 26, 1989, and divorced on February 21, 2012. The plaintiff and defendant had two children during their marriage. Throughout the 23 years of their marriage, a house and a piece of land were successfully acquired. Therefore, the plaintiff claimed that the properties were *harta sepencarian* because she had contributed her efforts by working on the land and had performed the role of a wife and mother. The defendant, on the other hand, denied the plaintiff's claim and stated that the properties were not part of the plaintiff and defendant's *harta sepencarian*. The defendant claimed that the properties sought were those acquired during his first marriage to his deceased wife. The defendant stated that he and his first wife joined the land on June 20, 1988, and that the house and land were subject to certain rules, laws, or orders because they were part of the FELDA Land Plans. In her claim,

the plaintiff requested that the properties be declared as *harta sepencarian* of the plaintiff and the defendant. The question here is whether the properties can be considered *harta sepencarian* between them.

The Court in its decision rejected the plaintiff's claim on the ground that, these properties were subject to the FELDA Land Plans, therefore, any matters connected therewith such as transfers, claims on *harta sepencarian*, or other relevant issues shall be referred to the specific and relevant law and order. In this case, the applicable law was the Land Act (Group Settlement Area) 1960 and Circular No. 1/2006 by the Department of Land: Rules of Matrimonial Property Claims, Maintenance and Rights of Ex-wife.

Para 4 in the Circular states:

"The former spouse either separated due to divorce or death is entitled to claim on the matrimonial property of the deceased. For those who are divorced, the entitlement of matrimonial property claim is regardless of the reason for the divorce"

Next, referring to Para 6:

Based on the provisions under Section 12 of the Land Act (Group Settlement Area) 1960, Amendment of 2002, a former wife who entered the plan together and lived with the husband until the divorce, is qualified and entitled to add in name as a joint holder."

Both of the above provisions lead to a conclusion that, in the case of the claims of property in which the FELDA Land Plans is considered as a *harta sepencarian*. The most important requirement is that the claimant is the same person who enters or participates in the scheme. In other words, both husband and wife must join the land plan together and remain in the scheme until they are divorced or dead. In this case, the judge was satisfied with the fact that the plaintiff and the defendant were married after the defendant lost his first wife who was an individual who had joined and entered the scheme in 1988. Additionally, it was proved that the plaintiff was not the person who had been together with the defendant when joining the Land Scheme, but the party involved in the scheme was his late wife. Therefore, the plaintiff did not fulfill the main requirements set out in Circular 1/2006.

A study conducted on cases that took place from 2011 - 2016 indicated that there was no claim to *harta sepencarian* made by the child or the deceased's beneficiary to the surviving party or the heirs. However, it shall be noted herein that the heirs of the party in a marriage may file a claim for a *harta sepencarian* on behalf of the deceased against the party in a marriage who survived or the heirs. When the Court decides that the property in question is the right of the deceased under the principle of *harta sepencarian*, his share may be divided according to the Islamic inheritance law among the beneficiaries. For example, a child of a mother (deceased) may submit a claim for the *harta sepencarian* against his father. This case is common when a father married another woman, and the children are concerned about the *harta sepencarian* of their father and deceased mother being disposed of by a third party, such as a stepmother. The opportunity for the child to make a claim is an exception to the general rule of *harta sepencarian*, where usually a claim of *harta sepencarian* is an exclusive right of the husband and wife, therefore, only those who are eligible and entitled can claim this matter (See also Rabi'ah Muhammad *et.al.*, 2021).

This is because, when a Muslim dies, the heirs have the right to claim for *harta sepencarian* on behalf of the deceased because, apart from tangible properties, the heirs also inherited any "rights" of the deceased, and that includes the right to apply to the court to claim the shares."Right" is defined as

anything that belongs to someone which has been acquired through his/her efforts as stated in the Qur'anic verse:

“And, do not covet the bounties which God has bestowed more abundantly on some of you than on others. Men shall have benefits from what they earn, and women shall have a benefit from what they earn. Ask, therefore, God [to give you] out of His bounty: behold, God has indeed full knowledge of everything.” (al-Nisa: 32)

However, the child's claim is not guaranteed to be successful. A child's position as a claimant is sometimes denied. For example, in the case of *Awang bin Abdul Rahman v Shamsuddin bin Awang and Zainuddin bin Awang*, (1997) 11 JH 193, the court rejected the plaintiff's claim on a land (GM 2283) as *harta sepencarian* between Abdul Rahman bin Ismail and Nik binti Abdul Rahman. The plaintiff, in this case, was the son of Nik binti Abdul Rahman, who was also a former wife of Abdul Rahman bin Ismail. Nik binti Abdul Rahman died on 24/10/1977 and during her life with his ex-husband, a piece of land was acquired and registered under Abd Rahman at the request of the plaintiff's mother. Therefore, the plaintiff demands, on behalf of his mother, that the land be declared as a *harta sepencarian* of his mother and Abd Rahman. The court explained that in the Malay community, the property acquired during the subsistence of marriage is sometimes registered in the name of the wife and vice versa.

The question is when a *harta sepencarian* could be claimed. There was a case where a matrimonial property was registered in the name of the husband who later died first, but no claim was made by his wife on the property as a *harta sepencarian*. In such a case, the court was of the view that the child should not claim for *harta sepencarian* on behalf of his mother because his mother who was the most entitled to claim the property also did not do so. This is to avoid the difficulty in giving evidence and proving that the property is a *harta sepencarian* of his mother during her marriage with the other party. Nik binti Abdul Rahman, the plaintiff's mother, was the eligible claimant in this case, but she did not apply for it. As a result, the plaintiff was not qualified to do so as a child because his mother may have been relieved by the position of the property, as evidenced by the fact that his mother herself had requested that the title of the land registered under the name of Abd Rahman and never demanded it as *harta sepencarian*. Furthermore, there was no evidence in this case that could be an issue if the property is a *harta sepencarian*. As a result, the court was unable to consider the plaintiff's claim.

Thirdly, the *harta sepencarian* can also be claimed after the husband has applied for polygamy. In this case, it is usually the first wife who claims her right on *harta sepencarian* - properties acquired by both of them before the second marriage. This is permissible to preserve the rights of the first wife as well as to prevent the conflict or the seizure of property between the parties concerned. The protection of the existing wife to the *harta sepencarian* is provided under the Enactment of Islamic Family Law (Perak) 2004, s. 108 that the Court may, on the application of any party to marriage make an order prohibiting the wife or husband, as the case may be from disposing of any *harta sepencarian* during the subsistence of their marriage if the Court is satisfied that it is necessary to do so. Those who fail to comply with the court's order shall be punishable as contempt of court.

However, there were no cases filed for a trial in the Syariah High Court of Ipoh for a division of *harta sepencarian* because of polygamy. According to Chief Registrar Abd Rahman Thobroni (2017), a former judge at the Syariah High Court of Ipoh with extensive experience in handling cases of *harta sepencarian*, such cases occur because when a husband enters into a polygamous marriage, the wife will demand a declaration that the property acquired during their marriage is *harta sepencarian*.

They normally only apply for a declaration of the property as a *harta sepencarian*, with no claim of property distribution. This is because the first wife is only concerned that the property rights will be gradually transferred to the new wife or exploited by her. Therefore, there is no case of *harta sepencarian* caused by the practice of polygamy by the husband in the Syariah High Court of Ipoh from 2011 - 2016, because they usually decided by mutual consent to declare their properties as *harta sepencarian*.

4.2 Claimable Forms of Properties

In general, both immovable and movable properties could be claimed as matrimonial properties. The basic method is that all properties, movable or immovable, purchased and acquired during the subsistence of the marriage, may be claimed as *harta sepencarian* regardless of whether the parties contributed directly or indirectly.

In the case of *ABNA v JG and Seven Others* (Civil Case: 08100-017-0704-2014), the plaintiff and the deceased had an Amanah Saham Bumiputra (ASB) savings amounting to RM 181,275.46 and savings in the Tabung Haji account amounting to RM 1870,29. The plaintiff demanded that the saving be part of the *harta sepencarian* of the plaintiff and the deceased. The Court was satisfied that the properties were acquired during the period of their marriage and subsequently declared as *harta sepencarian*. Therefore, the cash balance in the ASB account, amounting to RM181,275.00, and in the Tabung Haji account, amounting to RM10,000.00, shall be distributed equally ($\frac{1}{2}$) between the plaintiff and the deceased, with the latter's share being divided according to Islamic inheritance law.

However, it does not necessarily mean that all property allegedly acquired during a marriage is recognized as *harta sepencarian*, such as in a case where the claimant does not know about the existence of the property. In a case reported in *Jurnal Hukum* in 1988, *Sharifah Sapoyah v Wan Awli*, (1989) 6 JH (2) 259, the wife's claim on a share of *harta sepencarian* of a piece of land and a house was dismissed as the learned Chief Kadi held that the wife was unable to provide particulars of the land and its title. The husband denied the existence of the property. In determining the necessity of presenting the evidence of the location and area of the land, the Chief Judge relied on *I'nanah al-Talibin*. The learned Chief Kadi also rejected the claim in regards to a Toyota car, which he found was registered in the name of the parties' daughter. He did, however, grant the claim of *harta sepencarian* in regards to a television set, a refrigerator, a washing machine, and a Ford Escort car, all of which the husband admitted were the *harta sepencarian*. The wife received a third of the properties or their values.

Referring to the above cases, it could be concluded that any property, whether it is immovable or movable, may be claimed as *harta sepencarian* provided that it is acquired during the period of marriage by the joint effort of both parties and it must exist. But, it also should be noted that movable properties may come in various forms, and that includes EPF savings, as well as business assets. Sections 51 and 54 of the Employees Provident Fund Act 1991 clearly state that EPF contributions are not transferable except through the rules provided in the Act. The question is whether or not EPF savings can be claimed as *harta sepencarian*. The *fatwa* (religious ruling) was issued by the 49th Muzakarah of the Fatwa Committee, National Council of Islamic Religious Affairs on 10th September 2000 stating that EPF is considered as a part of an inheritance asset and will be distributed according to the *faraid* system, whereby the named beneficiary shall act as executor or administrator of the asset. Similarly, Dato' Muhamad Asri bin Haji Abdullah stated, that: "*EPF savings are solely for the deceased, thus subjected to the faraid system and divided among the heirs accordingly.*"

In the High Court of Ipoh, cases involving claims on EPF savings as matrimonial property were also discussed. For example, in the case of *KI v MJMJ and Two Others* (Civil Case: 08100-017-0509-2014), the plaintiff, who was a widow of the deceased, demanded that the deceased's EPF savings be declared as *harta sepencarian*. The defendants were her children from her marriage with the deceased, who died on 2.7.2014. Among the assets claimed as *harta sepencarian* was an EPF saving amounting to RM 20,726.68. However, this case was settled by *sulh* (amicable settlement), and the Court declared the claimed asset to be *harta sepencarian*, as agreed during the *sulh* session, the parties agreed to divide the EPF savings according to Islamic inheritance law.

However, in the case of *NMA v AC and Five Others* (Civil Case: 08100-017-0598-2013), the Syariah High Court of Ipoh allowed the plaintiff's claim and declared that the deceased's EPF savings were part of *harta sepencarian*. The plaintiff married the deceased on 29.7.1983 and they had five children, currently aged between 11 to 29 years old. The defendants, in this case, were the plaintiff's mother-in-law and five of the plaintiff's children. In addition to the EPF savings, the assets claimed by the plaintiff also included savings in several banks, shares, land, two houses, three motorcycles, and four cars. The court approved the plaintiff's application and declared that all of the assets claimed were *harta sepencarian* that the plaintiff reserved the right to 1/2 of the assets; and that the remaining 1/2 of the deceased's rights were divided between the heirs (involving all the defendants and the plaintiff herself) according to the *faraid* system.

Although the decisions in the two cases that are discussed above appear to be contradictory with one another, the first case involved a mutual agreement to divide the properties according to Islamic inheritance law, thus, the court respected such a decision and ordered accordingly. This, however, does not preclude the court from declaring the EPF savings to be *harta sepencarian*.

For the non-Muslims, the status is clear: EPF savings as well as gratuity payments are part of matrimonial assets. The Civil Court (*Leow Kooi Wah v Philip Ng Kok Seng* (1997) 3 MLJ 133) made a clear and decisive declaration by adopting the approach practiced by the Singapore High Court (*Ong Chin Ngoh v Lam Chih Kian* (1993) 1 SLR (R) 460) and stating that EPF savings were part of matrimonial properties and parties demanded it. The High Court in 1994 ruled that:

“...EPF contributions and gratuity payments which would have been a source of funds available to a couple and the family upon their retirement, **constitute a matrimonial asset**. If the EPF contributions were not deducted from the wages or salary of a worker, they would have gone to providing for the family. They are an asset acquired by the sole effort of the married worker during the marriage. The argument that a Court should have no power to order the division of a fund where the other spouse has no legal capacity to withdraw until the age specified in the EPF Act, has not deterred the Courts from declaring EPF fund as being part of matrimonial assets, if acquired during the marriage, and hence available for distribution.”

Previous writings on this matter indicate that EPF money and insurance contributions are not included in the *harta sepencarian*, as the effort to contribute to these two savings is carried out by a sole contributor, and there is no element of indirect contribution by the other party. The monthly contribution made by the husband does not reduce his responsibilities towards his wife and children. Therefore, this kind of saving is considered an absolute right of the contributor. This view is strengthened by the issuance of a *fatwa* in some states, such as Selangor, whereby it was declared that the assets of EPF, SOCSO, and insurance compensation money are not *harta sepencarian* and must be distributed according to Islamic inheritance law to the beneficiaries. And this is also applicable to the gratuity received by the government pensioner. However, it is

interesting to note that, even though the monthly contribution to EPF seemingly does not affect the duties and responsibilities of a husband towards the family, the fact that it is deductible has caused one's wages to be reduced. Thus, his wages alone might not be sufficient to provide for the family, and he thus needs his wife to work and contribute to the family's expenditures.

The same consideration should be taken into account in a case where the high position of one's job that entitled him to a high salary, for instance, was because of his wife's social status. For example, a husband occupied the position of CEO at a large company owned by his wife. A wife who owns many assets, including the company, has appointed her husband as CEO, which then makes EPF contributions possible. Without the influence of the wife or her family, he might not be selected to hold such a high position in a big company. In this situation, could an EPF asset or insurance contribution not be claimed by the wife as a *harta sepencarian*, despite her significant influence? It seemed that the Syariah High Court of Ipoh had considered the indirect contribution of the wife, which prompted the judges to allow the wife to claim these assets as a *harta sepencarian*.

In the case of assets that involve the Federal Land Development Authority (FELDA), resolving disputes over *harta sepencarian* could be complicated. This is because FELDA land cannot be divided. Those who sign up for the scheme, which is usually the name of the husband and wife, are eligible for FELDA land. In the context of FELDA, the requirement that qualifies a claim for a *harta sepencarian* is that the former wife must enter the planned land with her husband and live on the planned land until the divorce. Therefore, if the husband remarries after the divorce and continues living in FELDA to work on the crops, in the event of a divorce with the new wife, the wife may not claim for *harta sepencarian* in the form of FELDA real estate such as the house or farm, since she is not the party who registered together when joining FELDA for the first time. However, she is entitled to a share of the *harta sepencarian* of FELDA land income earned by her husband if she also contributes to such income, either directly or indirectly.

4.3 Types of Contribution and Proportions of Distribution

Direct contribution refers to both parties' contributions in the form of finance to acquire the asset, such as paying for the deposit or making monthly payments for the asset. Therefore, if the parties can prove that they have contributed directly but could not determine the value of each individual, then it is divided equally, and if determined, it is decided otherwise.

In the case of *HRH v MRMO* (Civil Case: 08100-017-0582-2012), the plaintiff and the defendant had been married for 15 years. During the marriage, they obtained a family house in Chemor, Perak, registered under the names of both of them. The plaintiff and defendant had made a bank loan to purchase a house, and later on, the plaintiff changed the loan scheme to a government house loan. Since then, the plaintiff alone has made payments on the mortgage. The defendant, however, contended that she also made a direct contribution by paying a sum of money as a deposit upon the purchase of the house and giving money every month to the plaintiff for a monthly payment. Among the plaintiff's claims was that the house was fully given to him. The court decided that the house would be divided equally between the parties. This is because the defendant had successfully proven a direct contribution of RM300 per month and RM160 per month after the loan scheme was changed.

In cases where one party makes a lower direct contribution than the other to acquire the asset or, at the very least, manage the asset, such as when one party cleans the house, looks after the kids, and does the housework then this is considered as an indirect contribution. The same goes when a wife's assistance or support provided to help the other party in his or her career is also considered

an indirect contribution such as the case of marrying someone with significant corporate influence or someone of great social prestige, such as royalty.

In the case of *RMS v RK and Five Others* (Civil Case: 08100-017-0367-2014), the plaintiff was a widow, and the defendant was her mother-in-law. The plaintiff's husband died in 2013, and during their marriage, they acquired several assets, such as a house in Kampung Sri Kinta, Ipoh, a car, and two motorcycles. The Court referred to section 122 (1) (2) of the Islamic Family Enactment (Perak) 2004, and the judge, in his judgment, taking into account, among other things, the type and extent of contributions made by each party. The court, however, was not satisfied with the plaintiff's claims for a half ($\frac{1}{2}$) share of the assets, as most of the plaintiff's contributions were in the form of indirect contributions. The deceased seemed to be the only one paying for the assets during his lifetime. The court ruled that indirect contributions, such as taking care of the family, were also a factor in determining the proper quantum in the division of *harta sepencarian*.

In assessing indirect contributions, the court has to examine the level of financial contributions made by both parties in obtaining or enhancing the value of the assets. This is because indirect contributions also include smaller financial contributions made by any party. The judge in the case of *Tengah v Ibrahim* (1982) 5 JH (2) 300 ruled that the wife (plaintiff) was to be awarded $\frac{1}{3}$ of the house's value, and the defendant got $\frac{2}{3}$ of it. The case was brought to the Court of Appeal, where the appellant demanded that she be entitled to half the value of the assets. However, the appeal was dismissed, and the High Court's decision was retained. The Court decided that the respondent's contributions, even in the form of financial contributions, were still insufficient to qualify her to obtain half of the *harta sepencarian*. The respondent worked as a laborer, while at the same time receiving wages during the harvest season to pay for the house. On the other hand, the appellant worked as a *songket* weaver, where every piece of *songket* woven was paid RM5. Therefore, the court decided that the contribution of the husband was more significant than the contribution rendered by the respondent.

A study of the research cases shows that to determine the proportion of *harta sepencarian* distribution, the main consideration is the form of contribution provided by the parties to acquire the asset, whether the contribution is directly or indirectly as provided in section 122, Islamic Family Law (Perak) Enactment 2004; See also Nur Sarah Tajul Urus et.al, 2021).

In cases where the wife owned an asset before her marriage and the husband successfully developed and increased the value of that asset after the marriage, the court usually ordered a portion of $\frac{1}{2}$ for each party after deducting the estimated sum of the husband's wages spent on developing the asset. In this case, if the husband's wages were used to purchase other assets, the wife would only be entitled to her share of the purchased asset based on indirect contributions (Abd. Rahman Thobroni, 2017).

On the contrary, the court would allocate $\frac{1}{3}$, $\frac{1}{4}$, $\frac{1}{8}$, and so forth to the party who contributed indirectly. Therefore, a wife who manages her household by taking care of the food and, drinks as well as clothing for the husband and children without the help of a maid would get a bigger proportion as compared to the wife whose husband provides a helper to manage the household. It should be noted here that, the distribution proportions are not rigid and fixed. The quantum of shares for the parties is within the judge's discretion based on his *ijtihad*, taking into account the facts of the case as well as the proofs disclosed to him during the trial. He will determine the case and decide on the appropriate sum that he deems fit and fair for the parties (Abd. Rahman Thobroni, 2017).

However, for a non-working husband where the wife is the only one working and providing for the family and buying assets, the court generally does not consider the chores done by the husband at home as an indirect contribution to the acquisition of assets. According to the division of roles under Islamic family law, it is the husband who should assume the role of the head of the family, and he is the one who should work to provide for his wife and children. As a result, when the task is taken over by the wife, the house husband loses his right to *harta sepencarian* as an indirect contributor. According to Abd. Rahman Thobroni, if an unemployed husband is allowed to claim for a *harta sepencarian*, he, presumably would take advantage of his wife, decide not to work, and free himself from his responsibility to provide maintenance for the family. He is, and he might not only refuse to work, but he is also waiting for the right time to claim his share of the assets purchased by his wife (Abd. Rahman Thobroni, 2017).

5.0 CONCLUSIONS

Research on cases heard by the Syariah High Court of Ipoh reveals that the approaches taken in resolving the disputes on *harta sepencarian* were based on the principles of equity and justice according to Islamic law. The welfare of the ex-wife or widow and the children is one of the crucial considerations that judges make before deciding the case. For this reason, the judges of the Syariah High Court of Ipoh do not confine themselves to particular opinions regarding the types of assets that may be divided as *harta sepencarian*, such as in the case of EPF funds. Although, EPF savings are seen by most academicians and religious scholars as an asset acquired by the sole effort of the contributor, for instance, the husband, the judge, by using his judicial discretion and *ijtihad*, will still give a share of the savings to the ex-wife. The same goes for insurance compensation money, which is also decided as money that can be claimed by parties in a marriage. It seemed that the Syariah High Court of Ipoh has executed a process of justice to resolve the issues between the disputing parties. There appeared to be no backlog of *harta sepencarian* cases. Facilitating an amiable settlement (*sulh*) would be the best option to resolve the case of *harta sepencarian*. Although there are conflicting views regarding certain aspects of *harta sepencarian*, they did not impede the process of justice.

Although *harta sepencarian* cases were often resolved without difficulty, there is always room for improvement in the High Court of Ipoh. To ensure that the legal process proceeds without glitches, we would propose the establishment of *Araban Amalan Kaedah Harta Sepencarian* at this court. For judges handling similar instances, the *Araban Amalan Kaedah Harta Sepencarian* might be helpful. Additionally, it could prevent significant differences of opinion on the same-issued *harta sepencarian* judgments.

To make it simpler for judges to render decisions in cases involving assets in the form of shares or equity in companies, an *Araban Amalan Harta Sepencarian* is also required. This directive must explicitly address challenging issues like the involvement of assets in these forms.

The Syariah Court has restricted authority in dividing the *harta sepencarian*, which involves the shares or other corporate equity. The Companies Act 2016 (Act 777), is the law that controls the process for transferring ownership rights of such properties. The Syariah Courts and related authorities should work together to quickly resolve this matter to adopt a policy to address these circumstances. This suggestion is based on the conversation with the chief registrar of the Syariah Court of Ipoh.

Additionally, it is advised that a practice guideline might be used as direction when resolving complex issues that necessitate consideration of other pertinent acts or agreements, such as EPF, insurance, and FELDA land concerns. To strengthen the decision-making process involving the

harta sepencarian, it is necessary to take into account the significance of the *Arabian Amalan Harta Sepencarian*.

Another issue is regarding the religious ruling (*fatwa*) regarding certain properties such as EPF savings, SOCSO, insurance, and gratuity whether these types of properties are considered as *harta sepencarian* or not. The 49th Muzakarah of the Fatwa Committee, National Council of Islamic Religious Affairs on 10th September 2000 concluded that EPF savings are not *harta sepencarian*. It is advantageous if the Perak government abides with the Council's decision on this subject, even if the *fatwa* is not immediately enforceable in Perak and only becomes a state law upon publication in the Perak gazette. It is a wise approach to establish uniform guidelines in situations involving Muslims in Malaysia, even if they are from different states. If there are divergent viewpoints on the same matter of *harta sepencarian*, the goal of having a uniform Islamic law in Malaysia throughout all states would not be achieved.

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