Managing and Preserving the Estates of a Deceased Person: The Extent of Personal
Representatives’ Powers and Liabilities in Malaysia

1Akmal Hidayah Halim and 2Nor Azlina Mohd Noor
1Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia,
2Ph.D.’s Candidate, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia/ Lecturer, College of Law, Government & International Studies, Universiti Utara Malaysia.

ABSTRACT
A personal representative is a fiduciary put in charge of administering the estate of a deceased’s person. The personal representative must at the utmost act with the highest degree of trustworthiness and good faith to ensure that the estate is administered accordingly. As the personal representative steps into the dead man’s shoes, he is vested with some powers to enable him to manage and preserve the estate. Nevertheless, one question that has nagged the office of personal representative is that what should be the extent of his liabilities for any losses resulting from actions taken in the course of exercising his powers. Hence, this paper seeks to examine the powers vested in a personal representative and to identify the extent of the personal representative’s liabilities in dealing with the deceased’s estate. For this purpose, the discussion focuses to analyze relevant statutory provisions as provided by the Probate and Administration Act 1959. An analysis of the decided cases is also made to determine the rights of the personal representative in the exercise of his powers and the available remedy to the legal heirs in cases of mismanagement or negligence on part of the personal representative. The paper predicates that as the personal representative holds a fiduciary duty to ensure that the estate is administered accordingly, he needs to conform to the fiduciary duties and standard of conduct, failing which would result in personal liability or legal action instituted against him by the legal heirs or other interested parties.

INTRODUCTION

Malaysian law mandated the appointment of personal representatives to deal with all of the deceased’s estate. Once appointed, the personal representative will step into the dead man’s shoes and consequently take over the deceased’s right as the owner of the property. In the course of his duties, personal representative is vested with some powers to enable him to manage and preserve the deceased’s estate. He is empowered to pass proper title of the deceased’s assets that are sold and any action he may undertake on behalf of the deceased would be held valid(Halim, 2012). However, the powers carry with it a number of duties and obligations. The capacity to hold property is co-extensive with the ability to become trustee and fiduciary to the deceased’s estate beneficiaries(Sidhu, 2005) and therefore is duty bound to observe fiduciary duties in carrying out his duties. Generally a trustee has to act in a fiduciary capacity which simply means putting the interest of the beneficiaries first(Ahmad & Andrews, 2005; George, 1999). Fiduciary here means a person who has undertaken an obligation of loyalty to another and is compelled to put that other person’s interest before his or her own which gives rise to a relationship of trust and confidence(Finn, 1977, 1989; Pearce, Stevens, & Barr, 2010; Shepherd, 1981).It is immaterial whether the undertaking is in the form of a contract or gratuitous (Ruce, 2010). In other words, the personal representative is expected to put the interests of the estate beneficiaries before his own interests and always to act in the interests of the estate rather than his.

Being clothed with dual character of trusteeship and fiduciary, any misconduct of personal representative will make him subject to potential liabilities and accountabilities. Therefore, one question that is needled in estate administration is that what should be the extent of the personal representative’s liabilities for any losses resulting from actions taken in the course of exercising his powers. Hence, this paper seeks to examine the
powers vested in a personal representative particularly under the Probate and Administration Act 1959 (Act 97) and to identify the extent of the personal representative’s liabilities in dealing with the deceased’s estate. The discussion includes an analysis of the decided cases to determine the rights of the personal representative and the available remedy to the legal heirs in cases of mismanagement or negligence on part of the personal representative.

Materials And Discussion: 
Appointment of personal representatives:

The appointment of personal representatives in Malaysia is governed by Probate and Administration Act 1959 (hereinafter referred to as ‘PAA’). The term ‘personal representative is defined by Section 2 of the PAA to refer to: 

‘the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the Court.’

A personal representative who is named and carries out the terms of the deceased’s will is known as executor while a person acting as a personal representative in cases where the deceased dies without leaving any will is known as an administrator (Halim, 2012; Malayan Law Journal, 2004; Pearce et al., 2010; Raman, 2005; Sidhu, 2005; Sundrum, 2006). The term ‘personal representative’ also includes any person who takes possession of or intermeddles with the property of a deceased person as regards any obligation in the estate administration (Section 2 of Civil Law Act 1956). This kind of personal representative is a person who is not being appointed by the court. He intermeddles in the affairs of the deceased’s estate and so takes on, by implication, the responsibilities and liabilities of an executor. Advertising for claims against the estate, paying the deceased’s debts, carrying on the deceased’s business are all activities which have been accepted as falling within the definition of intermeddling. Section 65 of the PAA provides that;

‘If any person, to the defrauding of creditors or without full valuable consideration, obtains, receives or holds any movable or immovable property of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the property received or coming into his hands, or the debt or liability released, after deducting—

(a) any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death; and (b) any payment made by him which might properly be made by a personal representative.

A mere assumption of the executorship does not make a person as an executor of the deceased’s estate. This principle was established in the case of Gan Chiew Heang And Ors V Universal Trustee (M) Bhd And Anor[2010] MLJU 1286. In this case, the court held that a mere assuming the directorship of the deceased’s company per se namely holding out as an executor of the estate in particular in the various communications between him and some other parties including the income tax office, did not automatically make a person as an executor of the estate.

The Powers of Personal Representative:

As the personal representative steps into the dead’s man shoes, he is vested with some powers to enable him to manage and preserve the deceased’s estate accordingly. The power vested in the personal representative carries with it a number of duties. Sidhu (2005) provides that among the primary duties of personal representative is to carry out the deceased’s instruction (in cases of testacy where the deceased left a will), to call in all the assets of deceased, convert them into cash, pay all the appropriate expenses and distribute them accordingly. The powers of the personal representative are comprised of inter alia power to dispose of property, power to enter into contracts, power to give assent and conveyance, power as to appropriation and power to appoint trustee of minor’s property.

Power to Dispose of Property:

The power of the personal representative to dispose of property is governed by section 60 of the PAA. This rule is based on the principle that the personal representative is driven to realize the assets in order to perform his duty in paying debts and distributing the estates(Martyn & Caddick, 2008). This is particularly important especially when there is insufficient cash to pay the deceased’s debt or liabilities or there exists necessity that the estate has to be converted into cash(Halim, 2012). In this respect, section 68(1) of the Probate and Administration Act 1959 stipulates that, on the death of a person intestate as to any property, his immovable property shall be held upon trust by his personal representative to sell such property. With regards to movable property, it shall be held upon trust by the personal representative to call in, sell and convert into money such part that may not consist of money.

On this point, it is pertinent to note that, in disposing of the deceased’s assets, an executor may, without leave of the Court, dispose of all or any property of the deceased as he may think proper, subject to any
restriction in the will of the deceased. If there is such a restriction, he may only do so with the leave of the Court (Section 60(3) of the PAA). In other words, if the executor wishes to dispose of the property not in accordance with the will, it would be prudent that he first obtain an order from the Court authorizing him to do so (Halim, 2012). However, as for an administrator, since he derives his authority and powers from the Court, section 60(4) of the PAA provides that:

An administrator may not, without the previous permission of the Court-

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

The above sub-section establishes that any act done by the administrator relating to the property is subject to the previous permission or leave from the court. However, the limitation is not mandatory as the word ‘may’ is used instead of ‘shall’ or ‘must’. Accordingly, it follows that in some cases, the administrator may enter into an agreement for sale without obtaining leave to sell (Halim, 2012). This is illustrated in the case of Haji Ahmad & Anor (1957) 23 MLJ 50 (CA) where the appellant, who was the administrator of the estates of two deceased persons, made an agreement for sale of land with the respondents. The respondents were put in possession of the land but the administrator took no steps to register the respondents as owners of the land. It was held that agreements for sale of land can be entered into by administrators, but the transfer of the land in question and the registering of the purchaser cannot be effected until the permission of the Court has first been obtained. The High Court is empowered, in cases of this kind, to give the permission required and if such permission is not given, the Court of Appeal is empowered to do so. In this case, it was further held that the making of an order for specific performance of the agreement for sale by the learned trial judge impliedly gave permission to the administrator to proceed with the sale.

The effect of an action or any agreement made by the personal representative without previous permission from the court is provided by section 60(6) of the PAA which stipulates that the disposal of property by a personal representative in contravention of section 60 of the PAA shall be voidable at the instance of any other person interested in the property. The section clearly shows that the act of administrator under section 60 of the PAA without the previous permission from the court is not void ab initio (Chee Hock Lai v Tan Swee Thai & Ors, [1990] 3 MLJ 477). Therefore, it is submitted that the failure to obtain for approval by the personal representative will enable the interested party to make an application to rescind the agreement. If there is no such application, the agreement subsists.

It is also to be noted that in the course of exercising his power to dispose of property, the personal representative holds a duty to convert the estate within a reasonable period and is required to be expeditious in the process of converting the estate into cash. This is illustrated in the case of Grayburn v. Clarkson (1868) 3 Ch App 605, where a testator by his will, directed his executors to convert his estate with all convenient speed. A portion of the estate comprised of shares in a trading company with unlimited liability. The shares were not converted, and about fifteen years afterwards the company was wound up. It was held that it certainly was the duty of the executors with all convenient speed, and indeed, as early as possible, to sell shares involving such a liability. The executors were held to be liable for the loss incurred due to their failure to sell some shares comprised in the estate as per directed in the will.

However, where property is of an uncertain and speculative character and the personal representative has exercised an honest discretion as to the time of selling, he ought not to be made responsible for loss through not having sold within twelve months (the executor’s year). In Marsden v. Kent (1877) 5 Ch D 598, a considerable part of the estate consisted of three foreign railway bonds of very uncertain value. At the time of the testator’s death, they were worth about 150 pounds each, but the value was declining rapidly and at the end of a twelve month they were worth about 54 pounds each. One of the legatees pressed the executor to sell, but the others did not join in doing so, and the executors thought it best to wait for the chance of a rise. Ultimately, fifteen months after the death, they sold two of the bonds for 54 pounds each. The third, which remained unsold, had fallen far below that value. It was held that as the executors had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character, they ought not to be made personally responsible for the loss arising from their not having sold within the executor’s year. It follows that particular circumstances must govern the case and a reasonable discretion will be allowed.

In Malaysia, there is no clear provision as regards the executor’s year or the timeframe when the personal representative is required to convert the property. Instead, the personal representative is allowed to postpone the sale and conversion of the property for such a period as the personal representative may think proper (Section 68(1) PAA). However, it must be emphasized that, the absence of such provision should not be an excuse for the personal representative to delay the deceased’s estate administration and to put the estate beneficiaries on risk of losing their rights to the deceased’s estate.
Power to enter into a contract:

By virtue of section 71(1) of the Probate and Administration Act 1959, every contract entered into by a personal representative in the exercise of his powers of administering an estate shall be binding on and be enforceable against and by the personal representative. The contract may be carried into effect or be varied or rescinded by the personal representative, and in cases of contracts entered into by a predecessor, the effect would be as if it had been entered into by personal representative himself.

It follows therefore, if the personal representative of the estates carried on the business of the testator, he will be personally responsible for any liability accrues from the contract entered for that purpose. In the case of Farhall v. Farhall (1871) 7 Ch. App. 123, the executrix of a testator kept an executorship account with a bank, and having a power under the will to mortgage the real estate, she deposited with the bank title deeds of part of the estate as security. The account was overdrawn and the moneys to a great extent misapplied. As the security was insufficient to pay the balance, the bank made application to prove as creditors against the estate for the difference. Sir W.M. James L.J. at page 125 said:

“[I]n this case it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrows money as executrix, says that she is executrix, and the bank debits her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realize the personal estate and to pledge specific assets, which is one mode of realizing them... But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is a position supported by no authority and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate”.

In the same case, Sir Mellish L.J. said:

“I am of the same opinion. It appears to me to be settled law that upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator.”

Therefore, the Court ruled that the bank was not entitled to prove this debt in competition with the other creditors of the estate.

The same position was also established in Bank Bumiputra Malaysia Berhad v. Yap Kiov Moi & Ors [1973] 2 MLJ 10. In this case, the executors of the estate of a deceased person carried on the business of the testator and for this purpose entered into a contract for overdraft facilities with the plaintiffs for the purpose of carrying on the business. The plaintiffs brought an action against the estate of the deceased claiming repayment of the overdraft and interest. It was held that the defendants were personally liable upon the contract that they entered into after the death of the deceased and the plaintiffs had no remedy against the estate of the deceased. It was further held that section 71(1) of the Probate and Administration Ordinance, 1959 indicates that an action lies against a personal representative and nowhere does there appear to be any right given to a creditor to prove debts against the estate in a contract entered into after the death of the deceased by the personal representative.

The position as to the liability of the personal representative carrying on the business of the testator was also discussed in the following passage from Chitty on Contracts (28th Edition), Volume 1, page 1072 which summarizes the position as follows:

“Unless empowered to do so by the testator’s will, an executor is not entitled to carry on the testator’s business, except for the purpose of winding it up. If he does carry it on, whether with or without authority, he is personally liable upon the contracts he makes, and persons contracting with him have no remedy against the testator’s assets. The executor, if he has carried on the business in accordance with his duty, has a right to be indemnified out of the estate and any profits made belong to the estate... An administrator only has power to continue the intestate’s business with a view to realizing its assets. The statutory power to postpone the sale for such period as he may think proper (Section 77, Probate and Administration Act 1959... emphasis added) may justify trading for purposes other than realization especially in view of the duty of a personal representative to preserve the business as an assets.”

However, for the contract that remains uncompleted at the death of the testator, the cost of its completion shall be borne by the testator’s personal estate. This is evident in the case of Re Estate of Kavena Mohamed Yoosuf, deceased[1936] MLJ 1 (CA) where a testator settled certain property in favour of his infant son. During his lifetime, the testator had entered into a contract for the erection of six houses on the settled property. The contract remained uncompleted at the time of his death. The executor of the will expanded a sum of RM17, 276 on completing the houses. It was held that the cost of completing the six houses should fall on the personal estate of the testator.

Powers of Personal Representatives as to Appropriation:

Appropriation by a personal representative is the application of the deceased’s estate in the actual condition towards satisfaction of any legacy bequeathed by the deceased. The power as to appropriation is provided by
section 74(1) of the Probate and Administration Act 1959. This power may be exercised as to the personal representative seem just and reasonable according to the respective rights of the persons interested in the deceased’s estate. Thus, if a beneficiary has a legacy of RM10, 000.00, the personal representatives can satisfy the legacy by transferring shares worth RM10, 000.00 to the beneficiary. The appropriation cannot be made if the assets worth more than the legacy. Alternatively, the personal representative can sell the asset to the estate beneficiary.

There are however various limitations on the power as to appropriation. One of them is that an appropriation shall not be made so as to prejudicially affect any specific devise or bequest. An appropriation of property, when made for the benefit of a person absolutely and beneficially entitled to possession, can only be made with the consent of that beneficiary. In respect of any settled legacy, share or interest, the consent of the trustees, or the person for time being entitled to the income must be obtained for the purpose of appropriation.

If the person whose consent is so required is a minor or a lunatic or defective, the consent shall be given on his behalf by his parents or parent, testamentary or other guardian, committee or receiver, or if, in the case of a minor, there is no such parent or guardian, by the Court on the application of his next of friend. It is not necessary to obtain consent on behalf of a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time. However, in making the appropriation, the personal representative shall have regard to the rights of any person who may thereafter come into existence or who cannot be found or ascertained at that time.

For a lunatic, if there is no committee or receiver has been appointed, then, if the appropriation is of an investment authorized by law or by the will of the deceased, no consent shall be required on behalf of the lunatic or defective. The consent is also not required if, independently of the personal representative, there is no trustee of a settled legacy, share or interest, and no person of full age and capacity entitled to the income thereof, provided that the appropriation is of an investment authorized by law or by the will.

In cases where a pecuniary legacy is given to an infant, it is recommended that the personal representative pays the amount of the legacy to the court so that he can escape liability and free the residue. This matter has been dealt with in the case of Re Salomons, Public Trustee v. Wortley [1920] 1 Ch 290. In this case it was held that by appropriating the amount of a pecuniary legacy given to an infant and investing the same in any investment in which money under the control of the Court ought properly to be invested, an executor cannot render himself free to distribute the residue of his testator’s estate without incurring personal liability in respect of the legacy and prevent recourse to the testator’s residuary estate by the legatee if the fund so created should prove insufficient to pay the legacy in full upon his coming of age. The only way in which the executor can escape liability and free the residue is by payment into court of the amount of the legacy and securing the legatee the ultimate payment of that which the testator intended him to have.

**Power of assent or conveyance by personal representative:**

A personal representative, may, before giving an assent or making a conveyance in favour of any person entitled, permit that person to take possession of the land. However, the possession shall not prejudicially affect the right of the personal representative to take or resume possession of the land. Hence, if the personal representative intends to give possession to a legatee before assenting, it is important for him to retain evidence that it was understood by both parties that the transfer of possession was not to constitute an assent. However, the assent shall not be valid unless it is sanctioned by an order of court and made by a transfer in the form required by any written law relating to the registration of title to land (Section 72 PAA).

**Power to appoint trustees of minor’s property:**

In cases where there exist a minor’s interests in the estate, the personal representative is empowered to appoint a trust corporation or individuals to be the trustee of the minor’s property. On such appointment the personal representative shall be discharged from all further liabilities relating to the estate (Section 75 PAA). In the absence of any such appointment, the personal representative himself will impliedly become the trustee of the minor’s property.

During the minority of any beneficiary or the subsistence of any life interest, and pending the distribution of the deceased’s estate, instead of paying the funds to the Corporation, the personal representative may also invest the residue of the estate or so much thereof as may not have been distributed. The investment however must be authorized by any written law for the investment of trust money and the personal representative is empowered to change the investments for others of a like nature at their own discretions (Section 68(3)PAA). The exercised of this power is best illustrated by the case of Re Estate of Yong Wai Man, ex p Yong Khai Min[1994] 3 MLJ 514. In this case, an administrator of an estate made an application for the money of the said estate which had been held in trust for three minor beneficiaries to be reinvested. Counsel for the administrator proposed that a sum of RM200,000.00 be invested in MBF First Fund or such other unit trust fund as the administrator deemed fit with power to sell and reinvest from time to time and the balance to be put in a financial institution that offered the highest interest rate to earn deposits to meet the living and education expenses of the beneficiaries. In deciding
the application, it was necessary for the court to determine what an administrator could do with the assets of an estate of infant beneficiaries. It was held *inter alia* that a guardian holding the property of an infant was a trustee holding property under an implied trust for the infant. The Trustee Act 1949 applied to the implied trust which arose as soon as the guardian came into possession of the property of the infant. The court however, declined to exercise its discretion under section 59 of the Trustee Act to permit the administrator to invest in the MBF First Fund as it did not qualify as an approved investment under section 5(3) of the Act which required the company, *inter alia*, to have been paying dividends for the past five years. Hence, it can be inferred that when the administrator invests the residue of the estate, he becomes the trustee for the beneficiary of the estate. Accordingly, he is subject to the Trustee Act 1949 and can only make an investment that is authorized by the Act.

**Liabilities of Personal Representatives:**

An appointed personal representative in particular an administrator, has to furnish security or administration bond before letters of administration could be extracted. Section 35 of the PAA provides for a statutory protection where there is a need for the personal representatives to provide for a security by bond. In this context, administration bond shall be made in Form 162 as provided by Order 71 rule 34, Rules of Courts 2012. The person to whom the grant is made or on whose behalf it is sealed shall give security by bond for the due administration of the estate where the gross value of the estate exceeds fifty thousand ringgit. The security shall ordinarily be by bond in the prescribed form by the grantee and two sureties. This requirement elucidates that the court is empowered to protect the beneficiaries from untrustworthy personal representatives through the bond security. Even though this requirement is not comprehensive since the provision as to the administration bond has expressly excluded a trust corporation, it is one of the steps taken by the court to protect the estate beneficiaries from unscrupulous personal representatives (Noor & Halim, 2013).

An administrator is also required to declare under oath in Form 161 that they will faithfully administer the estate of the deceased by paying his debts and will render a just and true account of their administration when lawfully required to do so. In other words, the personal representatives as fiduciary at the earliest stage have to give their solemn pledge that they will discharge their duties and function conscientiously, and in good faith and for the best interest of the estate. This is evident by the provision inserted in the Administration Oath in Form 161 in accordance with Order 71 Rules 33 Rules of Court 2012. The Administration Oath must be sworn before a Commissioner for Oath. Consequently in cases where the administrator breaches this oath, he may be criminally liable for an offence under section 199 of the Malaysian Penal Code that reads:

> “Whoever, in any declaration made or subscribed by him, which declaration any court, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.”

In so far as such declaration is made in Malaysia, it is governed by Statutory Declaration Act 1960. The purpose of statutory declaration is to obtain confirmation of written instruments or allegations or proof of debt or the fact of execution of deed which was otherwise unavailable but backed by penal sanctions.

It is also to be noted that the personal representative will be liable to refund the loss occurring from his negligence. Personal representative may be personally liable and accountable for his own assets on the ground of maladministration if he violated or neglected his duties in respect of the deceased’s estate administration. By virtue of 66 Probate and Administration Act 1959, the liability will extend to the defaulter’s estate.

Personal representative of a deceased person (including the executor in his own wrong) wastes or converts to his own use any part of the movable or immovable property of the deceased, and dies, his personal representative shall, to the extent of the available assets of the defaulter, be liable and chargeable in respect of the waste or conversion, in the same manner as the defaulter would have if living.

Nevertheless, the personal representative may escape liability if they can prove that they have acted honestly and sincerely. They need to show that they had taken the reasonable precaution against the risk of losing the deceased estate at that material time even though other person may choose to act otherwise. Each case must depend on its own fact as to the degree of care in a given situation. There is no hard and fast rule but that it depends on the risk that is tangible or probable at that given time. (*Khor Phaik Ean & Anor v Chew Sien Lup (as executor and trustee in the estate of Chew Sien Chee, deceased) & Anor* [2012] MLJU 886)

**Conclusion:**

From the discussion it can be established that a personal representative is given various powers in the administration of the deceased’s estate. The roles carry with it a number of duties and consequently some potential liabilities. A personal representative holds not only fiduciary duty but is also clothed with trustee character. In order to ensure that the estate is administered accordingly, the personal representative needs to
conform to the trustee and fiduciary duties and standard of conduct, failing which would result in personal liability or institution of legal action against him by the legal heirs or other interested parties.

REFERENCES