

Post-Marriage Division of Matrimonial Property (Harta Sepencarian) in Malaysian Shariah Court

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Abstract

Halal in Islam is a wide concept. It does not only cover dietary consumption, indulgence and services but also other matters under the rubric of halal and haram including the division of matrimonial property. The practice of dividing matrimonial property is often associated with unfairness to the claiming parties due to the non-clarity of the existing provision in providing appropriate and fair methods. The current provision causes the court to adopt different interpretations in ascertaining allocated shares to the divorced parties. This is mainly because contribution is considered as a sole criterion in dividing the assets. Other factor such as well-being of the minor dependent are often disregarded. Thus, the study aims to examine the effective law being used by the court in dividing matrimonial property of those couple who have divorced. Content analysis was conducted on a carefully selected sample of unreported cases, collected from six zones representing Shariah Courts in Malaysia. A total of 215 samples were selected for the study where analysis was made based on several variables such as the mode of division, scope of matrimonial asset, elements of consideration and proportion of share. Finding of this study indicates that contribution remains as a sole criterion used by the court to determine the share of parties. Thus, this study suggests that in order to commensurate the actual practice of the Shariah Court, it is

pertinent that the issue should be resolved by amending the existing law, taking into consideration a lot of other factors for fair and equitable proportions in the division of matrimonial assets thereby preserving the halal status of the property dispersal.

Keywords: Contribution; Division; Harta Sepencarian; Shariah Court; Malaysia

Introduction

The law empowered Shariah Courts to order matrimonial property to be divided to divorced spouse after considering few factors based on Section 122 of the Islamic Family Law Act/Enactments. The court needs to determine matrimonial property subjected to be divided, factors that to be considered in dividing the asset and appropriate share to be granted to divorced spouses. According to section 2 of Islamic family law Act/Enactment, *harta sepencarian* is defined as property jointly acquired by husband and wife during their subsistence of marriage according to Hukum Syarak. The definition of matrimonial properties expounds further on the concept and scope including individual property under Civil law and various property claims like EPF, insurance policies, *mut'ah* and joint-saving accounts (Siti Zalikha Md. Noor, 1996). However, in respect of claim for *harta sepencarian* involving EPF, there is uncertainty as to whether EPF money is to be considered as *harta sepencarian* or individual

property (Norliah Ibrahim, 2007). Islamic law recognised the rights of a wife to claim ancillary matters including claims against matrimonial property after the dissolution of marriage (M.A. Mohamed Adil, 1998), (Nik Noriani, 1993), (Nor Aziah, 2006). In determining the share, the court either abiding to an agreement of spouses made before divorce as regards to the disposition of matrimonial property or by determining the extent of contribution in acquisition of matrimonial assets (Zaleha, 2005).

In the division of matrimonial property, inconsistency of court decision can be observed from a few decided cases. The main reason for the inconsistencies is due to the absence of specific detailed provision in the law (Kamar Ainiah, 2003). Besides, there are also differences interpretation of court in defining the matrimonial property following the Islamic Family State of Enactments (Suwaid Tapah, 1996). However, the provision of matrimonial property stated in various state have common principles where the contribution of the husband and wife either in term of capital or joint effort are factors to determine whether the property acquired is *harta sepencarian* as well as to decide on the proportion. Thus, this study aims to examine the adequacy of the implementation of the statutory provisions relating to division of *harta sepencarian* through analysing the judicial approach of decided cases. Hence this study will focus on three important variables includes matrimonial property, factors of consideration in dividing the matrimonial property and determination of proportion of share.

Methodology

Qualitative method was adopted.. This study focuses on identifying problems in applying the existing law, confined to the factors and variables that are commonly applied when the court determines the share. Content analysis was adopted to analyse the judicial approaches based on the judicial decision of reported cases to identify area of law which are considered impractical and unclear. Three important

variables within the scope of matrimonial assets have been analysed. The first variable is asset tangibility - to identify whether it is tangible or intangible asset. The second variable is the factors of consideration and the third variable is the proportion of share. In addition, the analytical examination on judicial reason was the appropriate method to identify how the property is being divided and fair proportion to be granted to the divorced spouse. The court's discretion towards the needs of parties, minor children and the length of marriage have been taken into consideration to arrive at a fairer proportion of assets division .

Result and Discussion

This study has qualitatively examined 215 unreported court cases which were collected from six zones representing Shariah Courts in Malaysia. The following sub-sections are the analysis of this study's findings.

Statutory Interpretation of Matrimonial Property

Section 122(1) and (3) of Islamic Family Law Enactment /Act¹ clearly empowered the court to order the division of matrimonial assets acquired during marriage upon granting a pronouncement of *talaq*. The section particularly highlights two sub-sections. Firstly, subsection (1) where the

1 See equivalent provision in Sec. 122 of Islamic Family Law Enactment (Perlis) 2006, Islamic Family Law Enactment (State of Kelantan) 2002, Islamic Family Law Enactment (State of Penang) 2004, Islamic Family Law (State of Selangor) Enactment 2003, Islamic Family Law (Federal Territory) Act; Islamic Family Law Enactment (State of Malacca) 2002 and Rules, Islamic Family Law Enactment (Pahang), Islamic Family Law (State of Johor) Enactment 2003, Islamic Family Law Enactment (Terengganu) 1985, Islamic Family Law Enactment (Kedah Darul Aman) 2008, Islamic Family Law Enactment (Perak) 2004 and sec. 60 of Islamic Family Law Enactments (State of Sabah) 1992, sec.58 with exclusion of sub sec. (5) of Islamic Family Law Ordinance (Sarawak) 2001.

court orders the division between the parties of any assets acquired by them during their marriage by their joint efforts and secondly, subsection (3) where the court order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage.

The study describes those 120 out of 215 cases of matrimonial asset division involving the division of matrimonial home. This indicates that the matrimonial home is an important asset that is frequently claimed by the divorced spouse irrespective of the circumstances of the case, length of marriage and reason the division is made. This highlights the importance of the home to the parties, especially for the custodian of the children and when the matrimonial home is the only available matrimonial asset. (*Mek Yam Binti Mat Jusoh v. Mat Dohim Bin Seman* (03100-017-0070-2003).

The study shows that a landed property acquired for future investment or agricultural purposes is also liable to be divided. The accumulation of multiple assets are likely due to the financial ability and affordability of a spouse to own the assets as well as the spouse's awareness to generate a future income and investment for the family. For example in Kota Bharu, there are 25 out of 40 cases involving claims against landed property. This circumstance is likely influenced by the culture and interest of Kelantanese to own land purposely for agricultural and future investment. Other types of properties that are divided are shop houses (*Abdullah Shik Mohammad v. Ruhaidah Binti Ismail*, (01100-011-0040-2012 (Johor), wood stores (*Mek Yam Binti Mat Jusoh v. Mat Dohim Bin Seman* 03100-017-0070-2003 (Kelantan), lots of agriculture land (*Hasan B. Yeop v. Ramlah Bt Mahmud* 08600-017-0039-2005(Perak) and commercial lands (*Abdullah Shik Mohammad v. Ruhaidah Binti Ismail*, 01100-011-0040-2012 (Johor). It has been shown that in dividing the assets, the acquisition of the assets during marriage is an essential element to be

established either by the way of purchasing or constructed by using business profit (*Hawa Binti Ibrahim v. Ahmad Shukri & Anor* 03100-017-01119-2004 (Kelantan) or the capital for asset payment (*Rorkeeyah Binti Yakoh v. Sahimin Bin Awang* 03100-017-0424-2005 (Kelantan), saving (*Zainol Bin Mat v. Siti Nor Asiah Binti Salleh* 03100-017-0204-2004 (Kelantan) and the homemaker's contribution in taking care of the family. The court, in determining land lots as matrimonial property, takes into account the plaintiff's (wife) physical and mental contribution in assisting the husband in operating a business (*Wan Sepiah Binti Wan Omar v. Mamat Bin Jusoh* 03100-017-0822-2005 (Kelantan).

The study also indicates that shares, savings and vehicles are included in division. The assets are matrimonial assets irrespective of whether the purpose of asset acquisition is for family usage or self-investment. This development signifies that these assets' tangibly or intangibly are relevant to the parties and people who are aware on the importance of the asset for the survivality of the spouse after divorce. Shares were among assets claimed though it was rare. For example, in Kelantan, only 4 out of 40 cases of matrimonial asset division involve shares. The share includes commercial shares such as Amanah Bumiputra (*Siti Zaharah Binti Hussain v. Yaacob Bin Amah & anor* 03100-017-27-2003 (Kelantan), Koperasi Permodalan Felda Berhad (*Zainab Binti Muda v. Ramli Bin Mahmood* 03100-017-0057-2003 (Kelantan) and shares in commercial banks (*Aimi Nazura Binti Nawawi v. Mohd Sobri Bin Ahmad* 03000-017-0010-2007 (Kelantan).

2. Factors of Considerations

This study identified several factors that are considered by the court in determining the matrimonial property to be divided among the divorced spouses. Among the factors are extent of direct contribution by money, property and work. Apart from that, the indirect contributions of a homemaker, debts for joint benefits as

well as the needs of minor children were also examined in determining the assets division.

2.1 Direct Contribution

In general, direct contribution refers to a contribution of any party of the divorced spouse to acquire the disputable matrimonial assets, either the contribution in the form of money, property or labour. Monetary contribution is considered as direct contribution when it is used to cover the payment needed in acquiring the property, either to cover the total price, or some of the amount needed. It also refers to any payment made for improvement of property such as to cover the cost of renovation (*Siti Khalijah Binti Musa v. Muhamamad Farhan & Anor* 08300-017-0042-2010 (Perak) and construction of the home (*Zaliza Binti Aziz, Khatijah Binti Pawanchik v. Ahmad Bin Salleh* 07100-017-0251-09 (Perak). that certainly increases the value of the asset. It was illustrated in the case of *Siti Khadijah Binti Musa v Nur farah Farhanah, Intan Zuhairah, Muhammad Firdaus Bin Anuar* (08300-017-0042-2010) when RM 18000 was paid for renovation cost of the front and back extension of the matrimonial home, despite the mortgage payments made by the deceased for the house price of RM42 000. On the other hand, the money spent on family expenditure and household expenses is ignored by the court to be regarded as direct when the payment is made for the sole effort assets. In the case of *Hamidah Binti Abdullah v. Mohd Johanis Bin Busu*, The Kota Bharu Shariah court has granted 1/3 of the share to the appellant, a housewife, after taking into account the appellant who assisted the respondent to acquire the asset. The appellant undertook a part time job where her salary was used for renovation of the house and family expenditure. It was also used as family income when the respondent studied for a degree. In this case, it is clear that the court ignored the renovation as part of the direct contribution to the acquisition of assets.

Actual contribution is assessed based on payment related to the purchase of the asset

such as mortgage installment, deposit, premium and tax, balance of purchase price or payment for adding to the asset value by making an improvement and renovation on the asset. The wife is a main contributor when the purchase of the asset is paid by the wife's own money or amount obtained from EPF balance. The Sarawak case of *Fatimahwati Binti Bakawi v. Sopian Bin Jamain* (13100-017-0438-2003) illustrates that the plaintiff contributed for deposit payment and the balance of the purchase price was paid by the defendant where the court held that the plaintiff made direct contribution to the said house and ordered ½ share of the house to be granted to the plaintiff.

In some cases, the court adopted literal interpretation on the statutory provision and orders the asset to be divided equally when the monetary contribution of the divorced spouse could be identified and determined. In Sarawak case of *Mohmad Peridar Bin Hj. Leman v. Anni Binti Osman* (13100-017-0776-2001), the matrimonial home was purchased and registered in 1989 by a joint loan. The plaintiff paid RM55 000 whereas RM49 000 was paid by the defendant. The court has granted equal share of the house to both plaintiff and defendant. The rule is equally applied to the case when the extent of the spouse's joint effort in acquiring the asset could not be differentiated. In Kelantan case of *Zainol Bin Mat v. Siti Nor Asiah Binti Salleh* 903100-017-0204-2004) the court considered the asset as matrimonial property due to the payment made by both parties during their marriage though the court could not differentiate who made a greater contribution either in effort and money. Furthermore, the court also found difficulty to decide the quantum of contribution disputed by the parties. Based on the situation, the court has granted an equal portion to the divorced party.

The court is more inclined to an equal division when a quantum of money used for payment is related to the improvement and the acquisition of the asset during a long-term marriage. In the Sarawak case of *Dayang Norain Binti Awang*

Putra v. Awang Sabeli Bin Awang Morshidi (13100-017-0103-2005), the marriage lasted for 21 years. The evidence shows that the husband paid RM 354 per month for the mortgage installment of the house by using a government loan. However, the plaintiff proved that both spouses had jointly paid for the renovation amounting to RM15 000. In this case, it is observed that the court exercises discretion on certain occasions.

It is found that the court adheres to the literal provision that requires the consideration to only financial contribution of the parties. However, it is observed that in some cases, the court declined to follow the stipulated principle when the acquisition of asset is made through indirect contribution. This was illustrated in *Zaliza Binti Aziz, Khatijah Binti Pawanchik v. Ahmad Bin Salleh* (07100-017-0251-09) where an apartment was in joint names and was purchased in joint loan at RM 150 000. The plaintiff paid RM12 000 from her Employee Provident Fund (EPF) balance whereas the balance of property loan was paid by the defendant. The plaintiff also contributed for renovations, house furniture and household equipment, family expenditure and daily expenses. The court, after considering both the direct and indirect contributions of the wife, granted her $\frac{1}{2}$ share of the said house. This indicates that the wife's contribution to equip the house with furniture was considered by the court as contribution that entitled her to the share of the assets. This case highlights that when the financial contribution of parties is minimal; the court considers other factors to entitle the wife to get $\frac{1}{2}$ portion of share. This obviously shows that the court cannot follow the law strictly.

2.2 Property and Work

Besides monetary contributions, analysis shows that the court also recognizes contributions made in the form of property as direct contribution. A party can acquire the asset by making property contributions. For example, a wife traded in a car as part payment of a new car with the remaining price paid by the husband. The court

regards such contributions in the division of asset. In Sarawak case of *Mohamad Peridar Bin Hj Leman v. Anni Binti Osman* (13100-017-0776-2001), the car was traded in for RM4500 to purchase a Kancil. The court held that the Kancil was matrimonial property and the proceeds of the sale of the car were to be equally divided. An option was given to the party to purchase the interest of the other part of the car.

Besides contribution in the term of property, the court takes into account on the contribution in the form of work. Work is recognized as direct contribution in the occasion where as the result of the work, the spouse is able to acquire new assets or increases the value of existing assets and has made some improvement to the asset's value. In determining the proportion of share arising from work carried out to acquire the assets, the extent of work by the spouse is considered by the court. However, normally, equal division is an appropriate share for the work done by the spouse. This is illustrated in Penang case of *Zarifah Binti Jahaya v. Samad Bin Said* (07100-017-0246-05) where the plaintiff contributed capital for the business, claimed that she worked with the defendant in the retail business until they were able to acquire new assets consisting of a house, vehicle, food stall and 15 cows. The court ordered the assets to be equally divided.

From the above discussion, it can be noted that the court considers actual direct contribution either in the form of money, work or property if the contribution is made to acquire an asset. However, the study shows that the approach of court is inconsistent in dividing the joint effort assets based on monetary contribution. When the amount contributed is minimal, the court deviates from the statutory provision by considering the indirect contribution of the homemaker wife to entitle her for an equal share of the assets. The court, in this case, generalises the contribution by considering both indirect and direct contributions in ascertaining the division of joint effort assets.

2.3 Indirect Contributions of a Homemaker

The contribution of the homemaker has been significantly addressed in the distribution of matrimonial asset. In dividing sole effort assets, the homemaker's right to appropriate amount of matrimonial property is recognized for her service to take care of the family. It has been observed that the extent of homemaking contribution is confined to her physical efforts to serve her family as a wife and mother in taking care of the husband and the family. In the Sarawak case of *Zaiton Binti Enchi Alli v. Hussin Bin Enchi Mat* (13100-017-0273-2007), it indicates that the plaintiff was a full-time housewife and did not directly contribute towards the acquisition of matrimonial assets. The court, after considering her homemaking contribution, ordered $\frac{1}{4}$ of share of the asset to the plaintiff as her proportion for indirect contribution in maintaining the asset, taking care of the children and for discharging her homemaker's role.

The courts also recognizes financial contribution in family expenditure such as spending for home equipment or groceries as indirect contribution in dividing the sole effort assets. It was illustrated in the Kelantan case of *Aimi Nazura Binti Nawi v. Mohamad Sobri Bin Ahmad* (03000-017-0010-2007) where the appeal court increased the share of the appellant wife and granted her $\frac{1}{3}$ share of the value of matrimonial home after taking into account her direct and indirect contribution in the acquisition of the home during nine years of marriage. The appellant was formerly a teacher and made monetary contributions to the family expenditure. The court considered that due to appellant's assistance, the respondent managed to acquire a house. Similarly, in case of *Intan Salwah Binti Marjani v. Mohamad B Mat Sillah* 08700-017-0042-2008 (Perak), the plaintiff was a housewife and part-time direct seller. Her business profit was used for family expenditure. Therefore, she was granted by the court $\frac{1}{3}$ share as her proportion for her contribution..Thus, these cases signify that in

dividing sole effort assets, the court also takes into consideration the monetary contribution of the wife for family expenditure.

The study observed that the court gives substantial credit to a full-time housewife and working wife where the court did not differentiate the share of full-time and working wife. This is illustrated in the Kelantan case of *Zaiton binti Abdullah v. Zuha Bt. Hamzah* (03100-017-0920-2005) where the plaintiff was awarded $\frac{1}{3}$ of the matrimonial property to the plaintiff who worked as a part time cosmetic promoter apart from being engaged in household work and child-caring throughout the marriage. The court recognizes household work of the working wife by allocating the portion of share of assets which she has not acquired as long as she substantially discharges her role as wife and mother.

The difficulty to identify the direct and indirect contribution has resulted in cases where the court granted $\frac{1}{8}$ and $\frac{1}{4}$ to homemaker. The court in the majority of cases adopted a literal interpretation with regards to section 122(3) and (4) where the homemaker's contribution though very substantial is irrelevant when dividing joint effort assets. However, in a few cases, the courts deviate from the literal interpretation when indirect contribution is considered in dividing the joint effort assets. For example, in the case where monetary contribution is at minimal, consideration will be given to the wife's contribution as a homemaker. However, in several cases, it is observed that consideration of the division was based on the extent of both direct and indirect contributions. If the amount of money contributed to the acquisition of assets was not equal, the court would resort to the indirect contributions made to entitle the party for $\frac{1}{3}$ portion of matrimonial property.

The study shows that different approaches are adopted by the court while dividing the sole effort assets of the breadwinner husband or wife to determine appropriate proportions of matrimonial assets. The extent of indirect

contributions made to acquire the asset is relevant to determine the appropriate share to the parties. This is illustrated in the Penang case of *Burhan Bin Abdul Manap v. Norazlina Binti Yusof* (07100-017-0278-09) where the marriage of the parties lasted for 6 years without a child. The disputed matrimonial home was purchased in 2002 and only after 2003 the defendant wife stayed in the said home. The plaintiff paid for the acquisition of assets including down payment and mortgage installments. Despite the plaintiff's contribution, as sole owner, the court considered the marriage partnership of the wife in maintaining the house and doing household chores for 6 years and awarded 1/8 of the net value of the proceeds of the house to the plaintiff.

The above case indicates that the court decline to award equal division if the asset is acquired by sole effort. Here, the party who acquired the asset should receive a greater proportion. However, in certain cases, it is observed that the court did not follow the general rule strictly, especially after taking into account other considerations such as length of marriage. It was illustrated in the Penang case of *Noraini Binti Abdullah v. Aziz Bin Abdullah* (07100-017-0003-03), despite the fact that the husband had been paying for mortgage installments for 13 years before divorce, the court considered the wife's contribution as a homemaker for 40 years. The plaintiff, wife did assist the defendant in running a business where the income from the business was used for family expenditure that entitled her for a half share. Meanwhile, in the Penang case of *Hassimah Binti Said v. Syed Isa Bin Syed Ahmad Al Hady* (07100-017-0139-04), the plaintiff got 1/2 share of matrimonial property after considering her indirect contribution in the family expenditure by using her salary. This shows that the court had made loose interpretations on the law when it awarded equal division to the homemaker wife while dividing the sole effort assets based on her service of home making in long years of the marriage for more than 20 years.

The preceding discussion proves that the prescribed proportion of share allotted to homemakers is not an absolute right. The court seems to consider other factors and widen the scope of contribution not confining only to the acquisition of assets but indirectly towards the acquisition of such assets. In these situations, it is observed that the court awarded 1/2 portions. This is observed in many cases decided in Kelantan where the indirect contribution has been loosely interpreted. With regards to an appropriate share entitled to a homemaker wife, the study shows that at least 1/3 share is awarded to the homemaker wife as her entitlement for homemaking contributions while dividing sole effort assets. It has been noted that the court adopted an automatic approach to grant at least 1/3 share to the homemaker. However, the portion must be subjected to the circumstances of the case such as the extent of the homemaking contribution, the length of marriage and other factors stipulated in the provision.

2.4 Generalizing the Contribution

In division of matrimonial asset, the court adopts literal interpretation which requires the court to strictly follow the provision. However, in some conditions, the court uses discretion to decide what it thinks appropriate to arrive at a fair and just division. The discussion below highlights circumstances where the discretion of the judge is used in the division of assets.

Literal interpretation of section 122 (1) of Islamic Family Law Enactment requires the court to mainly consider monetary contribution for division of joint effort assets and disregards the indirect contribution in determining the share. The interpretation connotes that only a wife who did not acquire any property could claim the share on the basis of her indirect contribution. The law also clearly states that direct contribution is to be considered for dividing joint effort assets where the provision disregards the homemaker's contribution. However, in several cases, it has been observed that the court has adopted an opposite stand

whereby the homemaker's contribution is taken into account in dividing joint effort assets. This is illustrated in the Perak case of *Hasanah Binti Ini v. Nateman Bin Denan* (13100-017-0040-2008) with regards to a joint acquired home which was purchased by using a government loan amounting to RM36 288. The plaintiff and the defendant made monthly installments of RM282 and RM204 respectively. Besides considering the direct contributions of the plaintiff, the court also considered her indirect contributions for improvement of asset such as by maintaining and renovating the house, as well as equipping the house with furniture without the defendant's assistance.. The court ordered that $\frac{3}{4}$ share of the said house to be granted to the plaintiff and another share of $\frac{1}{4}$ to the defendant. The plaintiff and her children were also allowed to stay in the said house. Thus, it shows that the court deviated from the normal practice by generalizing the contribution of parties, where the court substantially gave equal weightage to the contribution of parties irrespective of the type of contribution made as long as the parties had significantly discharged each role.

The court generalizes the contributions considered without differentiating the division of sole or joint assets. This was illustrated in the case of *Mohd Shariff Ishak v. Aishah Bee Bin Iramshah* (07100-017-02-01) where the applicant claimed for an order for vacant possession of a matrimonial home situated at Kubang Semang, Penang which was occupied by the defendant, the applicant's ex-wife. The facts show that the asset was jointly acquired and was registered in both parties' names. The mortgage installment of RM300 was paid by the applicant and the defendant made monetary contributions of RM200-RM 300 for family expenditure. The court took into account the wife's payment for deposit of the home and her sacrifices to carry the responsibility as a fulltime housewife when she stopped working and carried out a part-time job to support the family expenditure. Hence, $\frac{1}{2}$ shares were awarded to the plaintiff and the defendant had to return $\frac{1}{2}$ of the installments to the plaintiff

effective at the date of the divorce. Thus, by virtue of these cases, it has been observed that the court had generalized both the direct and indirect contribution to be taken into account when dividing joint effort assets.

3. Needs of Minor Children

The study shows that in the majority of cases, the interest of minor children is not taken into account in dividing either sole or joint effort assets. However, it was observed that the needs of minor children are considered by the courts in few cases. The court protected the interest of children by preserving the accommodation to the custodian wife. This is illustrated in the case of *Hasanah Binti Ini v. Nateman Bin Denan* (13100-017-0040-2008) where the court allowed the application of the plaintiff and the children to occupy the matrimonial home and the division be made at $\frac{3}{4}$ of share to the plaintiff and $\frac{1}{4}$ to the defendant. The needs of the children were also considered by granting a greater proportion to the custodian wife as illustrated in the case *Hasmi Binti Ibdrahim v. Khairul Azwal Bin Osman* (13100-017-0270-2007). Here, the court declared that the matrimonial home was the sole property of the plaintiff because the defendant had not made any contributions to the acquisition of the asset.

In the Perak case of *Maznah Bt. Akob v. Che Rose B. Isak* (08400-017-025-2006) the court held that the matrimonial home to be divided at $\frac{8}{10}$ to the plaintiff and $\frac{2}{10}$ to the defendant after considering that the division of home and land was the only available asset left to the plaintiff and her children to stay in. The defendant also did not have to cater the necessity of his children. Facts showed that the marriage lasted for 21 years and the couple was blessed with 11 children and five of them were minors. The court ordered the plaintiff to register $\frac{8}{10}$ share out of the asset in the plaintiff's name and another $\frac{2}{10}$ to be registered in the defendant's name. Similarly, in the Perak case of *Fatimah Binti Abdul Wahab v. Nazali Binti Omar & anor* (08100-017-0031-2009) the

court considered both the direct and indirect contributions when dividing assets. The court also took into account the needs of two adopted minor children, their welfare and interest as well as their future needs to determine the deceased's asset such as matrimonial home, cars and savings. In this case, the court ordered the assets to be divided equally.

The study shows that in Penang, there were 13 cases involving minor children. However, the court hesitates to take into account their needs while determining the division of matrimonial assets where the element of contribution remains as a sole criterion in division of the assets. However, based on the interview with Penang judge, he viewed that the court has no duty to take into account this consideration i.e. interest of minors if the consideration is not included in the pleading of the parties. It is observed that the division of a matrimonial home to be sold and proceeds of sale to be divided at specific proportions is a common order made by the court although it involved minors. This shows that in the practice of division in the majority of cases, the court does not adhere to the provision which obviously requires the court to take into consideration the needs of minor children in determining the proportion of the matrimonial asset.

3.2 Length of Marriage

The literal approach of division of matrimonial property under section 122 of Islamic Family Law Enactment/Acts does not specify any requirement where the court needs to consider the length of marriage in determining the share. This is due to the reasons that the contribution of parties to the acquisition of asset remains as an important consideration in the division of matrimonial assets. In order to ensure a just and fair division, it is not necessarily appropriate for the same proportion to apply for every marriages irrespective of years of marriages.

The study describes that in several cases where the marriage lasted for a reasonable length

of time, probably more than ten years, the homemaker may receive at least 1/3 share as a proportion for her homemaking contributions. It was illustrated in *Rosenah Bt Ibrahim v. Ahmad Bin Ramli* (07100-017-71-02) that the courts have consistently given substantial credit for homemaking and child caring. The decided cases seem to show that the minimum percentage that will be received by the homemaker is 1/3. Similarly, for a marriage which lasted for more than twenty years, the Court of Appeal approved a 1/3 share of the former matrimonial home to be awarded to a wife who cared full time for her three children. Thus, the decision of the case shows that when the marriage is of reasonable length, the court will not hesitate to give credit to the spouse who has made substantial non-financial contributions to the homemaking and child-caring effort. The proportion normally granted is at least 1/3 share.

Despite giving substantial credit for homemaking and child-caring, the courts are inconsistent in their decisions in several cases with regards to appropriate share to be received by the homemaker. This is illustrated in *Faridah Sueiman v. Mohd Noh Othman* Mal case no. 86-2000 and *Rosenah Bt Ibrahim v. Ahmad Bin Ramli* (07100-017-71-02). The homemaker received at least 1/4 share in a marriage which lasted over 10 years, in contrast to the other two cases where the marriage lasted less than 10 years, the homemaker wife received 1/3 share and up to 1/2 of share in division of sole effort assets. This is in contrast with the decision in the case of *Suharni Binti Samjuddin v. Mohamad Ishak Bin Abdu Hamid* (07100-017-197-06). The marriage lasted only four years and the spouse has no child with minimal homemaking efforts. The homemaking contributions made without making any financial contribution entitled her for 1/3 share of the defendant's family house which was purchased prior to their marriage. On top of that, the court awarded her 1/2 share of a car which was purchased by the defendant prior to their marriage. This shows that generally, it is not appropriate that different proportion is applied for marriages which have lasted

over years. Therefore, the above discussion highlights the inconsistencies in the proportion of share irrespective of length of marriage.

In the case of brief marriages, in dividing assets, the court would normally incline to consider the financial contributions to the purchase of assets. Thus, a spouse whose entitlement arises from his or her non-financial contribution to the homemaking efforts will therefore be given a lower proportion. For example in the case of *Burhan Bin Abdul Manap v. Norazlina Binti Yusof* (07100-017-0278-09) the court awarded 1/8 of share of a former matrimonial home as her portion. The fact showed that the marriage was lasted for 6 years with no children. Breadwinner-husband paid for the purchase of the home. Thus, the above case illustrates that the little financial contribution in brief marriage could lead to a fairly low proportion as credit for non-financial contribution.

Proportion of Share

Section 122 of Islamic Family Law Enactment requires the court to determine the parties' share to examine the extent of direct contributions made by a spouse in terms of work, money and capital. In connection with this contribution, the entitlement of a spouse from this contribution is equal. For spouses who have not made any direct contributions, the entitlement of a homemaker wife arises from her indirect contribution in taking care of the welfare of the family. On the other hand, the basis of determining the proportion of matrimonial asset is ascertained by assessing the actual contribution made by the parties directly or indirectly. The court, in deciding the division, literally follows the provision where the extent of contribution either direct or indirect is a sole criteria in determining the proportion. In relation to that, the court regards monetary contribution of spouse to acquisition of asset as preference and significant rather than that of a homemaker's non-financial contribution. Thus, a spouse whose entitlement arises from his or her non-financial contribution to homemaking will therefore be given a

lower proportion. However, the spouse whose entitlement arises from financial contribution will receive equal or greater proportion.

Determining an Equal Share

As discussed earlier, the court does not hesitate to incline to equal division when the quantum and percentage of monetary contribution is determined and definite in the equal division of joint effort assets. However, in several cases when there was disparity in financial proportion between the spouse and in the contribution made, the court is likely to incline towards equal division. This was illustrated in the Penang case of *Hafizah Indra Bt Abdullah v. Jamaluddin Bin Eusoff* (07100-017-0035-2001) where the court ordered an apartment which was registered in the joint name to be divided at ½ share to the plaintiff as her proportion for her RM14000 withdrawal from an EPF balance for part payment of the apartment. An equal division is also ordered when the spouse's contribution is in the form of work although the job is not similar. The result of the work has assisted the parties to acquire new assets. This is illustrated in the case of *Zainab Binti Muda v. Ramli Bin Mahmood* (03100-017-0057-2003) where the court ordered ½ of lands, house as well as coconut palm land to be granted to the plaintiff as the properties were acquired through both parties joint effort when they were settlers though the assets already existed. After that, the spouses jointly contributed in renovating and extending the house. With regards to the profit of the coconut palm oil, the court ordered this to be divided at 1/3 share to the plaintiff and the other 2/3 shares to the defendant for the reason that the defendant contributed more physical strength to produce crops. This shows that money, work and property are essential contributions to entitle the parties to half share.

In another occasion, an overwhelming indirect contribution of a housewife towards the welfare of the family and her assistance to provide financially for the family's expenditure during a reasonable length of marriage were considered

by the court in determining the proportion of share. This is explained in the Penang case of *Hassimah Binti Said v. Syed Isa Bin Syed Ahmad Al Hady* (07100-017-0139-04) where the plaintiff received $\frac{1}{2}$ share of matrimonial property after the court considered the plaintiff's monetary contribution when plaintiff's salary was used for family expenditure. This case shows that the court deviated from the normal practice where equal proportion is emphasized on direct contributions of both parties in the acquisition of assets.

3.5 Determining the 1/3 Share and Other Proportions

The study shows that practically $\frac{1}{3}$ proportion is an appropriate entitlement for a homemaker-wife based on her homemaking contributions in the division of sole effort assets. It has been observed that this is practised in most states throughout Malaysia. This is illustrated in the Penang case of *Habsah Binti Sad v. Surianata Binti Baharum, Shaari Bin A. Samad* (07100-017-49-01) where the plaintiff's homemaking work for 36 years of marriage has been considered by the court as undisputed indirect contribution in the acquisition of two lots of land which entitled the plaintiff for $\frac{1}{3}$ share of the assets. A similar decision was made in the case of *Saurah Amma Bt. Pickiri Saboo v. Kuttabuteen Bin Aboo Salin* (07100-017-0108-03) where the entitlement of $\frac{1}{3}$ share of the deceased's estate comprised a former matrimonial home. The discussion shows that in general, a minimum proportion of $\frac{1}{3}$ was granted to a homemaker-wife as her entitlement on the basis of her homemaking contributions. In *Normah Binti Mohd Ali v. Abdul Rahman Bin Embong* (01100-017-231-2003) the court held that a property HS (D) 95636 PTD 58129 Mukim Plentong, District of Johor Bahru with a single storey terrace house situated in Johor Bahru was matrimonial property and $\frac{1}{3}$ share of the said house was granted to the plaintiff and $\frac{2}{3}$ was for defendant after the property was assessed according to the current value and after deducting all existing debt. This highlights that

in practice, the portion of $\frac{1}{3}$ share is associated with the homemaker wife or working wife after discharging the household job. Besides, $\frac{1}{3}$ share is also awarded to the wife after she contributed in taking care of family and contributed money for family expenditure. However, this portion is not automatic because the parties may receive lower portion and are subject to the rule of proving the contribution.

Conclusion

The study has concluded that although the law of the division of matrimonial assets is stipulated in the statutory provision, the court still cannot follow the law due to the rigidity of the provision that causes inconsistency and lack of creativity in court practice. Therefore, in order to commensurate the actual practice of the Shariah Court, it is pertinent that the issue is resolved by amending the existing law to take into consideration a lot of other factors for fair and equal proportions in the division of assets. In this particular aspect, the mindset of judges has to be changed, where marital relationships should be considered as partnerships rather than focusing on the exact contributions of the parties in the division of matrimonial property. The revamp of the current law is indeed necessary to comply with the current needs in the contemporary society. Omission of differentiation of assets between sole and joint efforts is highly recommended and it is also vital that assets are pooled in the scope of matrimonial assets as internationally recognized in other jurisdictions. Besides, it is also recommended in the reform for an omission of an equal division from the provision and to suggest for division that is just and equitable.

References

- Islamic Family Law Enactment (Perlis) 2006, Section 122
- Islamic Family Law Enactment (State of Kelantan) 2002

- Islamic Family Law Enactment(State of Penang) 2004
Mohamed Azam M. A, (1998): Undang-undang Perceraian Islam: Hak-hak Isteri Semasa dan Selepas Iddah, *IKIM Law Journal*, vol. 286-139.
- Islamic Family Law (State of Selangor) Enactment 2003
Nik Noriani N. B, (1993) Family Law Maintenance and other Financial Rights, 1st. ed, Dewan Bahasa dan Pustaka, Kuala Lumpur:
- Islamic Family Law (Federal Territory) Act
Nor Aziah, A, (2006). Hak Wanita dalam Harta Perkahwinan in *Wanita dan Undang-Undang* edited by Raihanah Abdullah Petaling Jaya:International Law Book Services,
- Islamic Family Law Enactment (State of Malacca) 2002
Norlia. I. (2007)). Masalah Tuntutan *Harta Sepencarian in Najibah Mohd Zin, et.al, Siri Pengembangan Undang-Undang Keluarga Islam*”, v.14, ,Kuala Lumpur: Dewan Bahasa dan Pustaka,
- Islamic Family Law Enactment (Pahang),
Suwaid. T, (1996) Elemen Sumbangan dalam Amalan Pembahagian *Harta Sepencarian* di Malaysia, *Monograf Syariah University Malaya*, vol.4,). .
- Islamic Family Law Enactment (State of Johor) 2003
Zaleha, K., (2005): “Divorce Laws in Malaysia (Civil and Syariah)”, *Malayan Law Journal* .
- Islamic Family Law Enactment (Terengganu)1985
Kamar Ainiah, (2003) Pemakaian Hukum Harta Sepencarian dalam Mahkamah, in *Siri Isu-Isu Mahkamah Syariah, Prosiding ex parte Perintah Injunksi* edited by Tajul Aris Ahmad Bustami et. al, Law Centre Kuliyyah of Laws, IIUM,