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## **The Role of *Wasi* in the Administration of Minor's Property under Provisions of Islamic law in Malaysia**

### **Peranan Wasi Dalam Pentadbiran Harta Kanak-Kanak di bawah Peruntukan Undang-Undang Islam di Malaysia**

Badruddin Hj Ibrahim \*

#### **Abstract**

This paper deals with the role of *wasi* in the administration of minor's property under the provision of codified Islamic law in Malaysia. The focus of the discussion is on the power of *wasi* in managing minor's property under his legal authority. The question is: To what extent the provision of the Islamic law that is codified in Malaysia prescribes the duties and powers of *wasi* in relation to the management of minor's property? Further, what is the safeguard that has been taken by the legal provisions in order to ensure that the minor's property is well managed and is not infringed and embezzled by the *wasi*? The research adopts qualitative research methodology which focuses on an examination of the statutory provisions on the role of *wasi*, including his duties and powers and control in the administration of minor's property. The paper also discusses the appointment of *wasi*, his position and his condition in administering minor's property and the situation where the *wasi* is removed from his office. It is found that there is the inadequacy of the law in relation to the role of *wasi* in the administration of minor's property. In addition to that, some provisions require further clarification and elaboration. Finally, the research found that there are still rooms for improvement with regards to codified Islamic law relating to the role of *wasi* in the administration of minor's property.

**Keywords:** *Wasi*, Administration, Minor's property, Islamic law, Malaysia.

#### **Abstrak**

Kertas kerja ini adalah berkaitan dengan peranan wasi dalam pentadbiran harta kanak-kanak di bawah peruntukan undang-undang Islam yang dibukukan di Malaysia. Fokus perbincangan adalah tentang kuasa *wasi* dalam menguruskan harta kanak-kanak di bawah pengawasan undang-undang seorang *wasi*. Persoalannya, sejauh manakah peruntukan Undang-undang Islam yang telah dibukukan di Malaysia menggariskan tugas-tugas dan kuasa *wasi* berkaitan dengan pengurusan harta kanak-kanak. Seterusnya, apakah perlindungan yang diambil oleh peruntukan undang-undang untuk memastikan

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harta kanak-kanak diuruskan dengan baik dan tidak dilanggar dan diselewengkan oleh *wasi*. Penyelidikan ini menggunakan kaedah penyelidikan kualitatif yang memfokuskan kepada kajian peruntukan undang-undang tentang peranan *wasi* termasuklah tugas-tugas dan kuasa *wasi* serta pengawalannya di dalam pentadbiran harta kanak-kanak. Kertas kerja ini juga membincangkan tentang perlantikan *wasi*, kedudukan serta syarat-syarat dalam mentadbir harta kanak-kanak serta keadaan bilamana *wasi* dilucutkan dari jawatannya. Hasil penyelidikan mendapati bahawa peruntukan undang-undang yang ada adalah tidak mencukupi dalam mentadbir harta kanak-kanak. Sebagai tambahan, terdapat juga peruntukan undang-undang yang memerlukan penjelasan dan penerangan. Akhirnya, penyelidikan ini mendapati masih ada ruang untuk penambahbaikan bagi peruntukan undang-undang Islam yang telah dibukukan berkaitan dengan pentadbiran harta kanak-kanak.

**Kata Kunci:** Wasi, Pentadbiran, Harta kanak-kanak, Undang-undang Islam, Malaysia.

### **Introduction**

*Wasi* is a person who is entrusted (*musi ilayh*) by another person (al-Shirbini 1933, 74). In general, there are three kinds of *wasi*: *wasi* of the Muslim ruler (*wasi al-khalīfah*), judicial *wasi* (*wasi al-Qadi*) and *wasi mukhtar* (al-Zuhayli 1989, 131).

*Wasi mukhtar* is a person who is appointed by another person to be a deputy after his death for the purpose of administering his estate and the property of his minor children ('Ali Fikri 1938, 213). Al-Shalabi (1977, 801), a contemporary Muslim scholar, stated that the *wasi mukhtar* might be appointed either from among relatives or strangers. The position of the *wasi mukhtar* among the guardians of property, as mentioned earlier, ranks after the father in the view of the majority of Muslim jurists (al-Kasani 1986, 155; al-Zarqani 2002, 533-534; al-Bahuti 1982, 446-447) or after the father and paternal grandfather according to the Shafi'i jurists (al-Shirbini 1933, 173).

### **Muslim Family Law as a State Matter**

The laws that relate to Muslim family matters are placed in the State List of the Federal Constitution. The Ninth Schedule List II State List of the Federal Constitution sets out the following as among the legislative powers of the State:

Except with respect to the Federal Territories, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy,

guardianship, gift, partition and non-charitable trust; *wakafs* and the definition and the regulation of charitable trust and religious trusts...trusts, charities... (Item 1).

Accordingly, state legislatures are given the power to enact laws relating to family matters of Muslim applicable within their boundaries. With respect to Federal Territories, however, the Federal Parliament has the power to enact the law relating to the above matter as provided in item 1 in the State List within the federal territories (Federal Constitution, Ninth Schedule List I - Federal List, item 6 (e)). At present, all states in Malaysia (Perlis, Kedah, Perak, Pulau Pinang, Selangor, Negeri Sembilan, Malacca, Johore, Pahang, Terengganu, Kelantan, Sabah and Sarawak) and also the Federal Territories (Kuala Lumpur, Labuan and Putrajaya) have enacted laws relating to Islamic Family Laws (Ibrahim 2000, 230-231). For example The Islamic Family Law Enactment, Kelantan, 2002 (No. 6 of 2002) (this Enactment repealed the previous Islamic Family Law Enactment, 1983 (No. 1 of 1983), s 136(1)); Islamic Family Law Enactment, Malacca, 2002 (No.12 of 2002) (the Enactment repealed the previous Islamic Family Law Enactment, 1983 (No. 8 of 1983), s 136(1)); Islamic Family Law (Federal Territories) Act 1984 (Act 303) as amended by Act A 828 of 1992 and Act A 902 of 1994 and Act 1261bA 2010 and Islamic Family Law (State of Selangor) Enactment, 2003 (No. 2 of 2003) (this Enactment repealed the previous Islamic Family Law Enactment, 1984 (No. 4 of 1984), s 136).

The issue of guardianship of property has been provided under the above-mentioned Family Law of the states and the Federal Territories. Thus, the law that is applicable to Muslims with respect to the guardianship of property is Islamic family law enactments or Act.

With respect to the administration of the said family law, Shariah Courts are given the power and jurisdiction as set out in the Administration of Islamic Law Act with respect to the Federal Territories and Shariah Court Enactment or Administration of Islamic Religious Affairs Enactment or Administration of Islamic Law Enactment with respect to the states (Ibrahim 2000, 228). For example, The Federal Administration of Islamic Law (Federal Territories) Act 1994 in sections of 46 and 47 specifies the civil jurisdiction of the Shariah Court, among others, to include the following matters;

Section 46 reads:

- (1) A Shariah High Court shall have jurisdiction throughout the federal territories and shall be presided over by a Shariah Judge.
- (2) A Shariah Court shall:

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1. (a)...
2. (b) in its civil jurisdiction, hear and determine all actions and proceeding in which all the parties are Muslims and which relate to:
  - (i) betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*) *nusuyz*, or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife;
  - (ii) any disposition of, or claim to, property arising out of any of the matters set out in subparagraph (i);
  - (iii) the maintenance of dependents, legitimacy, or guardianship or custody (*hadhanah*) of infants;...
3. Section 47 reads:
  - (1) A Shariah Subordinate Court shall have jurisdiction throughout the Federal Territories and shall be presided over by the Shariah Subordinate Court.
  - (2) The Shariah Subordinate Court shall:
    - (a) ...
    - (b) in its civil jurisdiction, hear and determine all such actions and proceeding as the Shariah High Court is authorized to hear and determine in which the amount or value of the subject matter in dispute does not exceed fifty thousand ringgit or is not capable of estimation in term of money...

Thus, the Shariah Courts have jurisdiction over family matters, which include the guardianship of property, with respect to Muslims in Malaysia.

In addition, the jurisdiction of the Shariah Courts is further strengthened by virtue of the amendment of article 121 A of the Federal Constitution in 1988 (Ibrahim & Joned 1995, 48 & 59; Ibrahim 2000, 231; Aun 1999, 152 & 164)). The clause reads:

The court referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah courts.

In brief, the family matters which include the guardianship of property fall exclusively under the jurisdiction of the Shariah Court of each state and the Shariah Court of Federal Territories with respect to the Federal Territories.

**The provisions on *the wilayah* of a minor's property: The Islamic Family Law (Federal Territories) Act 1984 (Act 303)**

For the purpose of this study, the concentration will be on the Islamic Family Law (Federal Territories) Act 1984 (hereinafter referred to

as IFLA) as this Act is considered as one of the pioneers among other statutes of similar nature (Ibrahim & Joned 1987, 72-73; Abdul Malek 1997, 54). In addition, the other state enactments are similar to this Act, and the only difference is the arrangement of the sections, for example, the IFLA provides the issue of guardianship of property in section 88 till section 105. The Islamic Family Law Enactment of Kelantan 2002 provides in section 89 till 105 and so on.

It is to be noted that there is no specific provision in the IFLA or other state enactments regarding guardianship of a *wasi* over a minor's property, but the issue has been provided in general under the guardianship of property.

The IFLA discusses the issue of guardianship of property in Part VII under the heading "Guardianship" with subheading "Guardianship of Person and Property" from section 88 till 105.

#### **The Meaning of Minor**

Subsection (4) of section 88 of the IFLA provides that a person is considered minor and shall be placed under guardianship when he/she has not yet completed eighteen years age. It reads:

A person shall, for the purpose of guardianship of person and property, be deemed to be minor unless he or she has completed the age of eighteen years.

This sub-section is in agreement with the view of the majority of the Malikis and Imam Abu Hanifah (with respect to male) who regarded that the age of eighteen years as the age of puberty (al-Marghinani n.d, 284; al-Khurashi n.d, 88-89). Nevertheless, it needs a further explanation as to whether this age is also considered as the age of maturity which marks the end of guardianship over ward's property where the property will be submitted to him/her completely, and he/she is considered mature enough and capable of disposing of his/her own property by himself/herself which is in compliance with the verse of the *Qur'an* (Surah al-Nisa': 6): "Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them release their property to them...".

#### **The Appointment of *Wasi*, His Position and His Condition**

Section 88(2) of the IFLA spells out that a father possesses the fullest power to make any dispositions by will in relation to the protection of the interest of his minor children. It reads:

The father shall have, at all time, the amplest power to make by will such dispositions as he thinks best relative to the guardianship of his

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minor children and the protection of their interests, provided that he is in full possession of his sense.

The provision does not clearly provide for the creation of *al-wilayah* by a father. Nevertheless, it indicates that the father shall have the power to create *al-wilayah* or appoint a *wasi* with respect to the protection of the interests of his minor children after his death since it is a type of disposition. Besides that, it lays down only a condition of sanity with respect to the testator, i.e. a person who is competent to appoint *wasi*.

It is contended that the provision ought to spell out the other important conditions of the testator as laid down by a majority of Muslim jurists: a testator shall be a person who is acting on his own free will without coercion (as laid down by the Shafi'i jurists) (al-Shirbini 1933, 75-76) and he shall not be a person who is prevented from administering his own property (as stipulated by the Malikis, the Shafi'is and the majority of the Hanbalis) (al-Ustrushana 1402 H, 33; al-Khurashi n.d, 192; al-Shibini 1933, 75-76). It is apparent that the disposition which is made under duress is invalid. Besides that, a person who is prohibited from administering his property cannot appoint a *wasi* to replace him after his death with respect to the protection of the interest of his minor children since he has no authority to do so.

According to section 91 of the IFLA, a mother may be appointed as *wasi* of the father. It reads:

A mother, whether a Muslim or *Kitabiyah*, may be validly appointed executrix of the father, and in that case, she may exercise her powers as testamentary guardian or....

This provision is certainly in line with the view of Muslim jurists. However, it will be more agreeable to them, if the provision provides that a woman in general and especially the mother is eligible to be appointed as *wasi* of the father if she fulfils all the requirements as mentioned.

Section 88 (1) of the IFLA specifies in general, the persons who are eligible to be the legal guardians of the minor after the death of the father and the qualifications of legal guardian. Besides that, it also sets out the potential legal guardians in order of preference. It reads:

Although the right to *hadanah* or the custody of the child may be vested in some other person, the father shall be the first and primary natural guardian of the person and property of his minor child, and where he is dead, the legal guardianship devolves upon one of the following persons in the following order of preference, that is to say-

- (a) the father's father



- (b) the executor's appointed by father's will;
- (c) the father's executor's executor;
- (d) the father's father's executor;
- (e) the father's father's executor's executor,

Provided that he is a Muslim, an adult, sane and worthy of trust.

The order of preference of the above-mentioned legal guardians, in general, is in accordance with the view of the Shafi'i's school that considers the father's father in preference to the executor (*wasi*) (al-Shirbini 1933, 173). That is to say, the position of the *wasi* with respect to the guardianship of property is next after the father's father in a case where the father has died.

However, with regard to the other legal guardians, the expressions "the father's executor's executor", "the father's father's executor" and "the father's father's executor's executor" seem inappropriate because it may mean that their guardianship is not established by appointment. Thus, it is proper to rephrase "executor appointed by father's executor" or "executor appointed by father's father" and "executor appointed by father's father's executor" respectively.

With regard to the qualification of a guardian, it is basically consistent with the opinions of most of the Muslim. However, it seems that the above-mentioned conditions seem inadequate, particularly with respect to *wasi* as he is a person who is responsible for the management and administration of the property of another person, i.e. the minor. As such, other conditions are necessary to ensure that the interest of the minor is well administered and protected. Malikis and Shafi'is stipulate additional conditions: that the person who is qualified to be appointed as *wasi* shall be a mature person, capable of carrying out the disposition or fit to hold the office and having no animosity with the minor as well as no conflict of interest with him (al-Dardir 1995, 333; al-Ansari n.d, 20).

Under this Act, the *wasi* has no legal authority over the minor's property where the instrument vesting the property in the minor excludes him. This is expressly provided in subsection (3) of section 88:

Subsection (1) shall not apply where the terms and conditions of the instrument vesting the property in the minor expressly excludes the person mentioned therein from exercising guardianship over the property, and in that case, the Court shall appoint a guardian of the property of a minor.

This provision is clearly contrary to the view of Muslim jurists since in the case where if a person is appointed as a *wasi*, he will be the guardian of the minor's property and will have legal authority over the

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minor's property. The guardianship of property will never transfer to the Court in the case if a guardian has already been appointed. As the hadith of the Messenger of Allah (PBUH) clearly states that *Qadi* is the guardian for those who have no guardian (al-Shawkani 1998, 608). In addition, there is an established principle of the Islamic law that "the specific guardian is stronger than general guardian" (al-Suyuti n.d, 283-286).

***The Power of Wasi in the Management of the Minor's Property***

Section 89 (1) of the IFLA prescribes the power of *wasi* with respect to the sale of immovable property. It reads:

As regards immovable property, a legal guardian shall have no power to sell, except in the following cases, that is to say-

- (a) where at least double the price of the property may be obtained by him from a stranger by the sale of the property;
- (b) where the minor has no other means of livelihood, and the sale is absolutely necessary for his maintenance, and the minor has no other property;
- (c) where the property is required to be sold for the purpose of paying off the debts of testator, which cannot otherwise be liquidated;
- (d) where there are some general provisions in the will of the testator that cannot be carried into effect without the sale of the property;
- (e) where the income accruing from the estate is insufficient to defray the expenditure incurred in its management and the payment of the land revenue;
- (f) where the property is in imminent danger of being destroyed or lost by decay;
- (g) where the property is in the hands of the usurper, and the guardian has reason to fear that there is no chance of restitution;
- or
- (h) in any other cases where it is absolutely necessary to sell the property on the ground permitted by *Hukum Syara'* and the sale is to the manifest or evident advantage of the minor.

The above provision regarding the power of *wasi* with respect to the sale of immovable property is fully in agreement with the view of the Muslim jurists (Ibn Abidin 1966, 711; al-Dardir 1995, 248; al-Shirbini 1933, 175; Ibn Muflih 1980, 341) where the *wasi* is allowed to sell immovable property belonging to the minor on necessity as in (b) and (e); where it is at high value as in (a); and when there is an advantage as in

(f), (g) and (h). However, in the case of (b) and (c) that relate to the payment of the testator's debt and the execution of his will are in agreement with the view of the Hanafi jurists, i.e. the legal opinion of the Hanafi Legal School who view that the legal authority of a *wasi* is absolute where he has to deal with the estate of the testator as well as the property of his minor children. That is to say, *al-wilayah* does not admit specification according to their view and that it cannot be created solely for the protection of the minor's property (al-Jamali 1402H, 85-86). Thus, by providing clause (b) and (c), it indicates that the administration of the estate of the testator is still in progress and the property does not absolutely belong to the minor.

Subsection (2) of the same section lays out the *wasi*'s power with respect to the sale or pledge of movable property. It states:

As regards movable property, legal guardians shall have the power to sell or pledge the goods and chattels of the minor, if he is in need of imperative necessities such as food, clothing, and nursing; and where the movable property of a minor is sold *bona fide* for adequate consideration, with the object of investing the procedure safely and for increasing the income, its sale shall be held valid.

This provision is basically consistent with the view of Maliki's and Shafi'i's that the movable property of the minor also cannot be sold except where there are a need and advantage to him/her (al-Sawi 1995, 246; al-Shirbini 1933, 175). This is due to the fact that movable property is susceptible to loss. Therefore, it is better to sell it for investment purposes rather than keeping it.

### **The Control of *Wasi* by the Court**

Section 100 of the IFLA provides that a *wasi* can seek the opinion or advice of the Court with respect to the management of a minor's property, as it states,

Any guardian may apply to the Court for its opinion, advice, or discretion on any question respecting the management or administration of minor's property.

It is apparent that the *wasi* may seek any opinion or advice from the Court since the judge or the *Qadi* is considered as one of the legal guardians of the minor who also has the power to monitor other legal guardians of the minor.

However, the power of *wasi* with respect to the disposition of the minor's property under this provision may be subjected to the permission of the Court. Section 101 of IFLA empowers the Court to make an order

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to subject the disposition of the *wasi* to its permission and the disposition without the Court's permission. The Court shall do so subject to the interests of the minor. The section reads:

- (1) Notwithstanding the provisions of section 89, the Court may, where it considers it necessary so to do, make an order prohibiting the father of a minor or the father's father or their respective executors or their respective executor's executor from-
  - (a) selling, charging, mortgaging, exchanging, or otherwise parting with possession of any movable or immovable property of the minor; or
  - (b) leasing any land belonging to the minor for a term exceeding one year, without the prior leave of the Court.
- (2) Any disposal of minor's property in contravention of an order may be declared void, and on such declaration, the Court may make such order as appears requisite for restoring to minor's property disposed of.
- (3) The Court shall not make any order under subsection (2) unless it is necessary or advisable in the interest of the minor.

The requirement of the permission of the Court in the disposition of the minor's property is more practicable in term of the control of the Court of *wasi*. Although Muslim jurists are of the view that the disposition of the *wasi* is not subjected to the permission of the Court, they fully agree that the Court has the power to monitor the *wasi* in his disposition of the minor's property (Ibn Nujaym n.d, 272; al-Dardir n.d, Vol. 4, p. 138; al-Shirbini 1933, 388; Ibn Qudamah 1981, Vol. 9; 48)

In short, the Court may subject the disposition of *wasi* to its control if there is an advantage, i.e. for the protection of the minor's interest since the disposition of his (minor) property is based on the principle of advantage (Al-Qur'an, 5: 152).

**The Removal of the *Wasi***

The law provides the Court with absolute power in the removal of a *wasi*. No grounds or justification for the removal have been mentioned. The law states:

The Court may at any time and from time to time remove any guardian, whether a parent or otherwise and whether of the person or the property of the minor and may appoint another person to be a guardian in his place (Islamic Family Law (Federal Territories) Act 1984, s 94).

In this regard, it is proper that the provision should clearly outline the reasons or justifications for the removal of the *wasi* from his office as

discussed in detail by Muslim jurists in order to avoid any misuse of judicial power.

### **The Adequacy of the Provisions in IFLA**

Are the provisions of IFLA regarding the guardianship of *wasi* over minor's property adequate as compared to the law that has been propounded by Muslim jurists?

The above discussion shows that there are very few provisions concerning the guardianship of *wasi* in IFLA. However, there are many provisions on the guardian of property appointed by the Court (See Islamic Family Law (Federal Territories) Act 1984, s 90, s 91, s 92, s 93, s 95, s 96, s 97, s 98, and s 99). It seems that IFLA does not give much emphasis on the guardian appointed by the testator even though the topic has some significance and has been given quite some consideration and has been discussed in detail by Muslim jurists in general and the Shafi'i jurists in particular.

There are no provisions relating to the number of *wasi*, how to resolve the disputes between joint *wasi* and the power of the Court to appoint a new *wasi* to replace the dead or disqualified *wasi*.

Similarly, the IFLA does not set out the essential duties of *wasi* with respect to his guardianship over the minor's property, for instance, the duty to collect the property that belongs to the minor; the duty to pay *zakat*, tax, revenue or any liability that relates to the minor himself as well as his property; duty to accept gifts or bequests that are given to the minor and the taking of possession of the property so given. The duty or power of *wasi* with respect to investment is not clearly elaborated.

In addition, the IFLA does not clearly provide whether the property of the minor has to be in possession of the *wasi* and whether the legal title to the property has to be vested in the *wasi*.

There are provisions in IFLA relating to the power of the *wasi* but only restricted to dispositions such sale or pledge. Many dispositions that the *wasi* has the power to carry out are not explicitly spelled out, for instance, the power to purchase property for the minor, taking a loan for the minor in case of need or employment of an agent etc. There is also no provision to limit the power of *wasi* in carrying out certain dispositions.

Finally, the Act has no provision regarding the entitlement of a *wasi* to remuneration, whether he is entitled to the payment in consideration of his work. Besides that, the liabilities of the *wasi* in the course of his management of the minor's property are also not provided. There is

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also no further reason that may bring the guardianship of *wasi* to an end and his important duties after the termination of *al-wilayah*.

**Conclusion**

In Malaysia, all states, as well as the federal territories, have specific enactments or act regarding personal and family matters of Muslims. The issue of guardianship of *wasi* over the minor's property has been provided in general under provisions of the guardianship of property. The foregoing discussion shows that the existing provisions of IFLA regarding the guardianship of *wasi* over the minor's property are basically consistent with the law that has been propounded by Muslim jurists.

It seems that IFLA does not give much emphasis to the guardian appointed by the testator even though the topic has some significance and has been given quite some consideration and has been discussed in detail by Muslim jurists in general and the Shafi'i jurists in particular.

Therefore, statutory provisions on guardianship of property, particularly the guardianship of a *wasi* have room for improvement. It is suggested that the existing statutory provisions of Islamic law in Malaysia will have to be read in light of Islamic jurisprudence (*fiqh*) as propounded by Muslim jurists. It is also timely that the provisions on the issue should be formulated adequately. This is due to the fact that the issue of the administration of the property of those who are not competent to administer it themselves like minors form one of the important issues in the Islamic law particularly with regard to the period after the death of the minor's father. At this period, the minor usually will own the property, which is to be inherited from his deceased father. As such, with the availability of adequate provisions on the issue, it will provide more safeguards to the minor's interest in the property. Besides that, the minor's property will be administered lawfully and properly.

Apart from that, the Shariah Court of each state in Malaysia, as well as the Shariah Court in the Federal Territories, have full jurisdiction on the issue. As such, by having adequate provisions, it may provide a solution to the Muslim uncertainties and the problem in safeguarding the interest of the minor children after their parent's death. Besides that, it helps them to make a plan wisely with respect to the fate of their minor children in future. Therefore, the need for having adequate provisions on *al-wilayah* of a minor's property is pressingly required based on social needs as well as legal clarity.

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