

**THE IMPACT OF DOMICILE ON VALIDITY OF WILL: RESEARCH ON
MALAYSIAN WOMEN WITH FOREIGN SPOUSE FROM UNITED KINGDOM,
SINGAPORE AND INDONESIA**



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JULY 2008

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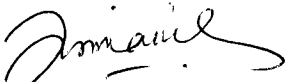
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**LAPORAN AKHIR PENYELIDIKAN “THE IMPACT OF DOMICILE ON
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FOREIGN SPOUSE FROM UNITED KINGDOM, SINGAPORE AND
INDONESIA”**

Merujuk kepada perkara di atas, bersama-sama ini disertakan 2 (dua) naskah Laporan Akhir Penyelidikan bertajuk “The Impact of Domicile on Validity of Will: Research on Malaysian Women with Foreign Spouse from United Kingdom, Singapore and Indonesia”

Sekian, terima kasih.

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Dengan hormatnya perkara tersebut di atas dirujuk.

Sukacita dimaklumkan bahawa Mesyuarat Jawatankuasa URDC Bil 2/2005 pada 19 Ogos 2005 dan 2 September 2005 telah mengambil keputusan:

- i. Bersetuju meluluskan cadangan penyelidikan yang dikemukakan oleh Puan Noraini bt. Ismail, Puan Norazlina bt. Abdul Aziz dan Puan Zuramaznum bt Sainan.
- ii. Adalah diharapkan projek penyelidikan ini dapat ditamatkan selepas 12 bulan mulai 1 Oktober 2005.
- iii. Kos yang diluluskan ialah sebanyak RM 5030.00 sahaja.
- iv. Penggunaan geran yang diluluskan hanya akan diproses setelah perjanjian ditandatangani.
- v. Kertaskerja boleh dibentangkan dalam seminar setelah 75% deraf awal laporan akhir projek dihantar ke URDC untuk semakan. Walaubagaimana pun, puan perlu membuat permohonan kepada Unit Penyelidikan, Pembangunan dan Pengkomersilan.
- vi. Pihak puan dikehendaki mengemukakan Laporan Kemajuan Penyelidikan setiap 3 bulan dari tarikh kuatkuasa. Laporan akhir perlu dihantar sebaik sahaja projek penyelidikan disiapkan. Format menulis laporan akhir boleh diperolehi di URDC Johor.

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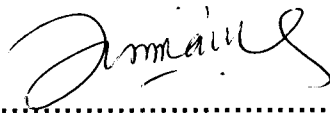
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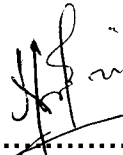
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Praise is to Allah s.w.t for His blessing through our journey in completing this research. Blessing to our Prophet Muhammad s.a.w for the guidance he left to his ummah in creating a meaningful life through gaining knowledge. Taking this opportunity we would like to thank our family for the moral and physical support given along the way. Special thanks for the kindness and corporation given by our respondents namely Associates Prof. Datin Noraziah Haji Awal of National University of Malaysia and Associates Prof. Dr. Wan Noraini Mohd. Salim of International Islamic University Malaysia. The help given has very much helped us in forming some of the suggested solutions for the dilemma in succession for inter marriages. We felt grateful and would also like to thank all relevant authors for all the sources that they have contributes through journals, book, magazines etc. The experience gained will enable us to go the extra mile in future research.

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ABSTRACT

Colonial era has left an impact to Malaysian culture. Marriage is one of the ways that the invader had used in starting their plan of invasion. Nowadays, after 48 years of independence, the scenario of local women with foreign spouse has been an accepted culture in this country. In the name of love, the marriage was solemnized with no regards to the future undertakings. One of the problems that arose if the marriage ends with dispute and leads to process of divorce is on the distribution of properties upon death. This involves interference of conflict of laws. One of the important facts that need to be pondering upon is the determination of the testatrix's domicile. Other important elements are the location of the properties either it be *lex domicile* or *lex situs*. As Malaysian Law is silent on the interpretation of domicile, according to Section 3(1) of Civil Law Act 1956, we will follow the rule of common law. Under the common law, a husband and wife were viewed as one entity. Only a decree of divorce will release her from this dependence. The question on the validity of will executed by deceased spouse is very much related to the domicile of the parties involve. It is still an unresolved issue whether the law of the deceased country or law of the widow country should administer it. This will invite the intrusion of law in settlement of case. Spouse from different country, have different set of law. The law, which they are bound to, depends on the country of their domicile. As for women, once they entered the marriage relation, the domicile will follow their husband's domicile, which is known as domicile of dependent. This research will focus on the problem arose and suggestion of solution in determining the administration of a will and rules of succession.

THE IMPACT OF DOMICILE ON VALIDITY OF WILL; RESEARCH ON MALAYSIAN WOMEN WITH FOREIGN SPOUSE FROM UNITED KINGDOM, SINGAPORE AND INDONESIA

CHAPTER ONE

1.0 PROBLEM STATEMENT

The law of domicile became diminished when the matrimonial law came in as main part that determines a marriage. The general rule of domicile states that a domicile of a wife becomes one of her husband when she enters into a contract of marriage. . As Malaysian Law is silent on the interpretation of domicile, according to Section 3(1) of Civil Law Act 1956, we will follow the rule of common law. In *Martin v Umi Kelsom*, (1963) MLJ 1 the judge decided that since at the time of the marriage, the domicile of the petitioner was England, the parties had therefore contracted a marriage appropriate to the husband's domicile. Nowadays, after 48 years of independence, the scenario of local women with foreign spouse has been an accepted culture in this country. Their marriages, which are valid under any law, religion, custom or usage under which they were solemnized prior to 1st March 1982, are deemed registered under the Malaysian Law Reform (Marriage and Divorce) Act 1976. The effect of such marriage is that a woman acquires her domicile of dependence, which follows her husband's domicile. As an illustration: if Minah, a Malaysian citizen is married to James an Australian, Minah's marriage will be governed by law of Australia. This is due to the effect of domicile of dependent that lays down the rule that a wife becomes a husband's property upon marriage. She loses her sole personal identity.

Domicile is what is termed in private international law a "connecting factor": it determines under which system of law and within the jurisdiction of which country's courts certain issues (principally those relating to status and property) is to be determined. Domicile greatly affects the administration of succession. For example, if a foreign husband dies, leaving properties inside and outside Malaysia, domicile plays an important factor, which will have great impact on the administration of his property.

When a Malaysian woman chooses to marry a foreigner, her domicile will depend on the husband's domicile. The rule of domicile is strictly adopted from the common law rules. Problems may arise in succession where properties are to be divided accordingly. Should the husband leaves a will, the will be administered according to his domicile. If the husband dies intestate, the movable properties will be administered according to his domicile. For his immovable properties, *lex situs* rules will apply.

According to that law such marriage was valid. In so deciding, the learned Chief Justice did not consider that according to the law of the domicile of the respondent, the marriage was invalid, as a Muslim woman cannot marry a non-Muslim man. In *Re Maria Huberdina Hertogh*, (1951) MLJ 164 by the law of Holland, the infant was wholly incapacitated from contracting a valid marriage and that therefore by the law of her domicile the marriage was void *ab ignition*. In *Radwan v Radwan* (1972) 3 All ER 1026, in English Law, the essential validity of a marriage was to be determined by the law of the country in which the parties were married. In *Melvin Lee Campbell v Amy Anak Edward Sumek* (1988) 2 MLJ 338, the husband had failed to prove that he had opted a domicile of choice in Malaysia. Therefore the court has no jurisdiction to entertain the joint petition for divorce.

As an illustration: if Minah, a Malaysian citizen is married to James an Australian, Minah's marriage will be governed by law of Australia. This is due to the effect of domicile of dependent that lays down the rule that a wife becomes a husband's property upon marriage. She loses her

sole personal identity. **Cheshire and North (1987)** Looking at this point literally, any will made by Minah will have to be determined according to the law of her husband's domicile. This will lead to the possibility of denying Minah's intention to bequeath part of her property to her family in Malaysia.

However, under the Malaysian Law Reform Marriage and Divorce Act 1976, it has been provided that the statutory provisions that determines matters regarding marriage depends on what has been stated in the matrimonial law of a country. It is interesting to note that domicile have minor impact on validity of will. Wills law significantly will govern the administration of 'wills' where the property is situated.

Therefore this research will discuss and explain the proper implementation of law that relates to Malaysian women with foreign husband who wishes to make will. The complexity of the law must be highlighted in order to assist those women.

- (i) A question of law as to what are the effects on the domicile of Malaysian women with foreign spouses from Indonesia, Singapore and United Kingdom
- (ii) A question of law on the judiciary standing and law regarding impact of domicile on validity of will made by Malaysian women with foreign spouses from Indonesia, Singapore and United Kingdom
- (iii) A question of law if there is a need to reform the current legislation that govern the law on domicile and will

2.0 OBJECTIVES

These specific objectives mainly deal with matters pertaining to effect of domicile on will and rules of succession.

- (i) To determine the effects on the domicile of Malaysian women married to foreigners.
- (ii) To determine the judiciary standing regarding issue of domicile for Malaysian women married to foreigners.
- (iii) To recommend the most relevant reformation on the current legislation that governs the domicile law, will and rules of succession

3.0 LITERATURE REVIEW

Colonial era has left an impact to Malaysian culture. Marriage is one of the ways that the invader had used in starting their plan of invasion. Nowadays, after 48 years of independence, the scenario of local women with foreign spouse has been an accepted culture in this country. In the name of love, the marriage was solemnized with no regards to the future undertakings. Problem arose if the marriage ends with dispute that leads to process of divorce or when the foreign husbands die leaving wills or dies intestate. Which law will be inferred in settlement of matters related to divorce? And how estates of the foreign husbands should be distributed? It may be that in a case involving private international law, there is not only a main question before the court but also some further subsidiary issue. After the law to govern the main question has been ascertained by the application of the relevant rule for the choice of law, a further choice of law rule may be required to answer the subsidiary question affecting the main issue. **Cheshire and North (1987)**. If the husband leaves a will, problems may be avoided. But, the validity of the marriage solemnized abroad will be another incidental matter, which needs further discussion. Section 3 of the Wills Act 1959 (revised 1988) defined will as a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires

to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child. According to the Shorter Oxford English Dictionary, domicile means a place of residence or ordinary habitation, a house or home, the place where one has his permanent residence, to which, if absent, he has the intention of returning. Domicile and citizenship are two different matters: citizenship determines a person's political status, such as his right to vote or to participate in a referendum, while domicile determines his civil status, such as his rights and duties in family law. **Mimi Kamariah (1999)**. In short, domicile is the country in which a person lives, which may be different from the country in which he or she has citizenship. **Kevin Boone (2003)**. The question of domicile arises frequently in cases of marriage and divorce. Soldiers, students and others who live for long periods of time in a state in which they are not domiciled are not able to sue for divorce at home under the domicile rule and cannot obtain a divorce subject to the law of the state that is most interested in them. Kevin Boone (2003). In *Martin v Umi Kelsom*, (1963) MLJ 1 the judge decided that since at the time of the marriage, the domicile of the petitioner was England, the parties had therefore contracted a marriage appropriate to the husband's domicile. According to that law such marriage was valid. In so deciding, the learned Chief Justice did not consider that according to the law of the domicile of the respondent, the marriage was invalid, as a Muslim woman cannot marry a non-Muslim man. In *Re Maria Huberdina Hertogh*, (1951) MLJ 164 by the law of Holland, the infant was wholly incapacitated from contracting a valid marriage and that therefore by the law of her domicile the marriage was void *ab initio*. In *Radwan v Radwan* (1972) 3 All ER 1026, in English Law, the essential validity of a marriage was to be determined by the law of the country in which the parties were married. In *Melvin Lee Campbell v Amy Anak Edward Sumek* (1988) 2 MLJ 338, the husband had failed to prove that he had opted a domicile of choice in Malaysia. Therefore the court has no jurisdiction to entertain the joint petition for divorce. In regard to the administration of the estate of the deceased; debts will have to be dealt with in accordance of the principles relating to either to testate or intestate succession. They will also be governed by what is sometimes called the principle of scission, under which the movable property of a deceased

may devolve according to their *lex domicilii*, his personal law, and his immovables according to their *lex situs*. RH Hickling QC (1995) Section 28 of Wills Act 1959 provides that a will executed within Malaysia by a citizen (whatever may be the domicile of such person at the time of making the same or at the time of his death) shall as regards movable property and immovable property situate in Malaysia be deemed to be a will executed for the purpose of being admitted to probate in Malaysia if it is executed in the manner required by this. Section 29 of the same Act further provides that no will shall be held to be revoked or to have become invalid in point of form nor shall the construction thereof be altered by reason only of any subsequent change of domicile of the person making the same.

4.0 RESEARCH METHODOLOGY

4.1 Theoretical study on the law of domicile and rules of succession

Library research will be conducted on the Act, books, journals, articles and cases, which discuss the law of domicile and rules of succession. Names of journals and Acts:

- (a) Malayan Law Journal, Current Law Journal
- (b) Wills Act
- (c) Law Reform and Family Marriage Act
- (d) Probate and Administration Act

Interviewing leading scholars for their views and opinions:

- (a) Prof Madya Datin Nor Aziah Haji Awal of UKM
- (b) Prof Madya Dr. Wan Noraini Mohd Salim of IIUM

5.0 DEFINITION OF TERMS

5.1 'Domicile'

According to the Black's Law Dictionary, domicile is a place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. And according to The Oxford Companion to Law, a person's domicile is a matter of law determined partly by inference from facts and partly by evidence of his expressed intention. Shorter Oxford English Dictionary, domicile means a place of residence or ordinary habitation, a house or home, the place where one has his permanent residence, to which, if absent, he has the intention of returning. In the case of *Whicker v. Hume* [1858] 7 HL Cas. 124, 164(ENG), Lord Cranworth mentioned that the meaning of the word domicile referred to as home, the permanent home. Domicile can be established by operation of law or by choice if there is intent that residence will be permanent.

Domicile and citizenship are two different matters: citizenship determines a person's political status, such as his right to vote or to participate in a referendum, while domicile determines his civil status, such as his rights and duties in family law. Mimi Kamariah (1999). In short, domicile is the country in which a person lives, which may be different from the country in which he or she has citizenship.

Generally there are three types of domicile. Domicile of origin, which is obtained at birth and in general situation, carries it through his lifetime. When someone acquires a domicile of choice, his domicile of origin becomes suspended and will be revived upon relinquishment of the domicile of choice. A legitimate children's domicile will follow his father's origin and an illegitimates will follow of his mother.

Second is domicile of choice, where a person has attained age of majority may opt his own domicile. It relates matter of intention and circumstantial evidence in proving the domicile of choice. An unmarried female is free to acquire this kind of domicile. Once a domicile of choice is acquired, the domicile of origin would be held in abeyance temporarily until abandonment of the domicile of choice.

In *Udny v Udny*, (1869) LR 1 Sc & Div 441, the issue was whether Udny was still domiciled in Scotland at the time his matrimonial affairs were being determined. He was originally from Scotland where he had bought a house. He lived in England for 32 years. At that point in time there was no doubt that he had changed his domicile from Scotland to England. He subsequently sold his house in England, together with its furnishings and furniture and left for France. At this stage, his domicile of origin was revived because by selling his house and its furniture, his intention was to terminate his domicile of choice. Thus, the law applicable to him was the law of his domicile of origin, that is, Scotland.

In *Shaik Abdul Latif v Shaik Elias Bux*, (1915) 1 FMSLR 204, the deceased had a domicile of origin in Hong Kong. He moved from Hong Kong to Singapore and subsequently to Kuala Lumpur, where he lived for 19 years until his death. While in Selangor he amassed wealth built a home for his family and regarded Selangor as his place of residence. He had no other house either in Hong Kong or anywhere else. His two Chinese wives had embraced Islam and he never visited China. The issue was whether he had acquired a domicile of choice in Selangor. If he had, the validity of his will be determined in accordance with the Islamic Law, and not the law of Hong Kong. On the facts, the court decided that the deceased had acquired a domicile of choice in Selangor.

In short, domicile is the country in which a person lives, which may be different from the country in which he or she has citizenship. Kevin Boone (2003). The question of domicile arises frequently in cases of marriage and divorce. Soldiers, students and others who live for long

periods of time in a state in which they are not domiciled are not able to sue for divorce at home under the domicile rule and cannot obtain a divorce subject to the law of the state that is most interested in them. Kevin Boone (2003). In *Martin v Umi Kelsom*, (1963) MLJ 1 the judge decided that since at the time of the marriage, the domicile of the petitioner was England, the parties had therefore contracted a marriage appropriate to the husband's domicile. In *Re Maria Huberdina Hertogh*, (1951) MLJ 164 by the law of Holland, the infant was wholly incapacitated from contracting a valid marriage and that therefore by the law of her domicile the marriage was void *ab ignition*. In *Radwan v Radwan* (1972) 3 All ER 1026, in English Law, the essential validity of a marriage was to be determined by the law of the country in which the parties were married. In *Melvin Lee Campbell v Amy Anak Edward Sumek* (1988) 2 MLJ 338, the husband had failed to prove that he had opted a domicile of choice in Malaysia. Therefore the court has no jurisdiction to entertain the joint petition for divorce.

Last is the domicile of dependence whereby in the case of a woman, she takes on the domicile of her husband upon marriage. As Malaysian Law is silent on the interpretation of domicile, according to Section 3(1) of Civil Law Act 1956, we will follow the rule of common law. Under the common law, a husband and wife were viewed as one entity. Only a decree of divorce will release her from this dependence.

5.2 'Will'

Will is generally defined as an instrument by which a person makes a disposition of his property, to take effect after his death, and which by its own nature is ambulatory and revocable during his lifetime. **Black's Law Dictionary (1979)**. A will normally disposes of the testator's property by way of legacies, special legacies of determinate subjects or general legacies of money or generic things, and provides in a residue clause for the disposal of the entire testator's property not already disposed of. **The Oxford Companion to Law (1980)**

Section 3 of the Wills Act 1959 (revised 1988) defined will as a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child.

5.3 Succession

There are several definitions of what succession is. Under universal succession, a principle that originated in Roman law, the perpetuation of the deceased is reckoned to be absolute. Their heir and the deceased are one person. It follows that their heir who succeeds to the property of the former owner is at the same time liable for the deceased's debt to the creditors of the deceased. It is said that the liability of the heir is said to be to the extent that his own property being liable to repayment of debts, unless he takes benefit of an inventory. But according to Wolff (pg 568) this definition is exaggerated. He defined universal succession as interest of creditors and means no more than that a person's property passes to his heir as a whole.

Succession is the branch of law, which deals with the devolution of a person's property to others on his death. It generally falls into three sub-branches, dealing with prior rights which some legal systems confer on certain relatives to specified shares in the estate of the deceased (intestate succession or succession on intestacy), and the rules relative to the making, interpretation, and enforcement of wills or written instructions left by the deceased. **The Oxford Companion to Law (1980)**. Although succession is defined in statute as the acquisition of title to the property of one who dies without disposing of it by will, the word frequently possesses the somewhat broader meaning of the acquisition of rights upon the death of another. **Black's Law Dictionary (1979)**

In the English conception, the executor or administrator is interposed for a time. There is an official succession and beneficial succession. The former is concerned with the realization of the assets payment of debts. Only the distribution of surplus properly speaking is the subject of succession law. Most foreign countries have adopted the principle of unity of succession by which questions relating to intestacy or wills are governed by one single law, the personal law of the deceased, irrespective of the nature of the subject matter. The common law of England has consistently adhered to what is called the principle of scission by which the issues are dealt with separately, with the result that the destination of movables on the death of the owner is governed by the law of his domicile, whilst the destination of immoveables is governed by the *lex situs*. **Cheshire and North (1987).**

However, the common ground of these two types of succession is that the persona of former owner is perpetuated in some manner in the new owner, the heir.

In *The National Bank of Greece and Athens v Metliss (1958) AC 509*, Lord Keith of Avonholm explained the importance of a successor to creditors. He said that the creditor will have lost the personal credit of the debtor on which he may be assumed to have relied. On the other hand he will not have lost, in a universal succession, the security of the debtor's assets which will have passed to the successor and be available for the creditor.

5.4 Property

Property is commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal, hereditaments and includes every invasion of one's property rights by actionable wrong. **Black's Law Dictionary (1979)**

Certain interests are clearly immovables; for instance, the interest of a co-tenant in land, an annuity charged on land, or a charge on the land to pay debts or a right to ground rents or a right of an undivided half share in land which is jointly cultivated. On the other hand, the income and the interest derived from immovable property is clearly movable property.

The distinction between movables and immovables which affects questions of jurisdiction, choice of law and, and in times past, procedure, must be made at material time. When considering whether certain property passes under a will or as intestacy, the material time is the date of the death of the testator. So if moneys are expended in the purchase of ground rents before the testator's death, the testator will be interested in them as immovables. If the purchase of ground rents occurs after the testator's death, his interest is in movables.

5.5 *Lex Situs*

Most decisions and most writers have proceeded on the assumption that it means the relevant rule applicable at the *situs* to a purely domestic situation involving no foreign element at all. **Cheshire and North (1987)**. However, it is not necessarily so as sometimes the court of the forum might include rules of private international law. It does not follow that a rule of land law designed to promote the welfare of persons domiciled in a country or to regulate local transactions should necessarily be extended to transactions completed abroad between domicile foreigners. **Cheshire and North's (1987)**. The general rule is that the law of the place where property is situated governs lands and other immovables. **Black's Law Dictionary (1979)**

5.6 *Lex Domicillii*

The above words refer to the domicile of one person. In conflicts, the law of one's domicile applied in choice of law questions. **Black's Law Dictionary (1979)**. It also means the law of the country of domicile or permanent home of a person. **The Oxford Companion to Law (1980)**

Probate and Letter of Administration

Literally, probate means the certificate granted by the court that the will of the deceased person has been proved and registered in the court and that a right to administer his effects has been granted to the executor proving the will. Probate may be granted in common form, which is done in ordinary cases where the executor swears and files an affidavit that the will is the true and original last will of the deceased and that he will faithfully administer the estate; or in solemn form, which is done where there is or is likely to be a dispute as to the validity of the will, in which case the person propounding the will brings an action against the person disputing it and if the court is satisfied, it pronounces for the validity of the will and grants probate of it. **The Oxford Companion to Law (1980)**. Letter of Administration on the other hand is the authority, granted now by the High Court in the exercise of its probate jurisdiction to a person to act as an administrator of the estate of a person who has died intestate or without naming an executor, and giving him powers and duties similar to those of an executor. If the deceased died intestate, letters of administration are granted to some of the next of kin, or to a creditor or other person. If the deceased died testate but without appointing an executor or the executor is unable to act, letters of administration are granted with the will annexed. **The Oxford Companion to Law (1980)**.