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Judicial Resolution of Hibah (Gift) over Encumbered Property: An Analysis of the Abdul Hamid Masidullah v. Norehan Abdul Jabbar Case

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Abstract: Ownership of a property is a crucial aspect in determining the validity of a hibah (gift) contract. Accordingly, the permissibility of gifting an asset that is still under financial institution collateral has been a subject of scholarly debate, particularly on whether such an asset constitutes absolute ownership by the donor. The appeal case of Abdul Hamid Bin Masidullah v. Norehan Binti Abdul Jabbar (Mal No. 08000-001-0014-2018) serves as a reference regarding the permissibility of hibah involving collateralised property. One of the arguments raised by the Appellant was that the hibah of a property still under the collateral of the Government of Malaysia's Housing Loan Division was invalid, as the gifted property was not deemed to be under the complete or absolute ownership of the donor. However, the Syariah Court of Appeal of the State of Perak, Malaysia, dismissed the appeal and upheld the decision of the Syariah High Court in Hibah Case No. 08100-044-0149-2015. The Court ruled that the gifted property constituted full ownership by the donor. Therefore, this article aims to examine and analyse the reasoning behind the Court of Appeal's judgment on this issue, based on scholarly opinions and juristic arguments *(fuqaha)*. This study employs a qualitative analysis, focusing on the Syariah Court of Appeal case of Abdul Hamid Bin Masidullah v. Norehan Binti Abdul Jabbar (Mal No. 08000-001-0014-2018). Data were collected through critical document analysis of court judgments, legal provisions, and relevant fatwas, with sources selected based on strict reliability and relevance criteria. Thematic analysis was used to systematically compare and synthesize diverse juristic opinions, ensuring the findings are jurisprudentially robust and contextually relevant to Malaysia's Syariah context. The study found that the reasoning in this appellate case aligns with Islamic legal principles and does not exclusively adhere to the opinion of a single school of jurisprudence. Instead, the views of scholars from other schools of thought, beyond the Shafi'i madhhab, were also considered and utilized by the Court in accordance with the contextual needs of the case. This study contributes to the development of Islamic property law by clarifying the judicial reasoning applied in resolving disputes over hibah (gifts) involving encumbered property.

Keywords: *Hibah (Gift), Encumbered Property, Absolute Ownership, Shariah Law, Appeal Case*.

Abstrak: Kepemilikan atas suatu harta merupakan aspek penting dalam menentukan keabsahan suatu akad hibah. Oleh karena itu, menghibahkan harta yang masih dalam jaminan institusi keuangan menjadi isu yang diperdebatkan mengenai keabsahannya, apakah harta tersebut merupakan milik sempurna pemberi hibah atau tidak. Kasus banding terkait tuntutan pengesahan hibah Abdul Hamid Bin Masidullah vs. Norehan Binti Abdul Jabbar (Mal No. 08000-001-0014-2018) menjadi rujukan dalam menentukan keabsahan hibah atas harta yang masih dalam jaminan. Salah satu alasan yang diajukan oleh pemohon banding adalah terkait status hibah yang dilakukan atas properti yang masih dalam jaminan Bagian Pinjaman Perumahan Pemerintah Malaysia, yang dianggap tidak sah karena harta yang dihibahkan dianggap bukan milik mutlak atau milik sempurna pemberi hibah. Mahkamah Banding Syariah Negeri Perak, Malaysia, menolak banding pemohon dan mempertahankan keputusan kasus Hibah No. 08100-044-0149-2015 yang telah diputuskan oleh Mahkamah Tinggi Syariah. Properti yang dihibahkan diputuskan sebagai milik sempurna pemberi hibah. Oleh karena itu, artikel ini ditulis untuk mengupas dan menganalisis alasan putusan Mahkamah Banding terkait isu ini berdasarkan pandangan dan argumen para fuqaha. Studi ini menggunakan analisis kualitatif dengan fokus pada perkara Mahkamah Rayuan Syariah Abdul Hamid Bin Masidullah v. Norehan Binti Abdul Jabbar (Mal No. 08000-001-0014-2018). Data dikumpulkan melalui analisis dokumen secara kritis terhadap putusan pengadilan, ketentuan hukum, dan fatwa yang relevan, dengan sumber-sumber dipilih berdasarkan kriteria ketat terkait keandalan dan relevansi. Analisis tematik digunakan untuk secara sistematis membandingkan dan mensintesis beragam pandangan yurisprudensial, sehingga temuan yang dihasilkan memiliki landasan hukum yang kuat dan relevan secara kontekstual dengan lingkungan Syariah di Malaysia. Kajian ini menemukan bahwa alasan putusan dalam kasus banding ini sejalan dan sesuai dengan hukum syarak, serta tidak hanya mengacu pada pandangan satu mazhab fuqaha tertentu, melainkan juga mempertimbangkan pandangan fuqaha dari mazhab lain selain mazhab Syafi'i, yang dijadikan landasan dan rujukan oleh Mahkamah sesuai dengan kebutuhan kasus. Penelitian ini berkontribusi terhadap pengembangan hukum harta kekayaan Islam dengan memperjelas pertimbangan yuridis yang diterapkan dalam penyelesaian sengketa hibah atas harta yang masih terbebani hak tanggungan.

Kata kunci: *Hibah, harta dalam jaminan, kepemilikan sempurna, hukum syarak, kes rayuan*

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Introduction

A hibah (gift) contract is valid when it fulfills the pillars and conditions stipulated by Islamic law. The property being gifted is one of the pillars of hibah, and among the conditions for the property to be gifted is that it must belong to the donor. This raises the question of the status of property that is under collateral—whether such property belongs to the pledger or the pledgee. If the collateralized property belongs to the pledger, then the pledger has the right to gift it. Conversely, if the property belongs to the pledgee, the pledger does not have the right to gift it.[1] The issue of gifting collateralized property was one of the arguments raised by the Appellant, Abdul Hamid Bin Masidullah, in the case Mal No. 08000-001-0014-2018.

The case Mal No. 08000-001-0014-2018 was heard before the Judges of the Syariah Court of Appeal of the State of Perak, Malaysia, on 10 Zulkaedah 1440H, corresponding to 17 July 2019. It concerned an appeal regarding the confirmation of a hibah of a house made verbally by the deceased, Allahyarham Abdul Jabbar bin Masidullah, to the Respondent, Norehan Binti Abdul Jabbar. The hibah was declared valid under Islamic law by the Ipoh Syariah High Court on 10 October 2016 in the case of Mal No. 08100-044-0149-2015. The deceased's gift of the property and all its interests, registered as GM 746, Lot 57645, Mukim Sungai Terap, District of Kinta, State of Perak, located at Lot 152, Kampung Tersusun, Taman Tasek Permai, 31000 Batu Gajah, Perak Darul Ridzuan, to the Respondent, Norehan Binti Abdul Jabbar, was witnessed by the Respondent's husband. The Appellant, Abdul Hamid Bin Masidullah, the deceased's younger brother and the Respondent's paternal uncle, was dissatisfied with the learned trial judge's decision and filed an appeal on 24 October 2016, presenting ten grounds. One of the Appellant's arguments was that the property gifted was not wholly owned by the deceased, as it was still under a government housing loan; therefore, the property should not have been gifted by the deceased.

Referring to the Court of Appeal's Grounds of Judgment in this case, the issue of gifting property still under collateral became one of the matters that needed to be decided by the Court of Appeal. The question was whether the property gifted, which was still under the collateral of the Government Housing Loan Division, was considered incomplete ownership and thus could not be gifted, or otherwise. The Appellant's argument regarding this issue was the Respondent's failure to provide any document or evidence proving that prior permission had been obtained from the Government Housing Loan Division to allow the deceased to execute the hibah to the Respondent. Due to the absence of such permission from the Government, the Appellant argued that the hibah was invalid because the property had not yet become the deceased's complete ownership at the time the hibah contract was executed.

The Court of Appeal unanimously dismissed the Appellant's appeal, and the decision in Hibah Case No. 08100-044-0149-2015, as ordered by the Syariah High Court, was upheld. Therefore, this article will explore the Grounds of Judgment of the Court of Appeal in deciding this case. The Grounds of Judgment

[1] Muhamad Mu'izz Abdullah, Othman Amirul Hafizin, and Mohamad Fadzil Mohamad. "Transformation of Collateral Hibah in Amanah Raya Berhad: Analysis From The Shariah Perspective and its Implementation in Malaysia." *IIUM Law Journal* 32, no. 1 (2024): 187–232.

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will be analyzed based on the views of Islamic jurists and their arguments to assess their alignment with Islamic law, alongside previous cases related to the hibah of collateralized property decided by the courts.[2]

Hibah, within the tradition of Islamic jurisprudence, is a comprehensive concept that jurists from various schools of thought have extensively discussed since the early centuries of fiqh development. [3] According to Nor Muhammad [4], hibah, as a voluntary asset transfer instrument, has received special attention among contemporary scholars due to its significance in estate planning and asset management for modern Muslim societies. [5] From a theoretical perspective, the concept of hibah encompasses not only ritual and devotional aspects but also socio-economic dimensions that require a deep understanding of the principles of milkiyyah (ownership) in Islam.[6] Mohd Zamro Muda[7] asserts that in the Malaysian context, the application of hibah has evolved beyond traditional frameworks to meet the needs of a modern society facing challenges in managing complex assets, including properties encumbered by financing agreements and collateral.

The issue of ownership status for encumbered property has sparked significant controversy among both classical jurists and contemporary scholars, particularly regarding the distinction between relative and absolute ownership. Noor Lizza et al[8] explain that this debate arises from differing interpretations of the nature of ownership in pawn contracts (*rahn*), [9] where some schools consider encumbered property as imperfect ownership, while others maintain the concept of full ownership by the pledgor. Previous studies have identified a substantial research gap in analyzing the application of these classical principles to contemporary Islamic financial products, such as *Bai' Bithaman Ajil*, particularly in the context of judicial decisions by the Malaysian Syariah courts. Abdullah et al [10] highlight that the lack of in-depth analysis of judicial reasoning that integrates the views of various madhhabs in cases involving hibah of

[2] Nasrul Hisyam Nor Muhammad, "Penyelesaian Pindah Milik Harta Bercagar di Institusi Kewangan: Dari Perspektif Undang- Undang Islam," Kanun 2 no. 23 (2011): 180-208.

[3] Bilalu, Naskur, Rosdalina Bukido, Syahrul Mubarak Subeitan, and Asril Amirul Zakariah. 2025. "Reevaluating Inheritance Distribution in Indonesia: The Role of Hibah As a Preventive Measure". *Al-Istinbath: Jurnal Hukum Islam* 10 (1):378-406.

[4] Nor Muhamad, Nasrul Hisyam, Ahmad Che Yaacob, and Norazila Mat Hussain, "Konsep Hibah Bersyarat dan Aplikasinya Dalam Perancangan Harta," *International Journal of Islamic and Civilizational Studies* 3 no. 1 (2017): 32–41.

[5] Supriyadi Supriyadi and Sukron Ma'mun. "Contemporary Inheritance: The Application of Inheritance Division in Juridical, Psychological, Sociological and Economic Perspective". 2023. *MILRev: Metro Islamic Law Review* 2 (2): 134-54. Husni, Muhammad. "Mencegah Potensi Konflik dalam Pelaksanaan Wasiat Pembagian Harta, Mungkinkah?" *De Jure: Jurnal Hukum dan Syar'iah* 11, no. 2 (2019): 90–99.

[6] Aziz, Abdul. "Pembagian Waris Berdasarkan Tingkat Kesejahteraan Ekonomi Ahli Waris dalam Tinjauan Maqāshid Shariah." *De Jure: Jurnal Hukum dan Syari'ah* 8, no. 1 (2016): 48–63. Rusfi, Muhammad. "Filsafat Harta: Prinsip Hukum Islam Terhadap Hak Kepemilikan Harta." *Al-'Adalah* 13, no. 2 (2017): 239–58.

[7] Mohd Zamro Muda, Nurnazirah Rosdi and Noor Lizza Mohamed Said, "Hibah Amanah Hartanah dan Kekangan Perundangan dalam Perancangan Harta Orang Islam di Malaysia," *International Journal of Islamic and Civilizational Studies* 9 no. 3 (2022): 31-40.

[8] Noor Lizza Mohamed Said,, Adnan Yusoff, Md Yazid Ahmad, and Mohd Zamro Muda. "Hibah of Collateral Property in Islamic Perspective and the Implementation in Malaysia." *International Journal of Academic Research in Business and Social Sciences* 13, no. 7 (2023): 1625–1635.

[9] Hidayah, Khoirul. "Kajian Hukum Islam terhadap Hak Merek sebagai Obyek dalam Perjanjian Rahn." *De Jure: Jurnal Syariah dan Hukum* 6, no. 1 (Juni 2014): 1–9.

[10] Muhamad Mu'izz Abdullah, Othman Amirul Hafizin, and Mohamad Fadzil Mohamad. "Transformation of Collateral Hibah in Amanah Raya Berhad: Analysis From The Shariah Perspective and its Implementation in Malaysia." *IIUM Law Journal* 32, no. 1 (2024): 187–232.

encumbered property has led to ambiguity in the contextual application of Islamic law in Malaysia.

This study makes a significant contribution to the scholarship of contextualized Islamic law by critically analyzing how the Malaysian Syariah courts apply the principles of Islamic jurisprudence in resolving issues related to hibah of encumbered property within the modern legal and financial system. Fathullah Asni and Jasni Sulong [11] emphasize the importance of the *mura'ah al-khilaf* approach in fatwa decisions that consider the views of multiple madhhabs to achieve optimal maslahah. This study contributes to the understanding of how this principle is applied in judicial reasoning.[12] The main contribution of this study lies in providing a systematic doctrinal analysis of appellate cases that serve as important precedents in Malaysian Syariah law, thereby demonstrating how a pluralistic approach to the schools of fiqh can offer fair and Shariah-compliant solutions in the context of Malaysia's multi-ethnic society. This study also contributes to the development of Islamic legal literature by providing an analytical framework that can serve as a reference for similar cases in the future, thereby strengthening the position of the Syariah courts as institutions capable of adapting classical Islamic principles to contemporary realities.

Method

This study employs a qualitative research approach, utilizing legal analysis, to examine the permissibility of hibah (inter vivos gift) involving properties under collateral within the framework of Shariah law. The primary subject of this study is the Syariah Court of Appeal case Abdul Hamid Bin Masidullah v. Norehan Binti Abdul Jabbar (Mal No. 08000-001-0014-2018). The research procedure involves a critical analysis of court documents, legal provisions, and relevant fatwas, with data collected through document analysis that focuses on judicial reasoning and the application of Islamic jurisprudential principles.

The selection of sources is based on rigorous criteria to ensure reliability, relevance, and methodological transparency. Primary sources comprise court decision document Abdul Hamid Bin Masidullah v. Norehan Binti Abdul Jabbar (Mal No. 08000-001-0014-2018), selected based on four inclusive criteria: (i) cases involving direct disputes over hibah of pledged property; (ii) finalized decisions with established precedent value; (iii) cases containing substantive discussions on property ownership status in pledge contracts; and (iv) decisions referencing opinions from multiple Islamic schools of thought (mazhab). Exclusive criteria eliminate: (i) cases not directly addressing ownership or hibah issues; (ii) decisions under appeal or pending finalization; and (iii) cases focusing solely on procedural aspects without substantive Shariah discussions. Secondary sources are systematically selected from authoritative classical fiqh texts representing Hanafi, Maliki, Shafi'i, and Hanbali schools, alongside contemporary scholarly works from peer-

[11] Fathullah Asni, and Jasni Sulong. "The Mura'ah Al-Khilaf and Ma'alat Method in Fatwa Decisions: Its Application for Fatwa Coordination Related to Conditional Hibah in Malaysia." *International Journal of Islamic and Middle Eastern Finance and Management* 14, no.4 (2020): 641–54.

[12] Rahman, Encep Taufik, Muharir Muharir, Hisam Ahyani, and Nurul Ilyana Muhd Adnan. 2025. "The Dynamics of The Fatwa on the Prohibition of Interfaith Greetings: Maqasid Al-Shariah and Its Implications for Multicultural Families in Indonesia". *Justicia Islamica* 22 (1):25-48.

reviewed academic journals to ensure argumentative quality and credibility.

The study employs a structured thematic analysis framework adapted from qualitative content analysis methodology to interpret diverse fuqaha perspectives on hibah of pledged property. This framework integrates the *mura'ah al-khilaf* approach, emphasizing systematic consideration of varied mazhab viewpoints to achieve optimal jurisprudential resolutions [13] . The three-stage analytical process comprises: (i) thematic categorization of substantive issues emerging from judicial decisions; (ii) comparative analysis of fuqaha opinions across different mazhab regarding each identified theme; and (iii) synthetic evaluation assessing alignment between judicial reasoning and Islamic jurisprudential principles. Each scholarly opinion is systematically analyzed based on presented evidence *(dalil)*. This analytical framework enables the identification of the reasoning employed by courts in integrating multi-mazhab perspectives to achieve decisions that are both jurisprudentially sound and contextually appropriate for Malaysia's pluralistic society.

Results and Discussions

The review of the Grounds of Judgment in this case is divided into two aspects, referring to the issues arising concerning the hibah of collateralized property: the aspect of ownership status of the collateralized property and the aspect of the necessity of obtaining the pledgee's consent in the hibah contract.[14]

Ownership Status of Collateralized Property

The Court of Appeal referred to the Judgment of the Learned Trial Judge to determine the ownership status of the property still under government housing financing. Based on the records, the deceased had gifted the property to the Respondent as an expression of a father's love for his child. The Court confirmed, based on documentary evidence, the issuance of a settlement letter for the remaining housing loan balance, which was paid off by the takaful (Islamic insurance) to the Government Housing Loan Division after the donor's death. This letter was issued on 24 September 2010. The Learned Trial Judge found no apparent contradiction regarding the pillars and conditions for the validity of a hibah under Islamic law. The Judge emphasized that, although the house was still under government financing, it is widely known that all housing loans are insured.[15] Considering this fact, the Learned Trial Judge agreed that the property could be deemed purchased and owned by the deceased during his lifetime.

In determining the validity of a hibah contract, the Court examines the fulfillment of the pillars of hibah as prescribed by Islamic law.[16] The Court referred to the Shafi'i fiqh text

[13] Zulzaidi Mahmod and Ahmad Hidayat Buang. "Metodologi Penghakiman dan Penulisan Teks Alasan Penghakiman Hakim Syarie Melalui Pendekatan Arahan Amalan Mahkamah Syariah di Malaysia: The Methodology of Judgment and Grounds of Judgment's Text Writing by Syariah Judges According to Syariah Court Practice Directions Approach in Malaysia." *Jurnal Syariah* 30, no. 1 (2023): 76–99.

[14] Mohd Izzat Amsyar Mohd Arif, Faezy Adenan, Shofiyyah Moidin, "Analisis Perundangan Terhadap Pelaksanaan Akad Hibah Amanah Dalam Industri Kewangan Islam Di Malaysia," Akademika 93 no. 3 (2023), 197–211.

[15] Mohd Yazid Zulkepli and Tajul Aris Ahmad Bustami, "The Grey Side Of Hibah Amanah As Inheritance Instrument In Malaysia," Al- Shajarah 24 no. 2 (2019), 267–292.

[16] Mohd Zamro Muda, Nurnazirah Rosdi and Noor Lizza Mohamed Said, "Hibah Amanah Hartanah dan Kekangan Perundangan dalam Perancangan Harta Orang Islam di Malaysia," International Journal of

Mughni al-Muhtaj by al-Khatib al-Syarbini, which outlines the pillars of hibah as follows: *al-wahib* (the donor), *al-mawhub lah* (the recipient), *mawhub bih* (the gifted property), and *sighah* (the offer and acceptance). Thus, the Court found that one of the key issues to be decided in this case was the status of the gifted property, which is the third pillar of hibah.[17] Specifically, the question was whether the property was wholly owned by the deceased, thereby enabling him to execute the hibah transaction, or otherwise.[18] According to al-Zuhayli[19], complete ownership refers to both physical ownership of the property and its benefits, meaning the owner holds all legitimate rights over the property.[20]

The ownership status of the deceased over the property gifted to the Respondent was thoroughly examined by the Court. The property in question is a house built on a piece of land gifted by the deceased's mother, Mariam Binti Haji Abas. The land was transferred to the deceased to enable him to construct a house using housing financing from the Government Housing Loan Division. Based on these facts, it is evident that the land became the deceased's property, and the house constructed on the land by the deceased also became his property. From the perspective of the majority of Islamic jurists, a house is categorized as immovable property that forms part of the land on which it is built. The ownership status of the house follows the ownership status of the land, unless the house can be detached or relocated to another location.[21]

Subsequently, the Court examined the nature of the contract executed by the deceased with the housing loan financier to determine the ownership status of the property after the financing agreement was concluded between both parties. Referring to the arguments and submissions of the Appellant, the financing contract entered into by the deceased to acquire the property was based on the *Bai' Bithaman Ajil* (BBA) contract, an Islamic housing financing product introduced by the Government.[22] The Court carefully reviewed the agreement between the two parties and found that the contract entered into by the deceased with the financier was not a loan agreement, but a sale and purchase agreement that granted the deceased beneficial ownership of the property. This is because, under the *Bai' Bithaman Ajil* housing financing scheme, beneficial ownership is established. Therefore, the Court confirmed that the sale and purchase process,

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[17] Harahap, Purnama Hidayah, Asmuni, Akmaluddin Syahputra, Ahmad Rezy Meidina, and Anwar Zein. 2023. "Religious Court Decisions Regarding the Revocation of Grant (Hibah) in the Perspective of Islamic Jurisprudence". *Al-Manahij: Jurnal Kajian Hukum Islam* 17 (2):233-48.

[18] Muhamad Mu'izz Abdullah, Abdul Bari Awang, Muhamad Sabri Zakaria, "Analysis of Trust Instrument in Islamic Estate Planning: a Study Case at Amanah Raya Berhad, Malaysia," Journal of Islamic Accounting and Business Research 14 no. 8 (2023): 1404 -1425.

[19] Wahbah al-Zuhayli. *al-Fiqh al-Islami wa Adillatuh*. Damshiq: Dar al-Fikr. 1989. Jil. 5.

[20] Muhammad Fathullah Al Haq Muhamad Asni & Jasni bin Sulong, "Fatwa Concerning Qabd in Hibah and the Insertion of Qabd Element in States Fatwa in Malaysia", Journal of Islamic Studies and Culture 4 no. 1, (2016): 143-154.

[21] Abd Aziz Muhammad al-Audhi. *Qabd al-Amwal fi Uqud al-Muᶜawadhat baina al-Hissi wa al-Hukmi.* Dar Alam. 2015. Nasrul Hisyam Nor Muhamad, Ahmad Che Yaacob, and Norazila Mat Hussain, "Konsep Hibah Bersyarat dan Aplikasinya Dalam Perancangan Harta," International Journal of Islamic and Civilizational Studies 3 no. 1 (2017): 32–41.

[22] Batubara, Chuzaimah, Mustapa Khamal Rokan, Muhammad Firdaus Bin Abdul Manaf, Sukiati Sukiati, and Isnaini Harahap. "Realizing Justice and Maṣlaḥah in E-Commerce: Fiqh Muamalah Insights and Challenges in Malaysia and Indonesia." *JURIS (Jurnal Ilmiah Syariah)* 23, no. 2 (2024): 253–267.

as well as the payment method through the Bai' Bithaman Ajil contract, provided full ownership to the deceased. This is consistent with the rulings of the Shariah Committee of Al-Rajhi Bank and the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), which recognize beneficial ownership as actual ownership under Islamic law.[23]

Although the property gifted was still under the government housing financing scheme, the Court affirmed that the property was wholly owned by the deceased, granting him the right to dispose *of it (taṣarruf) through any means, including* selling, gifting, bequeathing, or any other form of transaction. The findings of the Honourable Judges of the Court of Appeal align with the views of Islamic jurists regarding the status of collateralized property, which is considered the ownership of the pledger and not the pledgee.[24] The Prophet Muhammad (peace be upon him) said, as narrated by al-Shafi'i and al-Daruqutni[25]:

"A collateral does not cease to belong to the pledger who pledged it. He is entitled to its benefits, and he bears its losses." (Kitab al-Rahn, Chapter on the Guarantee of Collateral).

The profits, such as any increase derived from the collateralized property, belong to the pledger. Similarly, any damage or destruction of the property while in the custody of the pledgee is the responsibility of the pledger. Therefore, collateralized property does not belong to the pledgee. The pledgee has no right to dispose *(taṣarruf)* of the property and merely acts as a trustee. As a trustee, the pledgee is not required to compensate for any unintentional damage or destruction of the collateralized property unless there is an agreement between both contracting parties stipulating otherwise.[26] Additionally, evidence that collateralized property remains the ownership of the pledger is the permissibility of the pledger to dispose *(taṣarruf)* of the collateralized property, as supported by the hadith of the Prophet Muhammad (peace be upon him):

"A collateralized animal may be ridden, and its milk may be consumed by the one who bears its maintenance costs." (Kitab al-Rahn, Chapter on Collateral that Can Be Ridden and Milked, No: 2512).[27]

The responsibility for maintaining collateralized property rests with the pledgor, who is the owner of the property. Therefore, the pledgor is the party entitled to benefit from the property.[28] For example, the maintenance of a property pledged to the pledgee is the responsibility of the pledgor to manage and bear the costs of maintaining the property. Meanwhile, in terms of the right to benefit from the property, it remains the right of the

[23] Nik Abdul Rahim Nik Abdul Ghani et al. 'Analisis Syariah Terhadap Konsep Pemilikan Bermanfaat (Beneficial Ownership) Dalam Pembiayaan Perumahan'. *Journal of Contemporary Islamic Law* 1, no. 2 (2016): 69-90.

[24] Mustafa al-Khin et al. *al-Fiqh al-Manhaji ᶜala Madhahib al-Imam al-Shafiᶜi*. Damshiq: Dar al-Qalam. 2006. Jil. 3.

[25] Ismail Yahya al-Muzni. *Muhtasar al-Muzni.* Beirut: Dar al-Maᶜrifah. 1990.

[26] al-Khin et al. *al-Fiqh al-Manhaji ᶜala Madhahib al-Imam al-Shafiᶜi*. al-Zuhayli. *al-Fiqh al-Islami wa Adillatuh*.

[27] Aḥmad ᶜAli al-ᶜAsqalāni. *Fatḥ al-Bāri bi Sharḥ Ṣaḥiḥ al-Bukhāri*. Amman: Markaz al-Turath li Barmajiyyāt. 2013.

[28] al-Khin et al. *al-Fiqh al-Manhaji ᶜala Madhahib al-Imam al-Shafiᶜi*. Triyono Adi Saputro, Ismail Rumadan, Pujiyono Suwadi, Emmy Latifah, and Muhammad Syaiful. "The Urgency of Using al-Milk an-Naqiṣ in Geographical Indications: An Ideal Preservation for Intellectual Property in Indonesia." JURIS (Jurnal Ilmiah Syariah) 23, no. 2 (2024): 269–279.

pledgor to utilize it, whether by residing in it, cultivating it, or otherwise. However, according to al-Sharbini, [29] the pledgee has a right over the pledged property as a security for the debt and as a guarantee for the repayment of the debt by the pledgor.

In this case, the property used as collateral to secure the deceased's housing loan debt to the Government Housing Loan Division is considered to be the deceased's absolute ownership. If it were not the deceased's absolute ownership, the sale and purchase agreement and the Bai' Bithaman Ajil contract between the deceased and the Government Housing Loan Division could not have taken place. Therefore, using the property as collateral or as a guarantee for debt repayment does not revoke the ownership rights of the original owner until the collateralized property is sold in the event the pledgor fails to settle the debt. In fact, according to the views of the fuqaha, the pledgor or their representative is the party entitled to sell the collateralized property to settle the debt, as the pledgor is the owner of the property, or their representative acts on their behalf. [30]

In summary, the Court's analysis of the ownership status of collateralized property demonstrates that, despite the property being under a government housing loan, the deceased retained both legal and beneficial ownership, thus fulfilling the Shariah requirement for valid hibah. The judgment systematically addresses the central research question by evaluating whether collateral arrangements negate absolute ownership. By referencing classical and contemporary juristic opinions, the Court clarified that the existence of collateral does not transfer ownership to the pledgee, but rather serves as a security mechanism, leaving the donor's right to dispose of the property—including by hibah—intact. This approach not only aligns with the majority view among Islamic jurists but also reflects the practical realities of modern Islamic finance in Malaysia. Ultimately, the Court's reasoning reinforces that the validity of hibah involving encumbered property hinges on the donor's retained ownership, directly supporting the study's central inquiry and providing clear analytical linkage between legal arguments and the research objective.

The Requirement of Pledgee Consent in a Hibah Contract

The absence of consent from the pledgee, which would allow the donor to gift their property, is one of the Appellant's arguments in this case:

"The respondent has failed to present any document or evidence proving that prior consent was obtained from the Government Housing Loan Division to enable the deceased to execute the hibah to the respondent."

According to the Appellant, without the consent of the Government Housing Loan Division as the pledgee of the property, the hibah is invalid because the property has not yet become the absolute ownership of the donor.

In reality, the issue of whether consent from the pledgee is required to allow the pledgor to dispose *(taṣarruf)* of or transact

[29] Muḥammad Muḥammad al-Sharbini. *Mughni al-Muhtāj ilā Maᶜrifah al-Maᶜāni Alfāẓ al-Minhāj*. Beirut: Dār al-Kutub al-ᶜIlmiyyah. 2009. Jil. 2.

[30] al-Khin et al. *al-Fiqh al-Manhaji ᶜala Madhahib al-Imam al-Shafiᶜi*. Abdul Hakim Pratama, Hasbir Paserangi, Adi Nurhani Mufrih, Abdul Halim Talli, Mohd Al Adib Samuri. "The Position of Choice of Forum and Alternative Dispute Resolution Principles in Contemporary Sharia-Based Property Dispute". 2025. *MILRev: Metro Islamic Law Review* 4 (1): 184-207.

with the pledged property has been a subject of debate among Islamic jurists. Al-Zuhayli[31] has documented that there are three groups of fuqaha with differing opinions on this matter:

i. The Hanafi school of thought holds that the disposal *(taṣarruf)* of pledged property by the pledgor without the consent of the pledgee, whether through a sale, lease, hibah, or waqf (endowment), is not immediately invalid. However, the status of such a transaction is *mawqūf* (suspended) and remains ineffective until consent is obtained from the pledgee. This consent can be granted either at the time of contracting or after the contract has been concluded.

According to this group, the disposal *(taṣarruf)* by the pledgor, such as sale, hibah, and charity, is a transaction that can be annulled, but the right to annul it does not belong to the pledgee, as the disposal *(taṣarruf)* is made by the pledgor who has the qualification and authority over the property. If the pledgee does not consent to the disposal *(taṣarruf)* made by the pledgor over the pledged property, the transaction is not invalidated due to the pledgee's lack of consent; instead, it remains *mawquf* (suspended). For example, if someone purchases a property that is still under collateral without knowing its status, they have the option to either wait patiently until the collateral is resolved or bring the matter to a qadi to annul the sale contract.[32]

However, according to Ibn ʿĀbidīn[33], the disposal *(taṣarruf)* by the pledgor over the pledged property does not negate the pledgee's right to hold the property. That right remains with the pledgee even if the property is gifted or sold. Therefore, the disposal *(taṣarruf)* made by the pledgor does not invalidate the collateral contract but merely requires the consent of the pledgee for its execution.

ii. The Maliki school of thought holds that if the pledgor disposes of the pledged property without the pledgee's consent, whether through a sale, hibah, lease, charity, loan, or other transactions, the contract is invalid due to the absence of the pledgee's consent. However, if the pledgee consents to the disposal *(taṣarruf)* by the pledgor, the disposal *(taṣarruf)* is valid, and the collateral contract is nullified as a result of the pledgee's consent.

Nevertheless, Imam Malik[34] divided the permissibility of disposing of a pledged enslaved person into two situations for the pledgor. If the pledgor is financially capable (wealthy), the emancipation is permitted, and the pledgee's rights must be fulfilled immediately. On the other hand, if the pledgor is financially incapable (poor), the enslaved person is to be sold, and the pledgee's rights are to be paid from the sale proceeds.

iii. The Shafi'i and Hanbali schools of thought hold that any disposal *(taṣarruf)* by the pledgor that could nullify their ownership rights over the pledged property and result in a transfer of ownership, such as through a sale, waqf, hibah, or another pledge, is invalid if done without the consent of the pledgee. Therefore, no legal implications under Shariah will take effect from such a disposal, and the

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[31] al-Zuhayli. *al-Fiqh al-Islami wa Adillatuh*.

[32] Nor Aini Abdullah et al., "Aplikasi Qabd dalam Hibah: Pandangan Fuqaha dan Pengamalan Dalam Perundangan di Malaysia". Journal of Contemporary Islamic Law, 6(2), (2021): 12-21.

[33] Muḥammad Amin ᶜUmar Ibn ᶜĀbidin. *Hāshiah Radd al-Mukhtār ᶜala al-Durr al-Mukhtār Sharḥ Tanwir al-Abṣār.* Beirut: Dār al-Fikr. 1992. Jil. 6.

[34] Muhammad Ahmad Ibn Rushd. *Bidayah al-Mujtahid wa Nihayah al-Muqtasid.* al-Qaherah: Dar al-Hadith. 2004. Juz. 4.

property remains as collateral. This is because, if the disposal were valid, the rights of security (*al-wathiqah*) and the interests of the pledgee would be compromised. Similarly, any disposal *(taṣarruf)* by the pledgor that would reduce the value or physical condition of the property is not permitted without the pledgee's consent, in order to safeguard the pledgee's interests.

However, if the pledgee grants consent to the pledgor to gift the pledged property, the hibah contract remains valid, but the collateral contract becomes null and void. This group stipulates that the consent must be given at the time the disposal *(taṣarruf)* is made or during the contract session. Consent from the pledgee given after the hibah contract has taken place will render the hibah contract invalid.[35]

The rationale (*ʿillah*) and basis of this group's view is that the disposal *(taṣarruf)* by the pledgor over the pledged property could cause harm to the pledgee. Therefore, this group holds that the pledgor is permitted to lease the pledged property to parties other than the pledgee, as such a lease agreement does not jeopardize the pledgee's interest in recovering their debt. However, if the collateral period extends beyond the lease term, the lease contract becomes invalid.[36] According to al-Nawawi,[37] the pledgor does not have the right to engage in any disposal *(taṣarruf)* that could harm the pledgee, whether by selling, gifting, using the pledged property as a marriage dowry (*mahar*), or as rental payment. Actions that could harm the pledgee fall under the prohibition mentioned by the Prophet Muhammad (peace be upon him):

"Do not cause harm, nor reciprocate harm (to others)." (*Kitab al-Buyūʿ*, Hadith no. 2345).[38]

From the discussion of the fuqaha, it can be concluded that the disposal *(taṣarruf)* of pledged property by the pledgor without the consent of the pledgee is considered *mawquf* (suspended) according to the Hanafi school of thought and invalid according to the majority of jurists. The requirement for the pledgee's consent for the pledgor to execute a hibah contract over the pledged property is intended to safeguard the pledgee's interest in recovering their debt, as this is the primary purpose of the collateral contract agreed upon by both parties. However, the establishment of a collateral contract does not mean that the pledgee owns the pledged property or has the right to use it. Instead, the physical ownership and the benefits of the property remain with the original owner, namely the pledgor.[39]

Although the majority of jurists hold the view that the disposal *(taṣarruf)* of pledged property by the pledgor is invalid if it is done without the consent of the pledgee, the underlying rationale for requiring such consent is to prevent harm to the pledgee. Their opinion, which permits the pledgor to lease, occupy, ride, or use the pledged property as long as it does not diminish its value, demonstrates that the basis for prohibiting *tasarruf* without consent is to protect the pledgee's rights and ensure the debt can be

[35] al-Khin et al. *al-Fiqh al-Manhaji ᶜala Madhahib al-Imam al-Shafiᶜi*. al-Zuhayli. *al-Fiqh al-Islami wa Adillatuh*.
[36] al-Zuhayli. *al-Fiqh al-Islami wa Adillatuh*.
[37] Abi Zakaria Muḥyiddin Sharf al-Nawawi. *al-Majmūᶜ Sharḥ al-Muḥadhdhab.* Beirut: Dār al-Fikr. 1996. Jil. 13.
[38] Muhammad ᶜAbdullah al-Hakim. *al-Mustadrak ᶜala al-Sahihayn.* Beyrut: Dar al-Kutub al-ᶜIlmiyyah. 1990.
[39] Fathullah Asni, and Jasni Sulong. 2020. "The Mura'ah Al-Khilaf and Ma'alat Method in Fatwa Decisions: Its Application for Fatwa Coordination Related to Conditional Hibah in Malaysia." *International Journal of Islamic and Middle Eastern Finance and Management* 14 (4): 641–54. https://doi.org/10.1108/IMEFM-05-2018-0181.

repaid. [40] Therefore, if the rationale for requiring consent is absent or can be eliminated through the existence of any guarantee that the debt will be settled even if the property has been gifted, and such a guarantee safeguards the pledgee's rights, then consent is not required, as per the legal maxim:

"The ruling revolves around its rationale, whether in its presence or absence."

In deciding this issue, the Court appeared inclined towards the Hanafi school of thought. The Honourable and Learned Judges of the Court of Appeal explained that Islamic law does not stipulate that the consent of the pledgee must be obtained at the time the hibah contract is made; rather, it can be fulfilled after the contract between both parties. In this case, indirect consent was evidenced through the letter of settlement for the remaining housing loan payment, which was settled by the takaful provider to the Government Housing Loan Division after the death of the hibah donor. The letter, issued on 24 September 2010, demonstrated that the pledgee's interest had been released through the settlement of the loan.

In reality, the existence of takaful that covers the deceased's loan serves as a form of *thiqah* guarantee, a reliable and trustworthy assurance that protects the rights of the pledgee, namely the financier, to recover their debt. Al-Zuhayli [41] states that in situations where the pledgee does not consent to the hibah made by the pledgor, but the pledgor is financially capable of repaying the debt, the hibah is valid, and the pledgor must promptly settle the debt with the pledgee, provide alternative collateral, or offer something *thiqah* (something reliable or trustworthy that ensures the pledgee's debt will be repaid). Thus, the Court's decision aligns with what Al-Zuhayli stated and is, in fact, consistent with Imam Malik's opinion.

Referring to the Grounds of Judgment, the interest in the collateral can be discharged through the consent of the Government as the pledgee or through any other form of guarantee that ensures the remaining financing payment by the deceased can be settled, so as not to harm the pledgee. The decision in the case of *Shahirah Aimi binti Shahrudin v Siti Hawa binti Abu Talib and Shamimi Aqilah binti Shaharudin (05000-044-0002-2014)*, heard in the Seremban Court of Appeal, can also serve as a reference that consent from the pledgee can be interpreted or understood in various broader forms of consent, depending on local customs (*ʿurf*) and practices. The Appellant's action of settling the outstanding debt and the bank's acceptance of the remaining debt payment is considered a form of consent for the pledged property to be gifted. [42]

In essence, the Court's findings demonstrate a careful synthesis between the diverse fiqh positions and the realities of contemporary legal practice. While classical jurists differ, some requiring explicit consent from the pledgee for any disposal of pledged

[40] Alias Azhar and Mohd Zakhiri Md.Nor.. “Hibah In The Administration Of Ijtihadi Elements And Reality In.” *UUMJLS* 10 (July 2019): 103–19.
[41] Wahbah al-Zuhayli. *al-ᶜUqud al-Musamah fi Qanun al-Muᶜamalat al-Madaniyyah al-Imarati wa al-Qanun al-Madani al-Urduni*. Beyrut: Dar al-Fikr. 2007.
[42] Noor Lizza Mohamed Said & Wan Amirul Adli Wan Ayub. ‘Pelaksanaan Hibah Harta Bercagar dalam Industri Perancangan dan Pengurusan Harta Orang Islam’. *International Journal of Islamic Thought*. Vol.19. (2021.) 89-101.

property, and others allowing certain transactions with or without such consent, the Court contextualized these views by focusing on the underlying rationale: the protection of the pledgee's rights. By recognizing that modern financial instruments such as takaful can guarantee the settlement of outstanding debts, the Court concluded that the absence of explicit consent does not necessarily invalidate a hibah, provided the pledgee's interests are safeguarded.[43] This approach not only clarifies the practical application of fiqh in Malaysian Syariah courts but also highlights the adaptability of Islamic law to current financial and legal contexts, thereby reinforcing the study's contribution to understanding how classical principles are interpreted and operationalized in contemporary judicial decisions.

Conclusion

The Court of Appeal's decision to recognize that property still under housing loan financing is the absolute ownership of the deceased, thereby qualifying them to execute a hibah on the property, is in accordance with Shariah law and the concept of Beneficial Ownership. The collateral contract does not serve as a basis to revoke the pledgor's ownership rights over the pledged property.[44] The status of absolute ownership of the pledged property by customers of the *Bai' Bithaman Ajil* financing product further strengthens the reasoning in the judgment.

Therefore, the requirement for consent or the release of collateral rights by the financier should not be an issue in determining the validity of a hibah contract involving pledged property under the *Bai' Bithaman Ajil* product. Instead, it should only fall within the scope of actions to be implemented after the hibah contract has been executed. The settlement of outstanding debts by the takaful provider is one form of guarantee that the pledgee's rights are protected. The release of collateral rights or interests can be discharged through various other forms of collateral guarantees that do not harm the pledgee and should be taken into consideration.

The decision in this appeal case can serve as a reference for future cases involving pledged property. Based on the Grounds of Judgment, it can also be concluded that the Judge's considerations in making the decision were not solely based on or reliant upon the views of Shafi'i jurists but also incorporated the opinions of jurists from other schools of thought, ensuring the welfare (*maslahah*) of Muslims is preserved.[45] These findings not only clarify the legal position of hibah involving collateralized property but also demonstrate the adaptability of Islamic jurisprudence to contemporary financial realities in Malaysia. By systematically integrating classical fiqh perspectives with current judicial reasoning,

[43] Abozaid, Abdulazeem. 2022. "Trade of Debts Resulting from Financial Intermediation: Analysis from Sharia Perspective". Justicia Islamica 19 (2):245-62. Wahidah, Wahidah, and Alias Azhar. "Implementation of Faraidh's Provisions in Hibah Wasiat (A Case in South Banjar Kalimantan)." *Al-'Adalah* 16, no. 2 (2020): 375–92.

[44] Mohamed Said, Noor Lizza, Adnan Yusoff, Md Yazid Ahmad, and Mohd Zamro Muda. "Hibah of Collateral Property in Islamic Perspective and the Implementation in Malaysia." International Journal of Academic Research in Business and Social Sciences 13, no. 7 (2023): 1625–1635.

[45] Wanto, Deri, Rahmad Hidayat, and R. Repelita. 2021. "Maqasid shariah's Change As Theory: From Classical to Cotemporary Maqasid Shariah". *Al-Istinbath: Jurnal Hukum Islam* 6 (2 November):427-54. Disemadi, Hari Sutra, Sholahuddin Al-Fatih, Ninne Zahara Silviani, Shelvi Rusdiana, and Emiliya Febriyani. 2024. "Revitalizing Intellectual Property Rights in Indonesia: A Maqasid Al-Sharia Perspective on Communal Ownership". *Al-Istinbath: Jurnal Hukum Islam* 9 (2):625-48.

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this study highlights the potential for Syariah courts to provide solutions that are both faithful to Islamic legal tradition and responsive to modern societal needs. Consequently, the research contributes valuable insights for policymakers, legal practitioners, and scholars seeking to harmonize Islamic law with evolving legal and financial frameworks.

Credit Authorship Contribution

Noor Lizza Mohamed Said conceptualised the research idea, designed the overall framework, and drafted the introduction and conclusion. Muhamad Mu'izz Abdullah developed the theoretical foundation, analysed relevant legal and Shariah principles, and refined the main arguments. Adnan Mohamed Yusoff contributed to the methodological structure, reviewed key references, and provided critical feedback to ensure the academic quality of the manuscript. All authors participated substantially in the research process, contributed to the writing, and approved the final version of the manuscript.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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