

Hibah - an Early Transfer of Assets



Hibah - A Secure Vehicle to be considered to correct foreseeable Hurdles in the Transfer of Property

The importance of Hibah should not be underestimated - for a couple of reasons:

- Property - owned by a Muslim - can be transferred during the lifetime of that owner and be securely received by the intended beneficiary - regardless of their religion - before the death of the owner, the donor.
- The importance of Hibah becomes even more emphasized when:
 - there are restrictions placed on the ownership of the property.
 - Donor has no residuary heirs (waris 'asobah) who can take up all or remainder shares of the property.

The following article outlines the simple structure in which such a property transfer can be made during the lifetime of a donor or a property owner, eliminating many unintended results.

Introduction. Hibah is a benevolent contract of an offer and acceptance (ijab and qabul) between the donor (wahib) and the donee (mawhub lahu), wherein the donor, by a verbal recitation and conduct, voluntarily transfers ownership and possession (qabd) of property (the Hibah property) to the donee without any consideration, and this transaction takes full effect during the lifetime of the donor. That said, most literature written on Hibah concur that Hibah is an effective alternative instrument in managing the wealth of Muslims by expediting the distribution of property. Hibah is one of the most trusted

methods in preventing any disputes that may occur among potential heirs or misinterpretation of a donor's intent after his demise. So long as the donor is alive, he has free rein as to how his estate will be distributed – and is not subjected to adherence to Faraidh, the Islamic system of estate distribution.

A Case Study – The Advantage for a Wife, when her Husband dies with Hibah:

Scenario: The husband was a Muslim muallaf (a person converted to Islam) who died intestate leaving a Muslim wife. They had no children. The only estate was a house, in which his wife was

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residing. According to faraidh, his wife would only be entitled to one-quarter share of the house. Further, having no residuary heirs to inherit the remainder three-quarter share, this portion would be taken over by Baitulmal, the Public Treasury of Islamic state.

One must fully appreciate that: Had there been no Hibah proved, the wife would have been faced with the unfortunate prospect of losing the property. In this instance, Hibah was proved by the wife and the property was thankfully transferred to her.

5 Pillars of Hibah

(1) Donor (Wahib)

A donor must be Muslim, male or female, and have full ownership and control over the Hibah property and, as such, be able to voluntarily transfer ownership of his/her property to the donee.

(2) Donee (Mawhub Lahu)

Any person with legal capacity as an adult or, if a donee has no legal capacity, for instance, a minor, or is of unsound mind, a legal guardian must be appointed.

(3) Hibah property (Mawhub)

The property must be fully owned by the donor, legally tradable and have tangible value from a shariah perspective, and be in existence during aqad hibah, that is, at the time of Hibah transfer.



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4) Sighah (Aqad Hibah)

Pronouncement of an offer and acceptance (ijab and qabul) of Hibah must be clear, specific and unequivocal. It can be oral or in writing or established by the conduct of both parties.

(5) Possession (Qabd)

Possession of the Hibah property by the donee must be either physical or by constructive possession. Upon transfer of possession, the Hibah is completed and, thereafter, the donee must have full ownership and control over the Hibah property.

In the case of **Siti Khatijah Ismail lwn Zainab @ Esah Hamid & Yang Lain [2017] 3 LNS 8**, the Syariah Court of Appeal dismissed the appeal by the Appellant and found that Hibah made by her deceased father was void. The court held that despite the fact that the Appellant possessed the grant title of the Hibah property, it was, nevertheless, insufficient to prove that the condition of qabd had been fulfilled. The Appellant failed to prove that she had made some effort to manage the land. The court further held that the Appellant had to prove that the deceased father had waived his rights over the land and had given permission to the Appellant to carry out all transactions (tasarruf) on the land.

Comparison between Hibah and Wasiyyah

(1) Hibah can be granted by the donor to any person, that is, to either the heirs of the donor or non-heirs of the donor.

HIBAH - How It Works

Furthermore, the donee of the Hibah is not confined to Muslims recipients only but includes persons of any religion and the number of donees receiving Hibah is up to the discretion of the donor and subject only to restrictions or conditions imposed on the Hibah property itself. This is in contrast to wasiyyah in which the property can be bequeathed to non-heirs only.

(2) Allocation of Hibah to a donee(s) is unlimited so that the amount of Hibah property which may be granted has no limit.

By contrast, for wasiyyah, the amount of the property that can be bequeathed to non-heirs must not exceed 1/3 of the net estate of the deceased, the testator.

(3) The execution process of Hibah is much simpler and faster provided that the name of the donor on the Hibah property has been transferred to the donee during the lifetime of the donor. Wasiyyah, on the other hand, requires a beneficiary to go through an often lengthy process of inheritance, with proceedings heard either in the High Court, Small Estate or Amanah Raya Berhad, since wasiyyah is only carried out upon the demise of a testator, al-musi.



Hibah is an efficient wealth management system &... can protect the distribution of wealth to a beneficiary

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Since Hibah is made during the lifetime of the donor, no consent is required from all potential heirs of the donor for Hibah to be successfully executed and this particular feature of Hibah is of more practical importance to a donor who may have a large number of family members. By contrast, however, wasiyyah made to beneficiaries comprising more than 1/3 of the estate of the deceased/testator, is subject to the consent of all beneficiaries before execution.

In the case of **Muhammad Awang & Yang Lain Iwn. Awang Deraman & Yang Lain** [2001]1 MSLR 1, the court dismissed the appellants' appeal to annul the Hibah made by their deceased father to the respondents. The court held that Hibah by a deceased father during his lifetime to some of his children was valid even without the consent of other children because Hibah can be made to any person as long as that person has the legal capacity to receive Hibah.

4) The grant of Hibah can be tailored according to the economic needs of a donee. The donor can determine the allocation of the Hibah property to be given to a donee by taking into consideration the specific economic needs of the donee. This flexible nature of Hibah protects the interest of the donee especially if the donee is a minor.

HIBAH - protects the distribution of wealth

(5) A divorce between a husband and wife does not affect the validity of Hibah made between them during the subsistence of the marriage. This item is specifically included to protect the welfare or interest of either party at the receiving end.

In the case of **Salmiah Che Hat Iwn Zakaria Hashim**

[1999] 1 MSLR 53, the court reiterated: when a revocation of Hibah is permitted. It stated that, generally, a completed Hibah cannot be revoked except for a Hibah made by a father to his children, provided that the Hibah property is still in the possession of his children. The court refers to a hadith translation as follows:

"Tidak halal bagi seorang lelaki yang telah memberi satu pemberian atau telah menghibah satu hibah maka dia menarik balik apa yang diberi/dihibah, kecuali penarikan balik oleh bapa terhadap

A clear distinction between faraidh and Hibah is: the former (faraidh) takes place upon the demise of the deceased testator, while the latter (Hibah) occurs during the lifetime of the donor.

pemberian yang diberi kepada anaknya."
 (Narrated by al-Tirmizi)

6) A valid Hibah cannot be challenged by any party upon the death of the donor.

Hibah is not a way to evade faraidh

Faraidh is the distribution of estate to a deceased's heirs in which the portion given to the legal heirs is fixed and determined in the Quran. A clear distinction between faraidh and Hibah is: the former takes place upon the demise of the deceased testator,

while the latter occurs during the lifetime of the donor.

Allah s.w.t. ordered Muslims to distribute their estate by faraidh distribution mainly to avoid disputes between the heirs.

However, if there is a consensus between the heirs on the distribution of an estate, the consensus prevails over the faraidh.

In addition to the above, Hibah property will be excluded from being part of the Donor's estate. Thus, upon his demise, the remainder of the estate, if any, will be distributed among the heirs by way of faraidh.

Therefore, Hibah is not a way to evade faraidh because Hibah and faraidh serve a different purpose and do not conflict in any way; in fact, they compliment each other.

Conclusion

Hibah is an efficient wealth management system and a valid Hibah can protect the distribution of wealth to a beneficiary from being disputed and defeated. In essence, the Hibah system of distribution may greatly assist to expedite the distribution of property to heirs and designated recipients, thereby minimizing the number of unclaimed estates because the distribution of Hibah property is managed during a lifetime of the donor, so that all inconsistencies or ambiguities can be resolved in good time.



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