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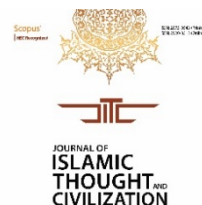
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## “I Want to Withdraw My *Hibah*”: Why and How to Explain it?

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### Abstract

*Hibah* or Islamic inter-vivos plays a vital role in reducing unclaimed inheritance estate problems, aiding recipients, and expecting recipients' care. However, there are cases of withdrawn *hibah* that have been argued in the court. This study was performed to understand this problem by interviewing *hibah* experts in Malaysia. Thematic analysis was applied to find an overview of why donors withdraw their *hibah* by interviewing 19 respondents who are *hibah* experts in Malaysia. There were two main themes which were 'Donor's desire' and 'Recipient's attitude.' 'Donor's desire' can be understood by the desire of donor to get benefits from the property that has been perfectly transferred or if the donor still resides on the property. Meanwhile, 'Recipient's attitude' describes a change in recipients' attitude such as ignoring and expelling the donors from the transferred property.

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The recipients also might sell the transferred property. This reason leads to donors wanting to withdraw their *hibah*. This study’s findings recommend that absolute *hibah* needs to be replaced with *hibah* legal documentation or living trust. These types of *hibah* are recognized by *Shari’ah* and Civil law and enable the donors to withdraw their *hibah* during lifetime. This study is the first attempt to discuss profoundly withdrawn *hibah* in qualitative approach. The paper offers an additional study on *hibah* practice in Malaysia.

**Keywords:** Thematic analysis, *Hibah*, Islamic inheritance, Inter-vivos, Withdrawn *hibah*.

### Introduction

In Malaysia, there are many studies that suggest *hibah* (Islamic inter vivos) as one of the alternative methods to deal with the conflicts of inheritance estate management. *Hibah* is applied to guarantee that the wealth does not get through a complicated and lengthy inheritance process after the death as it is accomplished during lifetime<sup>1</sup>. Additionally, wealth transfer during lifetime can be processed within one day as opposed to inheritance process which requires at least five months.<sup>2</sup> Simultaneously, Islam permits this practice to avert any clashes among heirs later after the death.<sup>3</sup>

In economic and sociological research, inter vivos is referred to as wealth transfers from earlier generation to the next generation either from parents to children or grandparents to grandchildren. The studies’ results show that inter

<sup>1</sup>Azizi Abu Bakar, Nur Syahira Md Fauzi, and Hydzulkifli Hashim, “*Hibah* as a Way of Islamic Wealth Management,” *Webology* Vol. 17, no. 2 (2020): 896-903, <https://doi.org/10.14704/WEB/V17I2/WEB17075>; Fatin Afiqah Md Azmi and Mohammad Tahir Sabit Mohammad, “A Proposal for a Single Tribunal of Estates Distribution in Malaysia,” *Jurnal Teknologi* Vol. 75, no. 10 (2015): 1-16; Nurul Syahirah Othman et al., “Case Analysis on the Practice of Conditional *Hibah* in Malaysia,” *Islamiyyat* Vol. 39, no. 2 (2017): 135-42.

<sup>2</sup>Mohd Khairy Kamarudin, Nasrul Hisyam Nor Muhamad, and Abdul Hafiz Abdullah, “Parents’ Transfer to Children: Study on the Impact of ‘Pindah Milik Tanah 1 Hari’ (Land Transfer Ownership in One-Day) by the Malaysian Land Office,” *International Journal of Academic Research in Business and Social Sciences* Vol. 8, no. 6 (2018): 520-29, <https://doi.org/10.6007/ijarbs/v8-i6/4255>.

<sup>3</sup>Mohd Zaidi Daud, Mohd Hafiz Jamaluddin, and Mohd Norhusairi Mat Hussin, “Innovation in Muslim Estates Distribution Planning According to the Qur’an and Sunnah,” *Al-Bayan - Journal of Qur’an and Hadith Studies* Vol. 16, no. 1 (2018): 60-89, <https://doi.org/10.1163/22321969-12340059>.

vivos transfer allows the recipients to benefit during lifetime more willingly than after the death. For example, parents' transfer can support children who have divorced or lost their jobs. This transfer brings a new opportunity to improve current children's consumption particularly to face adversity.<sup>4</sup> Therefore, it demonstrates physical and moral support for children.<sup>5</sup> In addition, parents' transfer can help the children to have their own home and subsequently supports government policy in delivering housing purchase policy to the younger generation.<sup>6</sup>

Parents' transfer also fosters their children to take care of their parents. Theoretically, the motive is known as exchange motive. This motive demonstrates that the donor believes in adding treatment and attention from the recipients. Evidently, it is shown through the differences in interactions and the residence distance between donors and recipients.<sup>7</sup> Residence is an indication in identifying the children who will take care of the donors and hence, affecting the donor's decision to transfer their wealth. By transferring to the recipients, it is sensible to stay close and it will also reduce the cost when the donors need support immediately.<sup>8</sup> For instance, children's care to their parents will lessen

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<sup>4</sup>Kathleen McGarry, "Dynamic Aspects of Family Transfers," *Journal of Public Economics*, Vol. 137 (2016): 1-13, <https://doi.org/10.1016/j.jpubeco.2016.03.008>.

<sup>5</sup>Celia Ray Hayhoe and Michelle L. Stevenson, "Financial Attitudes and Inter Vivos Resource Transfers from Older Parents to Adult Children," *Journal of Family and Economic Issues* 28, no. 1 (2007): 123-35, <https://doi.org/10.1007/s10834-006-9054-3>; Mohd Khairy Kamarudin et al., "Inter Vivos Transfers Based on Affection for Wealth Distribution Planning in Malaysia," *The Journal of Asian Finance, Economics and Business* 7, no. 4 (2020): 299-307, <https://doi.org/10.13106/jafeb.2020.vol.7.no.4.299>.

<sup>6</sup>Julia Cook, "Keeping It in the Family: Understanding the Negotiation of Intergenerational Transfers for Entry into Homeownership," *Housing Studies* Vol. 36, no. 8 (2020): 1-19, <https://doi.org/10.1080/02673037.2020.1754347>; Hyojung Lee et al., "The Role of Parental Financial Assistance in the Transition to Homeownership by Young Adults," *Journal of Housing Economics* Vol. 47 (2020): 1-8, <https://doi.org/10.1016/j.jhe.2018.08.002>.

<sup>7</sup>Suhaili Alma'amun, Mohd Khairy Kamarudin, and Mehmet Asutay, "Motivations of Inter Vivos Transfers Among Malaysian Muslims," *Acta Universitatis Danubius: Oeconomica* Vol. 12, no. 3 (2016): 149-62; Javier Olivera., "The Division of Inter-Vivos Parental Transfers in Europe," *Journal of the Economics of Ageing* 9 (2017): 41-51, <https://doi.org/10.1016/j.jeoa.2016.05.005>.

<sup>8</sup>Chien Hao Fu, "Living Arrangement and Caregiving Expectation: The Effect of Residential Proximity on Inter Vivos Transfer," *Journal of Population Economics* Vol. 32, no. 1 (2019): 247-75, <https://doi.org/10.1007/s00148-018-0699-7>.

government’s expenditure in nursing elderly such as providing financial assistance and welfare homes.<sup>9</sup>

Although inter vivos transfer is valuable to the donors and the recipients as discussed previously, there are numerous court cases of argument over the inter vivos transfer particularly leading to withdrawn *hibah*.<sup>10</sup> For instance, in the case of Eshah bt. Abdul Rahman v Azuhar b. Ismail [1997] 2 JH 219, the plaintiff requested to withdraw inter vivos transfer which was a land that had been transferred to the defendant who was her adopted child. Meanwhile, in the case of Rosinah binti Abdul Majid and Azmi bin Abdul Majid (as the legal representative of Pah binti Abdul) v Norsiah binti Yob and Noraini binti Yob (Kangar High Court, Originating Summons No.24-26-2007), the plaintiff intended to withdraw her land ownership transfer from two defendants and share the land equally among her children. However, the true reasons of withdrawn *hibah* are not well understood. Thus, this study aimed to understand this problem by conducting semi-structured interviews with *hibah* experts in Malaysia. *Hibah* experts are in a position which enables the researchers to determine factors that contribute to withdrawn *hibah* based on their experiences. The results will help policymakers to gain deeper understanding on the major problem of withdrawn *hibah* and provide useful insight on addressing these cases to cater more to donors and recipients’ needs.

## 2. Withdrawn *Hibah* (Islamic inter vivos): at Glance

Withdrawn *hibah* can be justified through two conditions i.e. prior to *al-qabd* (taking possession) and after *al-qabd*.<sup>11</sup> *Hibah* will not be enforced if the components of *al-qabd* are not finalized. Therefore, according to *Syafi’i* and

<sup>9</sup>Sanna Nivakoski, “Does the Exchange Motive Influence Intergenerational Transfers? Evidence from Ireland,” *Review of Economics of the Household* Vol. 17, no. 3 (2019): 1049–79, <https://doi.org/10.1007/s11150-018-9422-4>.

<sup>10</sup>Rusni Hassan, and Nor Azdilah Mohamad Zaizi, “The Concept and Application of *Hibah* as a Financial Instrument from the Malaysian Legal Perspective: An Analysis,” *IJUM Law Journal* Vol. 28, no. 1 (2020): 227-52, <https://doi.org/10.31436/iiumlj.v28i1.498>; Amylia Fuziana Azmi, et al., “Jurisdictional Conflicts in Facing Covid-19 Pandemic: An Analysis of *Hibah* Cases in Negeri Sembilan Syariah Courts,” *INSLA E-Proceedings* 3, no. 1 (2020): 622-28.

<sup>11</sup>Noor Lizza Mohamed Said et al., “Qabd Dan Hukum Penarikan Balik *Hibah*,” *Jurnal Muamalat* 3 (2010): 157-84; Noor Lizza Mohamed Said et al., “Revocation of Gift (*Hibah*): According to Islamic Law and Its Practice under Syria Civil Law 1949,” *International Business Management* Vol. 7, no. 1 (2013): 1-7.

*Hanafi* scholars, donors are definitely permitted to withdraw their transfer.<sup>12</sup> It can also be explained when the donors are available to manage the transferred property independently.<sup>13</sup> Meanwhile, *Maliki* scholars forbid the withdrawal of *hibah* with a reason that *hibah* can be enforced through *ijāb* (offer) and *qabūl* (acceptance) without the component of *al-qabd*.<sup>14</sup> Conversely, if the possession of property has been completed, generally, the *hibah* is irreversible as the recipients have the authority to conduct any commercial transactions such as selling or renting to other parties.<sup>15</sup> Viewed that this concern oppresses the donors in case they still benefit from transferred property such as living on the land or managing the crops.

However, all Muslim scholars agreed that withdrawn *hibah* after completing *al-qabd* is permissible under three circumstances which are; parents' transfer to their children, recipient's agreement to return the transfer or through legal order of the Judge.<sup>16</sup> Parents can withdraw their *hibah* transfer if *al-qabd* has been completed as the permission to withdraw *hibah* transfer demonstrates harmony in Islam. This is due to the fact that at present, there are various issues of children such as those who neglected the responsibility to take of their parents or those who sell the transferred property. Thus, *hibah* can control any undesirable action of the children.<sup>17</sup> However, *hibah* transfer to anyone other than children cannot be withdrawn promptly as determined in the case of *Eshah bt Abdul Rahman v*

<sup>12</sup>Alias Azhar et al., "Pengurusan Harta Dalam Islam: Perspektif *Hibah* Di Malaysia," *Journal of Human Development and Communication* 3 (2014): 115-28; Alias Azhar., "The Practice of *Hibah* in Trust Companies: A Case Study in As-Salihin Trustee Berhad," *Jurnal Sultan Alauddin Sulaiman Shah* 5 (2018): 1-19; Adilah Mohd Sa'afie and Mohd Zamro Muda, "Guideline in Preparing *Hibah* Document at the Shariah High Court," *Journal of Contemporary Islamic Law* Vol. 3, no. 1 (2018): 1-7.

<sup>13</sup>Nasrul Hisyam Nor Muhamad, "Elemen Qabd (Pindah Milikan) Dalam *Hibah*: Analisis Terhadap Keperluan Dan Pelaksanaannya Mengikut Perspektif Undang-Undang Islam," *Jurnal Syariah* Vol. 17, no. 2 (2009): 243-66.

<sup>14</sup>Mohamed Said, Awang, and Mohd Nor, "Qabd Dan Hukum Penarikan Balik *Hibah*," *Jurnal Muamalat* 3 (2010): 158.

<sup>15</sup>Mohd. Sarip et al., "Knowledge Level of Real Estate *Hibah* in the Islamic Estate Planning," *Journal of Islamic, Social, Economics and Development* Vol. 2, no. 5 (2017): (2017), 79-89.

<sup>16</sup>Azhar et al., "Pengurusan Harta Dalam Islam: Perspektif *Hibah* Di Malaysia"; Rositah Kambol, "Pengurusan Harta Orang Islam Melalui *Hibah*: Isu Dan Penyelesaian," *Journal of Law & Governance* Vol. 2, no. 1 (2019): 1689-99.

<sup>17</sup>Rabi'ah Muhammad Serji and Rohimi Shapiee, "Issues and Legal Conflicts Related to *Hibah* of Immovable Properties in Malaysia," *Journal of Muwafaqat* Vol. 1, no. 1 (2018): 84-101.

Azuhar b. Ismail [1997] 2 JH 219<sup>18</sup>. In addition, once the transferred property is sold or endowed, *hibah* transfer cannot be withdrawn at all because it is no longer owned by the donors.<sup>19</sup>

Practically, *hibah* transfer can be completed when donors change the ownership status to the recipients through Form 14A. Transfer is accomplished when new owner is registered as sole ownership which demonstrated the component of *al-qabd*. From Civil Law point of view, the right of registered owner in the Title Deed cannot be revoked or cancelled by donors because the ownership is recognized and indefeasible as provided in Section 340, National Land Code 1965.<sup>20</sup> This practice indicated that if donor has completely transferred the ownership to the recipients, the recipients then should not be forced to return the transferred property to the donor. It shows absolute ownership of the transferred property.<sup>21</sup>

### 3. Research Methodology

#### 3.1 Research Design

This study applied a qualitative approach to focus on the objective of the study which is to understand the causes of withdrawn *hibah* transfer by donors. The approach provides capacity for researchers to deeply understand a particular

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<sup>18</sup>Khairiah Ahmad et al., “Acceptance of *Hibah* as an Alternative Mechanism in Muslims Asset Management,” *SHS Web of Conferences* 36 (2017): 1-9, <https://doi.org/10.1051/shsconf/20173600030>; Nasrul Hisyam Nor Muhamad, Ahmad Che Yaacob, and Norazila Mat Hussain, “The Concept of Conditional ‘*Hibah*’ and Its Application in Property Planning,” *UMRAN - International Journal of Islamic and Civilizational Studies* Vol. 4, no. 3 (2017): 32-41.

<sup>19</sup>Y. Mohd Yusof and A. Ahmad, “*Hibah* as an Alternative Mechanism in Muslim Assets Management: A Study in Melaka Tengah,” *South East Asia Journal of Contemporary Business, Economics and Law* Vol. 3, no. 3 (2013): 1-5; Azhar et al., “Pengurusan Harta Dalam Islam: Perspektif *Hibah* Di Malaysia.”

<sup>20</sup>Rusnadewi Abdul Rashid, and Noor Inayah Yaakub, “*Hibah*: Isu Pindah Milik Dan Pembatalan *Hibah* Hartanah Di Bawah Kanun Tanah Negara,” *Shariah Law Reports* 1 (2010): 14-29.

<sup>21</sup>Rabi’ah Muhammad Serji, “Penipuan Dalam Urusniaga Tanah: Analisis Terhadap Hak Milik Tidak Boleh Disangkal,” in *Proceeding of the 1st International Conference on Management and Muamah 2014 (1st ICoMM)*, vol. 1, 2014, 277-85; Rabi’ah Muhammad Serji, “Pengecualian Kepada Hak Milik Tidak Boleh Disangkal Dalam Undang-Undang Tanah Di Malaysia,” in *International Research Management and Innovation Conference 2014 (IRMIC2014)* (Kuala Lumpur, 2014), 571-82; Muhammad Serji and Shapiee, “Issues and Legal Conflicts Related to *Hibah* of Immovable Properties in Malaysia.”

problem.<sup>22</sup> Additionally, this method allows the respondents to describe and explain profoundly about their experience of encountered phenomenon.<sup>23</sup>

### 3.2 Data Collection

Semi-structured interviews were performed to facilitate researchers in identifying answer precisely from respondents about the studied problem.<sup>24</sup> This type of interview also facilitates the researchers to explore more deeply on respondents' point of views or experiences without interrupting their storytelling.<sup>25</sup> It is also more flexible and comfortable for data collection.<sup>26</sup> For this study, the key question was, "Why do donors withdraw their *hibah* (Islamic inter vivos)?"

Purposive sampling was applied by dividing the respondents into three groups namely academician (Academia), industrial Islamic estate planning experts (Industry) and land officers (Officer) who were responsible to handle *hibah* process. The respondents were nominated based on specific criteria<sup>27</sup> such as being experienced in administering *hibah* process or has published academic articles that related to *hibah*.

For the group of academia, respondents were identified based on academic articles as indexed by Google Scholar, My Cite, Scopus or Web of Science over

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<sup>22</sup>Clive Roland Boddy, "Sample Size for Qualitative Research," *Qualitative Market Research* Vol. 19, no. 4 (2016): 426-32, <https://doi.org/10.1108/QMR-06-2016-0053>.

<sup>23</sup>Wendela de Lange et al., "Postdoctoral Nurses' Experiences with Leadership and Career Development: A Qualitative Study," *Journal of Nursing Scholarship* 51, no. 6 (2019): 689-98, <https://doi.org/10.1111/jnu.12519>; Cliodhna O'Connor and Helene Joffe, "Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines," *International Journal of Qualitative Methods* 19 (2020): 1-13, <https://doi.org/10.1177/1609406919899220>.

<sup>24</sup>Loretta Fernandez, "Qualitative Interview Analysis: The Use of Systemic Functional Linguistics to Reveal Functional Meanings," *Forum Qualitative Sozialforschung* Vol. 19, no. 2 (2018): 1-22, <https://doi.org/10.17169/fqs-19.2.2663>.

<sup>25</sup>Kenneth Drinkwater et al., "Understanding the Unknown: A Thematic Analysis of Subjective Paranormal Experiences," *Australian Parapsychological Review* Vol. 17, no. 1 (2017): 23-46.

<sup>26</sup>David R. Anthony et al., "A Qualitative Exploration of Mentally Tough Behaviour in Australian Football," *Journal of Sports Sciences* Vol. 38, no. 3 (2020): 308-19, <https://doi.org/10.1080/02640414.2019.1698002>.

<sup>27</sup>Sarah E. Bennett et al., "Understanding the Psychosocial Impact of Joint Hypermobility Syndrome and Ehlers-Danlos Syndrome Hypermobility Type: A Qualitative Interview Study," *Disability and Rehabilitation* Vol. 43, no. 6 (2019): 1-10, <https://doi.org/10.1080/09638288.2019.1641848>.



the last five years. Aside from that, the Islamic estate planning industry players were identified through Google and LinkedIn. The third group was discovered through the Land Office website (<https://ptj.johor.gov.my>). Potential respondents were contacted via e-mail to gain approval for the interview. The researchers were also clarified on the rationale of this study and the structure of the interview in the e-mail as well. When the respondents agreed to participate in interview session, the researchers set the time based on respondents' preferences. Interviews were conducted virtually via Google Meet and were recorded for data analysis purposes. In addition, the interview information was also noted to ensure that there was no missing information. The interviews were conducted from April 2020 to July 2020.

### 3.3 Data Analysis

Recorded interviews were shared with all researchers and transcribed by two researchers. Both transcribed documents were compared and reviewed by two other researchers to validate the data as referred to the original audio records. Later, the transcripts were sent back to the respondents for any alteration and also verification purposes. Respondents could change any information if there were any factual corrections or change of opinions.

Thematic analysis was performed based on four steps of theme development as proposed by<sup>28</sup> i.e., initialization, construction, rectification and finalization. At the first stage, two researchers separately identified the initial code. Next, the researchers developed the code to determine important elements related to the objectives of the study. At the construction stage, researchers compiled codes that have similarities and differences to place in code clusters. Each code clusters were labelled according to similar code clusters. The description of the labels allowed the researchers to explore the themes that describe the phenomenon of withdrawn *hibah*. At the rectification stage, the researchers continuously re-evaluated the analysis process through validation of developed themes with all researchers. At the final stage, the researchers reported the developed themes.

## 4. Results

There were two key themes and five sub-themes. The first theme, ‘Donor’s desire’ had two sub-themes which were ‘Benefits’ and ‘Residence’. Whereas the second theme, ‘Recipient’s attitude’, was explained by three sub-themes, ‘Donor ignorance’, ‘Donor dismissal’ and ‘Sell the property’.

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<sup>28</sup>Vaismoradi, et al. (2016): 100-110.

#### 4.1 Theme 1: ‘Donor’s Desire

This theme refers to the donors who are still having the desire or are using the transferred property. This includes the donors who are still gaining benefits from the property or living on the transferred property (in case of a land or a house).

##### 4.1.1 Sub-theme 1.1: Benefits

The donor wishes to transfer his/her property to the recipients in the expectation of reducing the problem of inheritance management after the death. However, the donor still plans to gain benefits from the transferred property as explained by Industry 1.

Sometimes, parents (donors) *hibah* (transfer their property) because of wanting to change the ownership of the land (property). But, when they are still alive, they want to take advantage of the property (to gain benefits). They really want to transfer because they know later after the death, it is difficult to change (transfer) the ownership (due to complicated inheritance process), hence they want to directly transfer the ownership (absolute *hibah*). But their real intention is, as long as they live, they want to gain benefits from the property.

(Industry 1)

Transferred property’s benefits can be explained as rental or agricultural activities. In fact, some donors merely rely on the crops yield during lifetime, especially for the elderly who can no longer afford to work.

The (transferred) property still provides income to the donor. For example, a land that has a rental house on it. The rental house is probably their major income because they are retired.

(Academia 1)

As a result, from the transfer, the donor no longer has the authority to benefit from the property because the ownership of the property has changed to the recipient. Thus, any benefits from the property are also transferred to the new owner (recipient)

If parents (donor) transfer the property to their children (recipients), one of the essential elements in the transfer is that the donor no longer has entitled ownership of the (transferred) property. Thus, if the (absolute) transfer has completed, any income (benefits from the property) will also transfer to the children (recipients).

(Academia 2)

#### 4.1.2 Sub-theme 1.2: Residence

Some donors are afraid to transfer the property by the reason that the donors do not have any other property. As a matter of fact, for example, the property is their only residence. Thus, in case the ownership of residence has changed, the recipient has absolute power over the property. "Donor is not willing to *hibah* (transfer his/her property to recipient). (Donor said), "I do not dare to *hibah* at this time. If I *hibah* now, where do I stay (live). That is the only property that I have."

(Industry 2)

"In case the donor barely has a piece of land, which is where he/she stays. Then, after transferring the land to the recipient, the recipient truly has full power of the land."

(Industry 3)

#### 4.2 Theme 2: Recipient's Attitude

This theme refers to the change in recipient's attitude after donor's transfer. This change can be explained by recipient ignoring and dismissing the donor. Additionally, there are even among the recipients who sell the transferred property which causes donor to no longer have a place to live.

##### 4.2.1 Sub-theme 2.1: Donor's Ignorance

The recipient's ignorance towards the donor is one of the reasons that a donor intends to withdraw *hibah* or cancel his/her intention to transfer. It can be explained as there are among the recipients who change their attitude by ignoring the donor after getting the property. According to Industry 4, this change creates fear for the donor.

He (Donor) thinks that if he proceeds with the transfer, it indicates that his right on the land (transferred property) is dropped. He will be abandoned or ignored by the children (recipients). That is why the community is afraid (to transfer).

(Industry 4)

Indeed, some of the recipients, especially children, do send the donors to welfare homes. It is due to the fact that the donor is deemed unnecessary anymore for the recipient.

"Usually, when parents (donor) transfer (property) to the children (done), the children become greedy (change their attitude). As a result, when they own the property, they will ignore their parents and leave them in welfare homes."

(Academia 3)

Furthermore, the donor will no longer own any property that can be used to control their children's attitudes and behaviours. It can be explained that the property originally owned by donor could influence the donee particularly when the donor is aged or sick.

"*Hibah* (transfer) during lifetime, the recipient will benefit or use the (transferred) property forever. So, there is a concern to the parents (donors) as they feel frightened of the fact that after the recipient has acquired the property, the children will leave (ignore) them (donors) once they are aged or sick. It can happen if all donors' properties are transferred."

(Academia 4)

#### 4.2.2 Donor's Dismissal

'Donor's dismissal' refers to the change in the recipient's attitude which completely expels the donor from the transferred property. It is one of the risks that needs to be considered by a donor especially the ones who still live on the transferred property, land or house.

"For example, parents (donor) *hibah* (transfer) a piece of land (property) to their children (recipients), thus it becomes a direct (absolute) ownership. (Then) The children may chase away the parents (donors)."

(Industry 5)

"As long as we are still alive, it is better to make a transfer (*hibah*). However, there are several risks. We (donors) only have that property. Then we transfer to our children. Our children (recipients) might expel us. That is the major risk in transferring the property."

(Officer 1)

The situation worsens when the donor is still living on the land that has been transferred. As a result of the recipient's attitude of expelling the donor, he/she no longer has a place to live.

There is only one (major) issue that will arise. If the parents (donors) transfer (property) to the children (recipients), maybe at that time the children maintain to be the same (do not change their attitude). But, when the children accept the transfers, they can expel their parents. Their parents will become homeless later. That can happen.

(Industry 6)

“Perhaps, the (transferred) land is where the donor lives. When it becomes a complete *hibah* for the children, the donor might be expelled. Becomes homeless and have no other accommodation.”

(Academia 5)

Even if fundamentally, the transfer is aimed to prevent the property from being inherited by other heirs; such as (for example) the donor who only has single daughter, it is likely that he/her siblings will inherit their inheritance estate. However, after *hibah*, the recipient might expel them.

Based on my experience at the Land Office, he/she only has a single daughter (without any sons to completely inherit all remaining balance of inheritance estate). So, he/she wants to prevent his/her siblings from inheriting the estate after they die, thus he/she completely transfers the property to the daughter. But (after transfer) the daughter’s husband incited her to expel her parents from the land (transferred property).

(Officer 2)

There is also the case of a donor transferring his or her property to adopted children. Adopted children are not eligible to succeed any inheritance estate because of the absence of blood relationship to their adoptive parents. This is as happened in the case of *Eshah bt. Abdul Rahman v Azuhar b. Ismail* [1997] 2 JH 219.

“I once met that kind of case in this area. Donor completely transferred the ownership (absolutely *hibah*) by changing his name to that of his adopted children. Later, his adopted children expel him from his house (transferred property).”

(Industry 7)

Practically, at a land office, the land officer will advise the donor to create awareness. If the donors do not have any additional property especially a land or a house, then they ought to transfer only partially. It can guarantee that the donors are still in control of the property although it is not the total ownership. In fact, both donor and recipient will be sharing the benefits of the property.

Previously, there were also children (recipient) who expelled away their parents (donors). Now, we need to be aware! We will ask the donor, “is it true that you want to transfer this property to your children? Later, where will you live?” If they said, “No (other place), I only have this property.” We will suggest them to transfer partially or only half (ownership). Half part is of his/her name, another

half part is of his/her children’s name. At least, the donor’s name remains there. If he/she fully transfers to his/her children, nothing will be left.

(Officer 3)

### 4.2.3 Sell Property

From the point of recipients selling the transferred property, it can happen because the recipient has full control over the property. Then, there is no obstacle for the recipient to carry of any transaction over the transferred property.

“If the recipients want to sell (transferred property), that is the right of the (new) owner. When the ownership has changed at the land office, it becomes the power of the owner to sell (transferred property) to anyone.” (Officer 4)

“If children (recipients) want to sell the land (transferred property), it depends on them because they have full (absolutely) ownership. Full ownership, then they can sell or mortgage it. (Industry 8)

Children (Recipients) can sell (transferred property). The property belongs to children (absolute ownership). For example, I have a piece of land. Then, I fill 14A form (a tool to transfer the ownership), and change the ownership. The land will belong to my children. As stipulated in National Land Code, “Name in the title is everything”. So, the recipients own the transferred property. (Industry 9)

Practically, at a land office, when the property is about to be traded by the recipients, land office management cannot prohibit this transaction because the property is already fully owned by the recipient.

“Children (recipients) who sell the property are a common practice. We (land office officer) as the authority on land transaction do not have any right to block the transaction.” (Officer 5)

## 5. Discussion

This study was conducted to understand the phenomenon of withdrawn *hibah* through semi-structured interviews with *hibah* experts in Malaysia. This study indicated that the donors aim to withdraw their *hibah* because they are still interested on transferred property. It can be understood, as the donors may still gain benefits from the property such as having rental house or agriculture activities going on it. Once the property has been transferred, the donors are no longer eligible to gain any benefits from the property. At the same time, there are among the donors who still live on the transferred property. It is feared that the recipients may prohibit the donors to stay or benefit from the property. If the donors wish to

gain any benefits or live on the transferred property, the donor must get permission from the recipients. This permission depends on the recipients' kindness.<sup>29</sup>

This study also discovered that donors wish to withdraw *hibah* because the recipients ignore and expel the donors before wanting to sell the transferred property. Recipients change their attitude after donors' transfer as the donors' no longer give any benefits to them. Whereas, *hibah* transfer is aimed to encourage the recipients to take care of them, especially the elderly or sick<sup>30</sup> or assisting *hibah* recipient who encounters economic problems.<sup>31</sup> The circumstance worsens when the recipients want to sell the transferred property to a third party. In this case, land office does not have the authority to block the transaction due to the ownership having been transferred to the recipients. According to Torrens System which was adapted into National Land Code 1960, the registered name in land title is the absolute owner of the transferred property.<sup>32</sup>

Moreover, this ownership is strengthened by Section 340, National Land Code 1960 which gives the recipient indefeasibility of title. In other words, donors cannot cancel or withdraw the *hibah*. Although seen as a contrast to Islamic law which allows the withdrawn *hibah* to the children, there are still some spaces to withdraw *hibah* by referring to the case of Rosinah binti Abdul Majid and Azmi bin Abdul Majid (as the legal representative of Pah binti Abdul) v Norsiah binti Yob and Noraini binti Yob (Kangar High Court, Originating Summons No.24-26-2007). In this case, withdrawn *hibah* is permissible as an exemption of indefeasibility of title with reference to Section 340(4)(b), National Land Code 1965 which provides exemption for indefeasibility of title i.e., revocation according to 'law enforcement' which refers to Islamic law and customary law.<sup>33</sup>

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<sup>29</sup>Mohamed Said et al. "Qabd Dan Hukum Penarikan Balik *Hibah*," *Jurnal Muamalat* 3 (2010): 170.

<sup>30</sup>Alma'amun et al., "Motivations of Inter Vivos Transfers Among Malaysian Muslims"; Olivera, "The Division of Inter-Vivos Parental Transfers in Europe," (2016): 150.

<sup>31</sup>McGarry, "Dynamic Aspects of Family Transfers", (2016):7-9.

<sup>32</sup>Azlinor Sufian and Nor Asiah Mohamad., "The Proposal for a Single Title System under the National Land Code 1965: Between Theory and Reality," *Kanun* Vol. 27, no. 2 (2015): 314-25.

<sup>33</sup>Abdul Rashid and Yaakub., "*Hibah*: Isu Pindah Milik Dan Pembatalan *Hibah* Hartanah Di Bawah Kanun Tanah Negara"; Muhammad Serji and Shapiee, "Issues and Legal Conflicts Related to *Hibah* of Immovable Properties in Malaysia," (2010): 19.

This study recommends that the term of 'law enforcement' to be clarified by including the terms of Islamic law and customary law.

Although this section is seen as contradicting to Islamic law, the retention indefeasibility of title benefits the new recipients to make any transactions. If this section is repealed, it will be difficult for the recipient to carry out the transaction as ownership can be cancelled at any time. Therefore, this paper proposes that this section must be maintained but should include a clause that permits withdrawn *hibah* if it oppressed the donors, specifically parents' transfer to children.

On another note, as other solution, this study suggests that parents' transfer should be made by legal documentation or living trust without changing the entitlement in property's title. *Hibah* legal documentation makes it easier for the donor to withdraw *hibah* because the property's title is still registered with donor's name.<sup>34</sup> Through living trust, the donor may be advantageous as it allows the donors to benefit the transferred property during their lifetime.<sup>35</sup> At the same time, this type of transfer can be questioned on its validity if the pillars and condition of *hibah* are insufficient.

## 6. Conclusion

*Hibah* fundamentally can assist donor to plan wealth distribution during lifetime. Through *hibah*, the transferred property does not have to be involved in lengthy inheritance management process. Apart from helping the recipient in continuing life, *hibah* can encourage the recipient to repay the services to the donors who have transferred the property. However, there are cases of withdrawn *hibah* that cause disharmonious atmosphere between donors and recipients. This study concluded that the donors wish to withdraw their *hibah* due to their desire for the transferred property. It can be clarified by referring to the donors who still gain benefit from the transferred property such as rental, agriculture or as a place to live. This study also found that there is withdrawn *hibah* which was due to change of recipients' attitudes. The recipient has ignored the donors after getting the transferred property. This is contrary to the original purpose of *hibah* which is

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<sup>34</sup>Mohd Sa'afie and Muda, "Guideline in Preparing *Hibah* Document at the Shariah High Court," (2018): 7.

<sup>35</sup>Akmal Hidayah Halim and Tajul Aris Ahmad Bustami, "Execution of *Hibah* Amanah as an Instrument of Islamic Property Management in Malaysia," *Kanun* Vol. 29, no. 2 (2017): 90-115, <http://jurnalkanun.dbp.my/wordpress/wp-content/uploads/2017/08/hibah.pdf>; Nazrul Hazizi Noordin et al., "Re-Evaluating the Practice of *Hibah* Trust in Malaysia," *Humanomics* Vol. 32, no. 4 (2016): 418-36, <https://doi.org/10.1108/H-05-2016-0044>.



to ensure recipients' attention towards the donors as the recipients expel the donors from the transferred property considering the fact that it belongs to the recipient, because of the absolute ownership. Thus, the recipients have the right to sell, mortgage or make any other transaction over the transferred property. To address this problem, donors can apply other *hibah* method than to transfer full ownership through Form 14A at the land office such as through *hibah* legal documentation or living trust. Both methods can overcome the problem because it does not require a change of registered land ownership. Thus, *hibah* can be withdrawn without any hindrance from Section 340, National Land Code 1965.

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