

## **Analysis of Section 404 of the Malaysian Penal Code in Relation to Criminal Liability by the Personal Representative in Estate Administration**

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### **Abstract**

*Personal representative refers to an individual or a body that is vested with the authority to manage the inheritance estate of the deceased person. Since estate administration deals with legal and technical matters, the key point in ensuring the success of inheritance management lies in the competency of the personal representative. This is corroborated by the fact that the administration of estate is known for its lengthy process which could sometimes take years to complete. Several reports show that there are several cases involving breach of trust committed by the personal representative during his tenure. This includes the misappropriation of the estate property for his personal benefit and other adverse actions taken by the personal representative that led to the detriment of the entitled beneficiaries. The focus of this paper is to analyse the criminal liability that is associated with the mismanagement of the estate by the personal representative under Malaysian criminal law, with specific reference to the Penal Code. This paper adopts a qualitative approach by undertaking library-based research as its main methodology. Relevant materials include, but not limited to statutes, case laws, textbooks, journal articles, newspapers and seminar papers are being referred to in this research. It is found that misappropriation of estate property by the personal representative occurs due to the lack of knowledge and awareness on how to administer the estate and failure to distinguish between his duties and entitlement over the deceased's estate.*

**Keywords:** *personal representative, inheritance, beneficiaries, Penal Code, criminal liability, estate distribution*

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## I. INTRODUCTION

Estate administration or inheritance management connotes a process of managing the assets and liabilities of a deceased person.<sup>1</sup> The process requires an appointment of a person or body to administer the estate of the deceased which usually ends with the distribution of the assets to the rightful beneficiaries. The personal representative refers to the person authorised under the law to deal with the deceased's estate, and it is the task that he needs to see through the completion of the estate. Since estate administration deals with legal and technical matters, the key point in ensuring the completion of inheritance management lies in the competency of the personal representative.<sup>2</sup> This is corroborated by the fact that the administration of the estate is known for its lengthy process which could sometimes take years to complete if the personal representative is not competent in carrying out his duties. It is without a doubt that the personal representative plays a crucial role in estate administration, given his ultimate task in managing and distributing the estate. Given the nature of its lengthy duration, estate administration is prone to several issues which could hamper the process, eventually causing a delay in the distribution of the asset. The focus of this paper is on the issue of the personal representative who commits misappropriation of the estate property for his personal benefit and other adverse actions taken by the personal representative that led to the detriment of the entitled beneficiaries. The study looks into the criminal liability of the personal representative in relation to the provision under the legislation of Malaysian criminal law, namely Section 404 and Section 405 of the Penal Code. Several aspects pertaining to the offence will be analysed namely the nature and the requirement of the offence, the punishment prescribed under the law as well as the implication of the said act to the estate administration process as well as the affected parties including the deceased family members and the beneficiaries.

### 1. Overview of the Estate Administration in Malaysia

Estate administration is a crucial aspect of inheritance, involving the management of a deceased person's assets. Following an individual's death, their estate remains unattended, necessitating its collection and management until the entire process is completed. The culmination typically involves distributing the remaining assets to the designated beneficiaries. The term "administration" encompasses a series of tasks,

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<sup>1</sup> Curzon, L.B. (2010). Dictionary of Law (6th ed.). Kuala Lumpur: International Law Book Services.

<sup>2</sup> Muhammad Amrullah Drs Nasrul & Wan Noraini Mohd Salim (2018). Administration of Estates in Malaysia: Determinant of Factors Behind the Delay in The Distribution of The Deceased's Asset. Journal of Nusantara Studies, vol. 3, no. 1, 75-86.

including appointing a personal representative, gathering assets, settling debts, and distributing the estate. Beneficiaries gain entitlement to the deceased's estate upon their death, underscoring the objective of estate administration in ensuring the rightful distribution of assets.

Compliance with various procedures is imperative in handling the deceased's assets. The individual overseeing the estate must possess a comprehensive understanding of estate administration law, guiding them in making informed decisions and navigating the process following the death. This person, the personal representative, plays a critical role and must possess the knowledge and capability to fulfill their responsibilities competently.<sup>3</sup>

In addition to the personal representative's role, the cooperation of beneficiaries is equally vital for the smooth progress of estate administration. While beneficiaries may not directly manage the estate, their collaboration is essential for a seamless process. Beyond being recipients of the deceased's assets, beneficiaries should actively support and cooperate with the personal representative and relevant authorities. This collaboration becomes especially crucial when attendance is required for hearings in the Syariah Court regarding the issuance of the Certificate of Fara'id or hearings before the Collector of the Land Revenue under the Estate Distribution Division.

A lack of active involvement and a positive attitude from beneficiaries can lead to various issues in estate administration. This paper explores how adverse actions from beneficiaries may result in delays and aims to identify the potential implications of such delays.

The issue of delayed estate administration is a significant concern for both authorities and the public. This delay has led to a noticeable increase in unclaimed assets in recent years, reaching an alarming amount of RM 80 billion in 2022, marking a substantial rise from previous years (Shafie, Wan Yusoff, & Al-Edrus, 2014). The identified causes for these undesirable delays can be categorized into legal, economic, religious, and social factors (Rashid, Hassan, & Yaakub, 2013).

The complexity of rules and procedures, along with the involvement of multiple entities in estate administration, contributes to the causes of delay. The estate administration process consists of two main stages. The first stage revolves around obtaining letters of representation from administrative institutions, granting the authority to manage the deceased's estate. The second phase involves the execution process, including extracting the deceased's assets from specific sources and

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<sup>3</sup> Hassan, A. (2014). The Legal Rights and Duties of Administrators and Executors of Deceased Muslim's Property in Malaysia. *The Social Sciences*, 9(2), 98–101.

distributing them in accordance with the law. Both stages entail interactions with third parties. The first stage primarily focuses on acquiring the authority to govern the estate, while the second phase involves dealings with individuals or corporate entities such as creditors and financial institutions holding the deceased's accounts once the authority is secured.

## **2. Analysis of the Relevant Provision under the Penal Code**

In relation to the offence of misappropriation of property committed by the personal representative, there are two specific provisions that addresses this matter namely section 404 and section 405 of the Penal Code.

### Section 404 of the Penal Code

In analysing the issue of criminal liability of the administrator of a particular estate administration, it is fundamental to delve into Section 404 of the Penal Code. First and foremost, two crucial elements of crime that have to be picked out from the said section are Actus Reus and Mens Rea. Based on the said section, there is a clear presence of actus reus or physical element. The actus reus of this section is dishonestly stealing, transforming for personal use, or allowing someone else to get rid of such a property. This includes any physical act that entails obtaining a deceased person's property and exploiting it for one's own benefit or getting rid of it in a way that deprives the rightful owner. The relation of this particular element with the main topic is that as an unlawful administrator, he will deprive the other beneficiaries' rights pertaining to the deceased's properties.

Next, in ensuring that Section 404 of the Penal Code is one of the offences in Malaysia, it is important to also have the Mens Rea or blameworthy mind's element. It is crucial to note that the presence of actus reus itself is inadequate to accuse the administrator for breach of trust. According to the said section, mens rea can be divided into two distinguished types. The first one is dishonest intent. The property belonged to a deceased person, and the personal representative must have understood that taking or employing it was improper. This implies that they had to have acted knowing and intentionally disregarding who owned the property in the first place. On the other hand, if they have acted in good faith, and thus, it cannot be considered as fulfilling the second element of crime namely mens rea. This is due to the fact that mens rea would not be established by simple negligence or an error in ownership. The second type under mens rea of this section is the specific intent. According to some legal interpretations, there must also be an explicit intent to misappropriate or convert the property for one's own benefit or to deprive the rightful owner. This suggests that rather than behaving merely out of curiosity or carelessness, the offender's main

objective must be to profit themselves or someone else. Taking for instance, the administrator of the estate takes more than he is ought to take in order to benefit himself, financially or in other terms as well. Specifically, he has his own personal intention in illegally taking the deceased's property that initially does not meant for him. Simply put, it is for his own personal benefits rather than others.

Aside from that, Section 404 of the Penal Code also provides an illustration whereby Z passes away with money and furniture. Prior to the money ever reaching the hands of anyone who should have it, his servant A dishonestly embezzles it. A is guilty of the offence listed in this section. The illustration laid down in this section has clearly showed how breach of trust can occur.

#### Section 405 of the Penal Code

The second fundamental provision in discussing the issue of of criminal liability of the administrator of a particular estate administration is Section 405 of the Penal Code. This provision specifically lays down the types of criminal breach of trust. One of the physical elements or Actus Reus under this section is the entrustment of property. The property must be entrusted to the person in some manner, either alone or in conjunction with another individual. Formal agreements like holding property in trust are examples of this. The second actus reus of this section is the dominion over property. This particular element notes the crucial part of this particular issue. This implies control or power over the property and goes beyond simple possession. Examples can be overseeing finances or abusing the power of taking care of the deceased's property. The third one is dishonest misappropriation. This refers to the dishonest taking or using of something that has been entrusted to the personal administrative for his own gain or advantage. It entails the intentional taking of the property away from its lawful owner, either in terms of possession or use. The fourth actus reus of this section is dishonest use or disposal in defiance of the law. This is relevant in cases where the property was handed under particular legislative directives or contractual duties concerning its usage. A breach of trust occurs when someone uses or disposes of the property in a dishonest manner, in violation of these instructions. The last physical element of this section is the wilful suffering of another person's misappropriation. The person entrusted with the property may also be charged if they intentionally allow another person to misappropriate or misuse the property, even if they do not do it themselves. The second element of crime that can be found in this provision is Mens Rea. There are a few of mens rea that are present in this section. The first one is dishonest intent. This is the most important aspect. By misusing or misappropriating the entrusted property, the individual must have acted with knowledge and intent to harm the

owner's interests. Simply being careless or reckless may not be enough. Intentional wrongdoing and disrespect for the rights of the owner are critical. The second mens rea is the knowledge of entrustment. The administrator must comprehend the nature of the entrustment as well as the responsibilities involved with property management. They should be conscious of their obligation to behave in the best interests of the owner. The next mens rea is the awareness of violated legal/contractual obligations. The personal representative must be aware of the precise legal instructions and how their acts vary from them if the breach entails breaking any contractual conditions or specific legal instructions for the use of the property. Subsequently, wilful disregard for the owner's rights. The person's behavior ought to reveal a willful and conscious disdain for the owner's legitimate ownership and expectations with regard to the entrusted property. The last mens rea is lack of justification. The act must be devoid of any legitimate rationale. Errors, inadvertent mishandling, or even personal tragedies would not override the mens rea if the act was fundamentally dishonest and damaging to the proprietor. This element is often overlooked.

Besides, Section 405 of the Penal Code also offers a number of illustrations of criminal breach of trust. The illustration is related to the issue is Illustration (a). Under this illustration, as the executor of a decedent's will, A dishonestly violates the law, which requires him to distribute the assets in accordance with the will, and keeps the proceeds for his personal benefit. A has broken the law by betraying confidence.

### **3. Decided Cases on Misappropriation of Property**

The personal representative has duties to uphold the beneficial interests of the beneficiaries. He is assigned the tasks of gathering and taking possession and control of the assets of the estate, protecting and prudently investing those assets during administration, and identifying the enforceable and payable debts and obligations of the deceased person. Duties that shall be exercised by the personal representative are limited according to Section 60(3) of the Probate and Administration Act 1959, which states that a personal representative may only charge, mortgage, or otherwise dispose of all or any property vested in him as he may think proper to do so. In *Ong Thye Peng v. Loo Choo Teng & Ors.* [2008], the court highlighted and remarked that this provision concerned the manner of disposal of the property of a deceased person by his personal representative. A similar approach is evident in *Haji Aminah bte Bakri v. Manisah bte Haji Bakri & Ors.* [1989] when it is a consensus that trustees must act in the best interests of all beneficiaries, their obligation is to guarantee that the estate of which they are trustees benefits as much as possible when dealing with trust property. As a result, additional action that falls beyond the scope of this paragraph may constitute an offence under Section 405 of the Penal Code for criminal breach of trust



and Section 404 of the Code for misappropriation of property possessed by a deceased person at the time of his death.

The essential ingredients with regard to section 405 of the Penal Code have been stated by Wan Suleiman FJ in *PP v Yeoh Teck Chye* [1981] that for a person to be guilty of the offence of criminal breach of trust, there must be proof that the accused has been entrusted with property or dominion over property and that he should dishonestly misappropriated or convert the property to his own use or dishonestly use or dispose of the property or wilfully suffer any other person to do so in violation of any direction of law prescribing the manner in which such trust is to be discharged or of any legal contract made touching the discharge of such trust. A trust here may be defined as any arrangement by which one person is authorised to deal with property for the benefit of another. The person who is entrusted with certain property is entrusted directly with the said property, that is to say, delivered to him with a specific purpose where the element of possession exists. In such a trust, the trustee holds a fiduciary duty and is bound to act in the best interests of the beneficiary. They must not misuse or mismanage the property, as doing so would be a violation of their legal obligations. Additionally, the trustee must follow any specific instructions or contractual agreements pertaining to the discharge of the trust. Failure to adhere to these guidelines may result in legal consequences and potential loss of the entrusted property.

In *Soo Hoi Ling & Ors v. Khoh Keow Bok & Ors* [2019], the plaintiffs have not proven that they have a very strong claim against the defendant or that liability in this case is easily established. The allegations against the defendant include misappropriating the deceased's property while serving as his administrator, using estate funds for the first defendant's personal benefit, and using the eighth defendant as a means of passing a resolution authorising the use of RM150,000.00 for legal fees related to a personal dispute. The dispute precludes the application of Section 404. This shows how difficult it is to convict someone of a crime under section 404 because of the drawn-out procedure and requirement to obtain enough evidence. and establish a clear link between the defendant's actions and the alleged criminal activities. Furthermore, the inherent complexity of estate administration and the need to navigate various legal technicalities often delay the resolution of such cases. Additionally, the burden of proof rests on the prosecution to establish beyond a reasonable doubt that the defendant knowingly and intentionally engaged in criminal conduct. Without concrete evidence connecting the defendant's actions to the misappropriation and misuse of funds, securing a conviction becomes a daunting task under Section 404. Consequently, perpetrators may continue to exploit legal loopholes, resulting in the evasion of justice and the perpetuation of fraudulent activities.

## II. LITERATURE REVIEW

Section 404 of the Penal Code offers a pretty broad discussion, but the case's conclusions indicate that it is challenging to be found guilty under section 404. According to our research, the majority of local cases are instead tried under sections 405 and 409, which only deal with criminal breaches of trust in general. Section 404 may not be fully relied on for a variety of reasons, including the difficulty of proving that the accused actually misappropriated the deceased's property or the prevalence of cases involving abuses of the power of the deceased's personal representatives to the estate that are not brought to court. Unfortunately, section 404 is a crucial part for the administration of the deceased's property. The error on the part of the public's fear of using section 404 is what causes many cases of abuse of the deceased's property to occur but is not proven and brought to court. This lack of proof and prosecution only fuels the cycle of abuse, as those with ill intentions continue to take advantage of their position of power without facing any consequences. Additionally, the lack of awareness and understanding among the public about their rights and the proper procedures for reporting such abuses further contributes to the perpetuation of this cycle. It is essential for authorities to address these issues and create a system that encourages transparency, accountability, and swift action against those who exploit their authority over the deceased's property. Without the ability to effectively utilise section 404, the deceased's estate remains vulnerable, and the rightful inheritors are left without their rightful assets. It is crucial for the public and legal system to address these issues and find solutions to ensure the proper management and safeguarding of the deceased's property.

This loophole in the legal system allows unscrupulous individuals to exploit the deceased's assets for their own gain, leaving rightful heirs and beneficiaries with nothing. It is imperative that the public becomes educated about their rights and the importance of utilising section 404 to protect their interests. Only then can we hope to put an end to this cycle of abuse and ensure that justice is served for the deceased and their loved ones.

## III. METHODOLOGY

Being non-doctrinal research, this paper adopts a qualitative approach by undertaking library-based research as its main methodology. Relevant materials include, but not limited to statute, case laws, textbooks, journal articles, newspapers and seminar papers are being referred to in this research. Specific legislation namely the Malaysian Penal Code is being referred to as to analyse the provision which is the highlight of



this study. The two provisions, which is Section 404 and Section 405 of the Penal are carefully examined and being discussed with reference to case law. Selected number of decided cases which is relevant to the discussion on the study are analysed, where the selection of such cases are taken from the domestic law journals.

#### **IV. RESULT AND DISCUSSION**

Disruptions in estate administration have resulted in the prolonged distribution of the deceased's assets. The distribution process is contingent on clearing prior tasks in estate administration, as asset distribution can only occur upon the completion of the entire administrative procedure. Regardless of the cause of the administration delay, the repercussions are significant, impacting the rights of various parties, including creditors and beneficiaries. A notable implication arises in cases where beneficiaries pass away before the actual distribution of the deceased's assets, introducing complexity, especially if there is a substantial time gap between the deaths of the deceased and the beneficiaries.

For instance, consider a scenario involving three generations—a grandfather, his son as the primary beneficiary, and his grandchildren. If the son passes away before receiving his share of the deceased's assets, his portion remains pending due to the delay in estate administration.<sup>4</sup> Consequently, the grandchildren cannot inherit their father's portion until the distribution of the grandfather's assets is finalized.

Another implication concerns the transfer of the deceased's funds from their bank account to the registrar of unclaimed money. According to the Unclaimed Moneys Act 1965 & (Amendment) 2002, if a deceased person's account remains dormant for over seven years, the funds are transferred to the registrar of unclaimed money. Any claims must then be directed to the registrar, as the former bank is no longer responsible. However, the process of withdrawing funds from unclaimed money is more intricate and time-consuming than withdrawing from a bank, further elongating the asset distribution process.

Incomplete asset distribution may strain relationships between heirs and beneficiaries. The prolonged waiting period for their respective portions may lead to tensions and disputes among them. If pre-existing relationships were already strained, the delay exacerbates the situation, fostering continuous blame and potentially fracturing family ties.

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<sup>4</sup> Nor Muhamad, N.H. & Mat Hussain, N. (2013). Pembahagian harta pusaka Felda: Perspektif masyarakat Islam Felda Taib Andak. *Sains Humanika*, 66(1), 27-33.

Moreover, the delay not only affects beneficiaries but also tarnishes the reputation of the government legal system. Reports on undistributed assets create a negative impression, both domestically and internationally, suggesting a perceived inability of the government to handle the matter effectively despite having a robust legal system and enforcement mechanisms. Urgent measures are imperative to address the delay issues, which have resulted in the accumulation of millions of ringgit worth of unclaimed assets.

## V. CONCLUSION

It is important to know that estate administration is a process that requires substantial knowledge of technical and procedural aspects in managing the estate of the deceased. The role of the personal representative in delivering its duties is the key requirement in ensuring the success and completion of the process. With rights of several parties, including the beneficiaries and creditors being considered, it is imperative that the personal representative understand the process and carry out the duties diligently and with utmost level of fiduciary. The absence of these qualities will render the process prone to misbehaviour and mistreatment of the deceased's estate, consequently lead to commission of unlawful offence. From the criminal law perspective, misappropriation of the estate by the personal representative is a serious offence, amounting to a physical punishment. Somehow, the low number of cases being reported in relation to this offence is a reflection of thoughts among the public that some parties or event victims are hesitant to lodge a report against the personal representative, since the appointed person is among their family members. While in other cases, some would resort to a civil suit as it is more practical and beneficial rather than to proceed under the criminal proceedings. Regardless of the choice, it is essential for the family members to have a knowledge regarding what needs to be done in the event misappropriation of estate by the personal representative arise, so that their entitlement over the deserved estate portion will not abolished due to the wrongdoing of the personal representative. Cumulative efforts are required by the stakeholders including the government, the administrative bodies, the enforcement agencies and the academicians to instil awareness to the public regarding the wrong act of misconduct in managing the deceased's estate as well as the implication of committing such offence.

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