

## **Is a Nominee a Trustee or a Beneficiary? A Study on the Islamic Legal Maxim “In Contracts Effect is Given to Intention and Meaning and not Words and Forms” and Its Relevance to the Nomination Concept and Practice in the Administration of a Muslim’s Estate in Malaysia.**

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**Abstract:** In a sale transaction, parties to the contract are allowed to pronounce an offer using words which do not indicate a sale. He may use the word such as *hibah* in the offer as long as the nature of the contract is exchange. Nomination is a means to expedite the process of the administration of a deceased Muslim’s estate. It is commonly practiced in financial institutions such as insurance and *takaful* companies, Pilgrimage Fund and Employee Provident Fund. An issue arises as regard to the status of nominee, as a trustee or beneficiary. A *fatwaw* issued by the National *Fatwa* Committee in 1973 stating that a nominee acts only as a trustee. However, the decisions of the civil courts and the *Shari`ah* court show that a nominee could be a beneficiary. This research is undertaken to examine the Islamic legal maxim and its relevance to the principle of nomination in Malaysia. Here, even though it is a nomination form and the nominee appointed is merely a trustee according to the 1972 *fatwa*, the wordings of the nomination might indicate a different connotation.

**Key words:** Nomination, Islamic Law of Succession, Islamic Legal Maxim

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### **INTRODUCTION**

There is an Islamic legal maxim, which states that the basis to be considered informing a contract is the meanings and intentions, and not words and forms. It means that in a contract of sale for example, parties to the contract may pronounce words which do not indicate a sale. He may use the word such as *hibah* in the offer as long as the nature of the contract is exchange. The contract is a valid sale contract because both parties indicate their consents to the exchange between the object and the price. Here, even though it is a nomination form and the nominee appointed is merely a trustee according to the 1972 *fatwa*, the wordings of the nomination might indicate a different connotation. It does not necessarily mean that a nominee is a trustee but it depends on the meaning of the nomination clause.

#### ***The concept of nomination and its practice in Malaysia; nomination constitutes a contract in Islamic law:***

‘*Aqd* in Islamic Law is a means of creating obligations by either a single or two intentions. Literally it denotes tying, knitting, joining and locking (Haqqi, 1999). As discussed by scholars, the term has specific and general meanings. For the specific meaning, the term has been defined technically as a relationship of the speech of one of the contracting parties with that of the other according to the *Shari`ah* in a way that its effect appears in the object (Hassan, 2005). Article 103 of the *Mejelle* defined it as the two parties taking upon themselves an undertaking to do something. It is specific because it confines ‘*aqd* to the connection between two intentions and singles out obligations arise from the single intention. For the general meaning, al-Jassas defined it as what the contractor commits himself to do, or commits others to do on binding bases (Nawawi, 1999). This implies that ‘*aqd* includes both the single as well as the two intentions to create obligations. From these two definitions, it is understood that ‘*aqd* in Islamic law can be bilateral such as sale, hire and agency. Hence ‘*aqd* may be translated as a contract as understood in English law, which is concluded by two parties through their pronouncement of an offer and an acceptance respectively. However, ‘*aqd* can also be unilateral such as divorce, endowment and *ibra`* or remission of debt and as such, it is different from a contract.

In order to constitute an ‘*aqd*, there are four essential elements that must exist namely the existence of two parties, the proceeding of what indicates the consent of both contracting parties i.e. *ijab* (offer) & *qabul* (acceptance), the connection of offer & acceptance and the appearance of the effect of tying the acceptance to the offer in the object, i.e., transfer of ownership of the subject matter. Parties must mutually agree with the terms of the contract. This constitutes the most important requirement of a valid contract (Ayyub, 2003).

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This is based on the Qur'anic verse (al-Nisa', 4:29) to the effect "O you who believe, devour not your property among yourselves by unlawful means except that it be trading by your mutual consent".

Zamakhshari explains that the contracting parties must mutually agree on the terms of the contract at the time they pronounce the offer and acceptance respectively (Zamakhshari, 1995). Such a requirement is also mentioned in a hadith: "The contract of sale is valid only by mutual consent" (al-Zuhayli, 1989). The consent is originally a mere intention and hence, must be manifested through the verbal offer and acceptance. Without manifesting it, it is not sufficient to conclude the contract. Other acceptable means which function similarly are allusion, writing and gestures as long as they could manifest the presence of consent. However, there arises a juristic discourse on the reason why the contracting parties opt for other means instead of spoken words.

The subject matter of a contract is not confined to the physical object but it includes the creation, transfer, extinguish or release of rights (Haqqi, 1999). Generally, there are four conditions for the subject matter namely; existence, deliverability, ascertainability and suitability. All these are important in order to avoid negative elements such as *gharar* or uncertainty, deception and manipulation that could affect the consent of any party to the contract. In ensuring that the subject matter fulfills the conditions, the Islamic law allows the modification of the means so that it is suitable and practicable in any situation provided that it does not break its general principles.

Under English Law, nomination is a method of testamentary disposition. Unlike a will, it can be made by an adult and even by a minor who has attained the age of 16. It is effective upon the death of the person who makes such a nomination. In fact, it is a direction of an individual to the person holding the relevant funds on his/her behalf to pay the funds to a named person on his/her death (Clive, 1993). It has been defined as the naming by a member of a friendly society of a person to take his interest in the society on his death, without the need for a formal will (Oxford Dictionary of Law, 1990). It was originally intended to avoid the incurrence of the expense of making a will especially for those with little property (Sawyer, 1998). It is revocable by a subsequent nomination and not by a will.

In Malaysia, nomination is applicable to funds such as the Employee Provident Fund, Post Office Savings Bank, Insurance and Co-operative Societies. It can be classified into two groups, namely the statutory nomination which consists of savings accounts in the financial institutions and a nomination that has the effect of creating a trust in favour of the nominee such as the proceeds of life insurance policies (Merican, 2004).

Concerning the status of the nominee, the National Fatwa Council had issued a *fatwa* on 9<sup>th</sup> October 1973 that he or she, by way of nomination holds such position as no more than a trustee. The complete *fatwa* reads:

"Nominees of the funds in the Employees Provident Fund, Post Office Savings Bank, Insurance and Co-operative Societies are in the position of persons who carry out the will of the deceased or the testator. They can receive the money of the deceased from the sources stated to be divided among the persons entitled to them under the Islamic law of inheritance." [1974] 1 MLJ x.

The *fatwa* was issued due to the uncertainty of the position of the nominee of a Muslim's property. For non-Muslims, the practice is very clear that is the nominee is the beneficiary or the recipient of the property. However, as far as Islamic law is concerned, it was argued that the nominee is not the beneficiary or the recipient but as a mere trustee. Accordingly he is under the responsibility to divide and distribute the property to the legal heirs of the deceased as laid down in the *fara'id* system.

For example, with respect to funds kept in financial institutions like the Employers Provident Fund and Pilgrimage Fund, there are two court cases that can be referred to. In *re Ismail Rentah* [1940] MLJ 77, the deceased had nominated his daughter as nominee to receive his shares and benefits in the co-operative society in which he was a member, upon his death. The Court held that the daughter was a trustee and not a beneficiary. She could receive the property as a trustee and is responsible to distribute it to the legal heirs of the deceased as prescribed in the *fara'id* system. Raja Musa J. held that such a nomination would not constitute a *hibah* because there was no transfer of ownership to the nominee.

The judge arrived at the conclusion after studying the wording of the letter of nomination. The letter reads:

"Whereas I, Ismail bin Rentah, living at Terusan.... do nominate/ appoint in the presence of two witnesses Maznahbinti Ismail living at Terusan and who is related to me by way of being my child as being the person who may receive all my money in the said society if I die in accordance with the provisions of section 22 of the Co-operative Society Enactment 1922."

The judge concluded that the nomination was in fact a bequest. However it was an invalid bequest as the nominee appointed was an entitled legal heir and the other legal heirs had not consented to it. In fact, he also considered the case from the point of view of there being a *hibah*, but due to there being no transfer of ownership to the donee, the *hibah* failed.

In *re Man Bin Minhat* [1965] 2 MLJ 1, the deceased took out an insurance policy for RM40,000 on his life. He assigned the policy to his wife as the nominee that the benefit of all moneys under the policy shall be payable to her upon his death. The High Court decided that the wife is fully entitled to the insurance money when the insured person dies. The Court held that the moneys payable under the insurance policy did not form part of the

estate of the deceased. The Court also held that it is lawful for a Muslim to dispose off his property during his life time by way of a gift or through trustee.

The above decision was followed by the Malaysian High Court in the case of *re Bahadun bin Haji Hassan*[1974] 1 MLJ 4. The deceased had taken out a life insurance policy and the sum assured was made payable to his wife as the nominee. Disputes arose as to whether the nominee is beneficially entitled to the moneys due under the policy on the death of the assured or whether the moneys constitute part of the estate of the deceased on his death to be distributed among his legal heirs under *fara'id* system. It was argued that since the wife was nominated as the beneficiary she was entitled to receive the money for her own benefit. The Court held that it was a complete gift from the insured to the nominee when he nominated the latter in his life insurance policy.

The court did not follow the *fatwa* on the status of nominee that was issued in 1973. The principle of binding precedent was strictly applied and the Court followed the principle laid down in *re Man Bin Minhat*, even though the case was decided prior to the issuance of the *fatwa*. It appears that the judges contended that the insurance money belongs to the insured. It is therefore permissible for the insured to make it as a gift or *hiba* to the nominee after his death. Based on this finding, it can be argued that there is indeed no difference in essence between the 1973 *fatwa* which states that the position of a nominee is a trustee and the judges' understanding with regard to the ownership of the insurance money. According to the 1973 *fatwa*, the nominee must distribute the money to the insured's heirs and this means that the money is part of the insured's estate or in other words, it belongs to the insured. Therefore he should be allowed to make it as a *hibah* in favour of his nominee. In other words, the *fatwa* and the judges are of the common opinion that the insurance money belongs to the insured, and it can be the subject matter of *hibah* and can be distributed under *fara'id* system.

With regard to nomination under conventional life insurance, it is worth mentioning that on 15<sup>th</sup> June 1972, the National *Fatwa* Council had issued a *fatwa* that the conventional life insurance contract is prohibited because it contains the elements of *gharar*, *maysir* and *riba*. This implies that the money payable under the policy is also prohibited. Therefore, it should not be the subject matter of inheritance on the basis that the deceased has no ownership over something that is prohibited. Islamic law only recognizes properties that are legally acquired. Qur'anic verse (al-Nisa', 4:29) states to the effect "O you who believe, devour not your property among yourselves by unlawful means except that it be trading by your mutual consent".

Al-Tabari explains that the examples of prohibited wealth are *riba*, gambling and others, which are prohibited by Allah (s.w.t.) (Tabari, 1992). Wealth, which is earned through illegitimate means such as robbery, *riba* (including bank interest), *rishwah* (corruption), *gharar*-based transactions, stealing or gambling, is not subject to inheritance. Furthermore, the legal ownership is a condition for the heritability of wealth. If the ownership is not legitimate, it is not valid to transfer it to the deceased's legal heirs. This is odd with the Malaysian *fatwa* related to the nomination under conventional life insurance policy. The *fatwa* issued on 20<sup>th</sup> September 1973 stated that it is the responsibility of the nominee appointed by the insured to distribute the money which is prohibited acquired wealth in Islamic law, according to the *fara'id* law.

In this regard, section 167(1) of the Malaysian Insurance Act 1996 (Act 553) provides that when a Muslim nominee receives the policy moneys upon the death of the policyholder, he or she receives it as an executor and the money payable constitutes part of the estate of the policyholder which is subjected to the payment of any debts. Furthermore, section 167(2) provides that the nominee is under a responsibility to distribute the policy moneys in accordance with Islamic law. Here, it is not clear whether the 'Islamic law' stated in section 167(2) is the Islamic law of succession as no further statutory explanation is given. However, taking into account the statement of the former Minister as well as the position that the money payable is part of the estate of the deceased policyholder as stated in section 167(1), it is reasonable to assume that the term refers to the Islamic law of succession.

The *Shari'ah* Court in *Wan Puziah v. Wan Abdullah bin Muda & Another* [2001] JH June 235, also decided that the nominee is a beneficiary. The plaintiff who was the adopted daughter of the deceased claimed her share in the deceased's savings in the Pilgrimage Fund. She was appointed as the nominee by the deceased during her lifetime. It had been declared by the deceased in the nomination form that upon her death, the plaintiff would receive half of her savings in the Pilgrimage Fund. It was contended by the plaintiff that the nomination constituted a valid bequest. However, her contention was challenged by the defendants, who were nephews and heirs of the deceased. They argued that the nomination did not amount to a bequest and the moneys must be distributed in accordance with *fara'id* law. Ismail Yahya H held that the nomination by the deceased depositor for her savings account with the Pilgrimage Fund in favour of the plaintiff was a bequest. In his judgment, the judge initially referred to the *fatwa* issued in 1973 by the National *Fatwa* Council, but due to the absence of any stipulation regarding the nomination under the Pilgrimage Fund's regulations i.e. *lacuna*, the judge viewed that he was free to refer to the sources of Islamic law and accordingly applied his own reasoning.

After this case, the Pilgrimage Fund is believed to have introduced a new form of nomination clause. This new form expressly defines the responsibility of the nominee appointed. Upon receiving the deceased's deposited money from the Pilgrimage Fund, he must distribute it in accordance with the *Shari'ah* principles

(ARB, 2007). It is clear that the position of the nominee for the accounts deposited at the Pilgrimage Fund, is a trustee. There should be no further dispute over the nominee's position whether as trustee or beneficiary as previously disputed, as it clearly states that the nominee must distribute the money as laid down in the Shari'ah.

The present nomination clause for the *takaful* benefits is also clear. It mainly differentiates the position of nominees for Muslim participants, as trustee and for non-Muslim participants, as beneficiary. The dispute over the position of the nominee would not arise. For instance, the nomination form prescribed by the eTiqa Takaful of Malaysia which allows the participant to appoint several nominees. For Muslim participants, generally the nominee acts as a trustee but, for certain *takaful* products namely *Takaful Amal*, *Takaful Alif&Takaful Insan*, the nominee is the beneficiary and would receive the *takaful* benefits on the basis of "*hibah*" (gift). All nominees appointed would receive the hundred percent of the *takaful* benefits but the company would pay the amount only to one nominee following the sequence of the appointment. This implies that if the first nominee predeceases the participant, the hundred percent of the benefits shall be paid to the second nominee and so forth. The form also defines clearly the responsibility of the nominee that is the *takaful* benefits must be distributed to the legal heirs of the participant upon his death, as this is the part of the instruction given to the nominee and is agreed upon by the participant. It further elucidates that for non-Muslim participant, the nominee(s) are the recipients of the *takaful* benefits and would be entitled to the benefits based on the percentage indicated. If the nominee predeceases the participant, his or her portion shall be divided equally among the surviving nominee and would be distributed in accordance with the Distribution Act, 1958.

However, the nomination form currently practiced by the Employee's Provident Fund (EPF) seems inconsistent. Even though the form clearly states that the nominee of the Muslim participant is a *wasi* or executor, the mode of appointment indicates differently (EPF). There appear conflicting elements between the clause of appointment and the stated position of the nominee as an executor. The participant may appoint more than one nominee, but he is required to state the percentage that every nominee would receive from the money upon his death. This is in fact similar to a *wasiyyah* document. Besides, this would cause difficulties among legal heirs when it comes to the distribution of the property under *fara'id*. There is no clause in the EPF's nomination form which states that upon the death of the participant, and upon the courts' request or any similar clause which has the effect of necessitating nominees to withdraw and present the money for distribution process. If any of the nominees refuses to withdraw the money or lives abroad, it would cause the delay of the distribution. In other words, there is possibility that the distribution of the EPF money to the legal heirs of the dead participant would be conducted in several occasions. This would defeat the purpose of nomination which is initially to speed up the process of distribution. The legal heirs might also receive the amounts as prescribed in the *Shari'ah* in stages depending on which nominees would execute the responsibility swiftly.

#### **Under Which Aqd That Nomination Is Categorized?**

##### **a) Wasiyah:**

Making *awasiyyah* or bequest which is a means of property disposal is recommended to all Muslims. It is testamentary succession which is an option for a Muslim to disburse his wealth upon his death (Pearl, 1987). It is based on the deceased's wishes and is effective upon his death which means that it must be carried out before his estate is distributed according to the *fara'id* system. It was originally incumbent upon every Muslim following the revelation of the Qur'anic verse *al-Baqarah* (2): 180, which apparently states that there is an obligation upon a Muslim close to death to make a bequest in favour of his parents and next of kin. However, according to the four Sunni schools of law, this original ruling was abrogated by the revelation of the Qur'anic verses *al-Nisa'* (4): 11, 12 and 176 and the *hadith* of the Prophet (s.a.w.) '*no bequest in favour of legal heirs*' (al-Shawkani, *hadith* no. 2515).

However bequest is not an absolute right of a Muslim. He cannot make a bequest in favour of his legal heirs. If he does, the consent or refusal of the entitled heirs is decisive (Coulson, 1971). There is no single Qur'anic verse prohibiting a Muslim from making a bequest in favour of legal heirs. This limitation is based on a number of sound Prophetic traditions that state that making a bequest in favour of legal heirs is not permitted. According to the Hanafis, if the deceased makes a bequest in favour of an heir who is entitled to his property under inheritance, such a bequest, if not consented to by the other legal heirs, is invalid. This is on the basis that bequests made in favour of legal heirs need the approval of the other legal heirs. This argument is based on the *hadith* that narrates that if other legal heirs consent, the bequest is effective (San'ani, 1986). On the other hand, the majority view that the bequest is void. However, if the other legal heirs agree, the legatee is entitled to the property. This opinion is based on the *hadith* that Allah has specified the details of the rights of every legal heir, and hence they have no further right under a bequest.

Another limitation is pertaining to the quantum. A Muslim is allowed to make bequest up to 1/3 of the whole estate. This is based on the *hadith* that Sa'ad bin Abi Waqqas said: The Prophet came to visit me in the year of the farewell pilgrimage when I was afflicted with a severe illness. I said to him: "O Prophet (s.a.w.), you see how ill I am. I have property and no heir except my daughter. Shall I then give away two-thirds of my property as alms?" He replied "No." I said "A half then?" He still said "No." I then asked "A third?" He replied: "A third.

And a third is much. It is better that you leave your heirs rich than you should leave them destitute, begging from their neighbours.” (Bukhari, *hadith* no 2742 and Coulson, 1971).

**b) Hibah:**

The *hibah* is a mode of property disposal which is operative during the lifetime of the donor. Unlike *fara'id* and *wasiyyah*, which become effective upon the death of the deceased or the testator, a *hibah* is effective immediately (Caroll, 1994). It is a contract voluntarily made during the lifetime of the donor vesting the ownership of the corpus of property to a person without consideration (al-Sharbini, 1958). The recommendation of making a *hibah* contract is unanimously agreed on by Muslim scholars as it is an act of helping each other in the course of righteousness and piety as inspired by the Qur'anic verse (5:2). It reads “They ask thee what they should spend (in charity). Say: “Whatever ye spend that is good, is for parents and kindred and those in want and for wayfarers, and whatever you do that is good- Allah (s.w.t.) knoweth it well. There are also *hadiths* that read: “exchange gifts among yourselves so that love may increase among you” and “if any one seeks to take back a gift he is like a dog who returns to its vomit.” (al-San`ani, 1986 and al-Shawkani, 1995).

It is a contract-based agreement, and hence the general principle applicable to the contract is that it needs the pronouncement of an offer and acceptance from the donor and the donee respectively. This is to ensure that the contract is based on the mutual consent of both parties. Muslim scholars differ on the issue of whether the ownership is transferred with the mere acceptance of the offer or when possession is taken of the property. The Hanafis and the Shafi'is hold the view that taking possession by the donee is a condition to make the contract *luzum*, or binding. This is based on the practice of the Righteous Caliph AbuBakr regarding the case of his *hibah* of dates in favour of his daughter, `Aishah who did not take it until he was on his deathbed (Ibn`Abidin, 1404H and al-Sharbini, 1958) The non-binding effect of the contract means the ownership of the property remains with the donor and the contract is not binding on him/her. However, to the Malikis, possession is a condition for the completion of *hibah*. It is not a condition of its validity. This opinion is based on the analogy with a sale contract (IbnRushd, 2003). Taking possession is the right of the donee. The mere acceptance by the donee renders the contract complete and the ownership is therefore transferred to the donee. Once the contract is concluded by the mere acceptance of the donee, he may be compelled to take possession. Furthermore, even though taking possession is the right of the donee, if he delays it until possession is lost through the illness or insolvency of the donor, his right is annulled (IbnRushd, 2003). In consequence of this, there is no need to obtain permission from the donor for the possession of the property because the transfer of ownership occurs with the mere acceptance of the donee.

**c) Wisayah:**

*Wisayah* is trusteeship. It is a means to create a trust under Islamic law. It has been defined by al-Sharbini as an instruction given to a person to carry out certain things after his death (al-Sharbini, 1958). Al-Zuhayli explains it as the appointment of a person to administer the deceased's estate, including the manner in which the estate is to be distributed (Al-Zuhayli, 1989). This is similar to a will made under the Malaysian Wills Act, 1956, which is applicable to non-Muslims. In making such a will, the testator is allowed determine the beneficiaries of his property and the quantum each of them would be entitled to. He is also permitted to insert everything in the will document including his instructions of the manner the property is supposed to be distributed as well as the appointment of a guardian.

Section 2 of the Malaysian Wills Act, 1959 (Act 346) defines will as a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child. In Islamic law, this is in fact a combination between *wasiyyah* and *wisayah* and Muslims are encouraged to utilize the means of a will to fasten and mitigate the process of the distribution of their estates under Islamic inheritance law.

With regard to the significance of trusteeship, Dr. Muzammil H. Siddiqi, former President of the Islamic Society of North America viewed that in countries where the Islamic law of succession is not recognized, a Muslim is under religious responsibility to prepare a will before his death. This is based on his contention that without leaving a will, his wealth would be distributed according to the law of the country, where he or she lives, and not according to the *Shari'ah*. If such thing happens, he or she would be held responsible on the Day of Judgment for the negligence committed in a very important matter (Islamonline).

***The Applicability Of The Maxim “In Contract Effect Is Given To Intentions And Meanings Not To Words And Phrases” In Determining The Nominee’s status Either As A Trustee Or A Beneficiary:***

According to Kamali, legal maxims are theoretical abstraction in the form of usually of short epithetic statement that are expressive, often in a few words of the goal and objective of the *Shari'ah* (Kamali, 2006). They are constructed basically in simple forms and few words but they carry meanings which are comprehensive and

applicable to various issues of *fiqh*. In other words, they are important general rules of *fiqh* functioning as principles in deducing rules of *fiqh* (Laldin, 2006). They are known in Arabic as *al-qawa'id al-fiqhiyyah*. Mustafa al-Zarqa' defined it as general *fiqh* principles which are presented in a simple format consisting of the general rules of Shari'ah in a particular field related to it (al-Zarqa', 2004 and Laldin, 2006). As an example is the maxim "matters are judged by intention" which is comprehensive and applicable to various issues of *fiqh* such as *ibadah*, *muamalat*, and *andjinayah*. However, legal maxims function as to facilitate the understanding of problems and principles and nothing more. This means that a judgment cannot be based on maxims unless they are endorsed by the Qur'an or *hadith* (Mahmassani, 2000).

The maxim "in contracts effect is given to intention and meaning not to words and forms", according to Zaydan falls under its major maxim that is "*al-umur bi maqasidiha*" which means matters are determined according to intention (Zaydan, 2001 and Mahmassani, 2000). The latter implies that the effect of any particular action or transaction must be in accordance with the intent underlying such action or transaction. This is based on the *hadith* narrated by 'Umar r.a. that the Prophet (s.a.w.) had said: "Deeds are judged by intentions and every person is judged according to his intentions" (Bukhari, *hadith* no. 1). Therefore, an act of a human being is judged in the light of his intention or purpose. If a person finds something on the street and takes the object with the intention of returning it to the owner, his conduct is in order and he is considered as the keeper (*amin*) of the item, but if he intends to keep the item as his own, he is considered to be a person wrongfully appropriating property (*ghasib*) (Laldin, 2006). The item found is kept by him in both situations but his intention or purpose in keeping it makes the two situations different from each other.

Muslim scholars do not fix specific words to constitute a contract. Instead, every contract is constituted by that which indicates its meaning and idea clearly, regardless whether this indication is express or by allusion (Hassan, 2005). The maxim "in contract effect is given to intentions and meanings not to words and phrases" can be applied in the situation of ambiguity for example, that arises from the pronouncement of offer. When a person makes an offer to sell his car, he may utter "I donated this car to you for RM40,000." This pronouncement would in fact lead to the creation of a sale contract, not a donation. Applying the maxim, though the word 'donated' is uttered, it is a sale because its nature is an exchange between the object and the price. 'Azzam explains that pertaining to human being transactions, it is the meaning that constitutes the actual objective, not the express words ('Azzam, 2005).

### Conclusion:

Nomination constitutes an *aqd* contract in Islamic law. It is similar to a contract of agency which is pertaining to delegating the other to act on its behalf, which constitutes its subject matter (AAOIFI, 2007). There exists confusion among the Muslim as to the status of a nominee either a trustee or beneficiary. Even though there is a *fatwa* that has been issued since 1973, but the civil and Shari'ah court practices show that the judges have their own approaches to decide. The judges had examined the nomination clause in detail before issuing the judgment. This is to determine the real intention of the deceased who had appointed the nominee, whether to act as a trustee or to receive it as a beneficiary. This practice is in fact in line with the Islamic legal maxim "in contract effect is given to intentions and meanings not to words and phrases". In this regard, the *fatwa* issued in 1973 should not be generally applied to all nomination clauses. Understanding the meaning of the clauses is more important rather than the nomination itself.

### REFERENCES

- 'Azzam, 'Abdul 'Aziz, 2005, *al-Qawa'id al-Fiqhiyyah*, Kaherah: Dar al-Hadith.
- Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), 2007, *Shariah Standards*, Bahrain: AAOIFI.
- Al-Nawawi, 1930, *Sahih Muslim bi Sharh al-Nawawi*, Kaherah: al-Matba'ah al-Misriyyah.
- Al-San'ani, Muhammad Ibn Isma'il al-Amir al-Yamani, 1986, *Subul al-Salam Sharh Bulugh al-Maram min Jam' al-Adillah al-Ahkam*, Beirut: Dar al-Kutub.
- Al-Sharbini, al-Khatib, 1958 *Mughni al-Muhtaj*, Egypt: Mustafa al-Babi al-Halabi, 1958, vol. 2.
- Al-Shawkani, 1995, Muhammad bin 'Ali bin Muhammad, *Nayl al-Awtar*, Bairut: Dar al-Kutub al-Ilmiyyah.
- Al-Zuhayli, Wahbah, 1989, *al-Fiqh al-Islami wa Adillatuhu*, Damshiq: Dar al-Fikr, 1989, 4.
- Amanah Raya Berhad (ARB), 2007, *Compilation of Articles presented at the Konvensyen Perwarisan Harta Islam*, Kuala Lumpur: ARB.
- Ayyub, Hasan, 2003. *Fiqh al-Mu'amalat al-Maliyyah fi al-Islam*, Kaherah: Dar al-Salam.
- Caroll, Lucy, 1994, "Definition and Interpretation of Muslim Law in South Asia: The Case of Gifts to Minors", *I.L.S.*, 1:1.
- Clive V Margrave-Jones, 1993, *Mellows: The Law of Succession*, London: Butterworths, 5<sup>th</sup> edition.
- Coulson, N.J, 1971, *Succession in the Muslim Family*. London: Cambridge University Press.
- Endowment Provident Fund, Malaysia (EPF) at <http://www.kwsp.gov.my/> accessed on 13th November 2012

- Haqqi, Abdurrahman Raden Aji, 1999, *The Philosophy of Islamic Law of Transactions*, Kuala Lumpur: Univision Press Sdn. Bhd.
- Hassan, H.H., 2005, *An Introduction to the Study of Islamic Law*, New Delhi: Adam Publishers & Distributors.
- <http://www.islamonline.com>. [accessed 6<sup>th</sup> April 2005]
- Ibn Abidin, al-Shami, 1404H, *Hashiyah Rad al-Mukhtar 'aaDur al-Mukhtar*, Bakistān: MaktabahRashidiyyahKu`tah.
- IbnRushd, Abi al-Walid Muhammad bin Ahmad bin Muhammad, *Bidayah al-MujtahidwaNihayah al-Muqtasid*, translated into English by Nyazee, Professor Imran Ahsan Khan and reviewed by Rauf, Professor Mohammad Abdul, 2003, Reading: Garnet Publishing, 2003.
- Kamali, Mohammad Hashim, 2006, *An Introduction to Shari`ah*, Kuala Lumpur: Ilmiah Publishers.
- Khan, Muhammad Muhsin, 1997, *The Translation of the meanings of Sahih al-Bukhari Arabic- English*, Riyadh: Darussalam.
- Laldin, Mohamad Akram, 2006, *Introduction to Shari`ah and Islamic Jurisprudence*, Kuala Lumpur: CERT Publication.
- Mahmassani, Subhi, 2000, *Falsafat al-Tashri`fi al-Islam*, translated by Farhat J. Ziadeh, Kuala Lumpur: The Open Press.
- Merican, Pawancheek, 2004, *Islamic Inheritance Law in Malaysia*, Kuala Lumpur: KexisNexis.
- Nawawi, Razali, 1999, *Islamic Law on Commercial Transactions*, Kuala Lumpur: CT Publications Sdn. Bhd.
- Oxford, 1990, *A Concise Dictionary of Law*, Oxford: Oxford University Press, 2<sup>nd</sup> ed.
- Pearl, David, 1987, *A Textbook on Muslim Personal Law*, 2<sup>nd</sup> edition. London: Croom Helm
- Sawyer, Caroline, 1998, *Principles of Succession, Wills & Probate*, London: Cavendish Publishing Limited.
- Tabari, Imam, 1992, *Tafsir al-Tabari*, Beirut: Dar al-Kutub al-Ilmiyyah, vol. 4.
- Zamakhshari, 1995, Mahmud ibn`Umar ibn Muhammad, *al-Kashshaf*, Beirut: Dar al-Kutub al-Ilmiyyah, vol. 1.
- Zarqa`, Mustafa Ahmad, 2004, *al-Madkhal al-Fiqhi al-'Am*, Damshiq: Dar al-Qalam.
- Zaydan, `Abd al-Karim, 2001, *al-Madkhal li Dirasah al-Shari`ah al-Islamiyyah*, Beirut: Mu`assasah al-Risalah.