Islamic Wealth Management: Is the Nominee a Trustee or Beneficiary? An Analysis on the Application of the Nomination Instrument in the Disposition of Property in Malaysia from the Perspective of Islamic Law

*Mohamad Asmadi Abdullah**

Abstract

Nomination is originally a means to expedite the process of the administration of a deceased Muslim's estate. With nomination, a nominee therefore has a legal right to claim the property of the deceased from the relevant financial institution such as insurance companies, Takaful companies, Tabung Haji and the Employees Provident Fund. However, there is a question pertaining to the status of the nominee whether he is a trustee or a beneficiary. The *fatwa* issued by the National *Fatwa* Committee in 1973 suggests that a nominee acts only as a trustee. However, looking into the decisions of the civil courts as well as the Shariah court, a nominee could be a beneficiary. This research is undertaken to examine the nature of the nomination process and to identify any similarities and differences between nomination, *wasiyyah* and *hibah* according to the Islamic law in order to determine whether a nominee is a trustee or a beneficiary.

Introduction

The distribution of a deceased Muslim's estate is in accordance with the *Fara`id* system as determined by the *Qur`an* and *hadith*. Both constitute the two fundamental sources to deduce legal rulings pertaining to issues in inheritance. *Wasiyyah* and *hibah* are also two instruments that are related to the distribution of the estate of a deceased Muslim. However, there is no overlapping rule that governs these three instruments. Each stands on its own and there is no conflict of rules between them. Muslim scholars agree that *fara`id* and *wasiyyah* are related to death and the former caters for two-thirds of the estate whereas the remaining one-third is reserved for the *wasiyyah*. On the other, *hibah* is not conditional on the giver's death but it is effective immediately.

When a person dies, his estate must be legally administered in order to avoid unnecessary disputes regarding its distribution. The nomination

* Assistant Professor, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM).

is an instrument that can assist a deceased Muslim to get his property distributed quickly, i.e. without the need to apply for a letter of probate or administration. However, there are seemingly similarities and differences between the nomination and other modes of property disposition especially the *wasiyyah* and *hibah*. The *fatwa* issued by the National *Fatwa* Council of Malaysia in 1973 caused some difficulties in order to determine the status of the nominee. According to the *fatwa* which generalises its application in all cases of nomination, a nominee is merely a trustee. However, when the nomination clause is examined in depth and compared with the nature of the *wasiyyah* and *hibah* respectively, it reveals that a nominee is not necessarily a trustee but could be a beneficiary.

Wasiyyah in Islamic law

Wasiyyah is another means of disbursing one's wealth upon death. It is an optional testamentary succession and is different from the *fara`id* system which constitutes the compulsory succession.[1] Even though it is an optional disposition of property upon death, it is a right of the deceased that must be carried out before his estate is distributed according to the *fara`id* principles. This testamentary disposition, which is based on the wishes of the deceased, is not effective until his death. Only upon his death is the ownership of the property transferred to the beneficiaries.

It has been unanimously agreed by the four Sunni schools of law that the execution of the *wasiyyah* of the deceased should occur after the payment of the funeral expenses and all debts but prior to the distribution of the estate to the legal heirs. This is based on the Qur`anic verse *al-Nisa`* (4): 11 where Allah commands that the distribution of property to the entitled legal heirs takes place after the execution of the *wasiyyah*.

Making a *wasiyyah* was originally incumbent upon every Muslim following the revelation of the Qur`anic verse *al-Baqarah* (2): 180. The verse 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. 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 "*no wasiyyah in favour of legal heirs*".

Even though a Muslim is allowed to dispose of his property by way of a *wasiyyah*, and by that means he is permitted to freely select the beneficiaries and confer upon them rights to his estate effectively upon his death, such a right is not absolute. His right to make a *wasiyyah* is subject to limitations. A *wasiyyah* that exceeds the prescribed limits would constitute an *ultra vires wasiyyah*, which means the consent or refusal of the entitled heirs is decisive.[2]

1 Pearl, David, *A Textbook on Muslim Personal Law*, 2nd edn (London: Croom Helm, 1987), p 138.
2 Coulson, N J, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), pp 242– 243.

There is no single Qur`anic verse prohibiting a Muslim from making a bequest in favour of legal heirs. This limitation is therefore based on a number of sound Prophetic traditions that state that making a bequest in favour of legal heirs is not permitted.[3] The Qur`anic verse *al-Baqarah* (2): 180, which is known as the verse of bequest, however, states that making a bequest in favour of parents and next of kin is an obligation. However, according to the Muslim jurists of the Sunni schools of law, the ruling contained in this Qur`anic verse was abrogated by the subsequent revelation of verses of inheritance.[4]

With careful observation, it becomes apparent that there are no conflicting messages between the Qur`anic verse of bequest and the Prophetic traditions which prohibit making bequests in favour of legal heirs, including the parents. With respect to these Prophetic traditions, the Hanafis' opinion is that if the deceased makes a bequest in favour of the 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. The deceased has no right to make a bequest in favour of a legal heir and if he/she does so the rights of the other legal heirs are encroached on. This is the reason for the need for the approval of the other legal heirs because their rights have been affected. The Hanafis base their argument on the *hadith* that narrates that if other legal heirs consent, the bequest is effective.[5] The other three schools of law hold the opinion that the bequest is void; if the other legal heirs agree, the legatee is entitled to the property bequeathed but on the ground that it is a gift or *hibah* from them. 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.

Based on the above arguments, it is clear that the meaning of "*warith*" in that particular *hadith* and those *hadiths* which give the same effect, is the "*warith*" who is entitled to the deceased's property under inheritance law. If the legal heir is either de jure or de facto excluded from inheritance or is disqualified due to the presence of any impediment to inheritance that affects his/her entitlement, any bequest made by the deceased in their favour is valid.

---

3 There are a number of Prophetic traditions but with different versions that do not allow making bequests in favour of legal heirs. The difference is only in the matter of the words of the narrations. They carry the same meaning, i.e. a bequest is not allowed to be made in favour of legal heirs. See Tanzil-ur-Rahman, *A Code of Muslim Personal Law*, vol 2 (Karachi: Islamic Publisher, 1980), pp 457–461. An example is the *hadith* "No *wasiyyah* in favour of the *warith*".

4 Al-Zuhayli, Wahbah, *al-Fiqh al-Islami wa Adillatuhu*, vol 2 (Beirut: Dar al-Fikr), pp 11–12.

5 Ibn Abidin, al-Syami, *Hasyiyah Rad al-Mukhtar ala Dur al-Mukhtar*, vol 6 (Bakistan: Maktabah Rasyidiyyah Ku`tah, n.d.), p 656. The Hanafis accept another version of the *hadith*, which carries the addition of the words "except when the heirs permit the same". See al-San`ani, Muhammad ibn Isma`il al-Amir al-Yamani, *Subul al-Salam Syarh Bulugh al-Maram min Jam`i Adillah al-Ahkam* (Beirut: Dar al-Kutub), p 204.

According to al-Qaradawi, when the verses of inheritance were revealed, even though the entitled legal heirs' rights to bequests were abolished, the disentitled legal heirs' rights to bequests remained in existence.[6] Such heirs have no rights under inheritance and hence are entitled to the bequest. This is sanctioned by the *hadith*, from which we can identify the reason behind the prohibition of bequests being made in favour of legal heirs, i.e. those who are entitled to the deceased's property under inheritance law are not entitled to bequests. Since Allah has prescribed their rights to the deceased's wealth by way of succession, they have no right to the deceased's wealth by way of bequest.[7]

A Muslim is not allowed to bequeath all his wealth. In this respect, the whole version of the *hadith* is that Sa`ad bin Abi Waqas narrates that 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, 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".[8] Besides this version, there are different versions reported in other books of *hadith*, which carry the same effect: that the quantum of bequest is limited to one-third of the whole estate of the deceased.[9]

In this regard, there are two circumstances that need to be considered, namely the situation where the deceased leaves behind heirs and that where there is no heir. In the former case, the four Sunni schools of law hold the same opinion that a bequest exceeding the limit of one-third is valid provided the consent of all the entitled legal heirs is obtained. This is due to the fact that the right to the whole property, on the death of the deceased, passes immediately to the legal heirs and hence, they have absolute freedom to do as they will with such a right. If such a bequest is approved it becomes effective. If it is not, it is still valid but only up to the portion of one-third, because the exceeding part is regarded as an encroachment on the rights of the legal heirs.

In the second situation, the Hanafis, the Syafi`is and the Hanbalis are of the opinion that a bequest exceeding one-third of the whole estate is valid. The idea of limiting the bequest to one-third is to protect the interests of the legal

---

6 Al-Qaradawi, *Fatwa Terkini Wanita dan Keluarga*, translated into Bahasa Malaysia by H Mohd Roihan M (Kuala Lumpur: Pustaka Shuhada), p 172.

7 Abu Imamah narrated: "I heard the Prophet say: Allah has already given to each entitled relative his proper entitlement. Therefore, no bequest in favour of a legal heir." Al-San`ani, p 204.

8 Khan, translation of *Sahih al-Bukhari*, p 16. See also Coulson, N J, supra, n 2, p 214.

9 For example in another *hadith* narrated by Mu`adh bin Jabal that Allah had conferred upon a Muslim alms of one-third of his property in the time of death approaching as an addition for his good deeds. See al-San`ani, p 108.

heirs and hence, since no legal heir exists, the issue of encroachment does not arise. In this connection, the majority goes further, saying that there is no need to get the consent of the ruler of the state, in his position as the heir of those who leave behind no heir, because unlike the Malikis, they are of the view that the *bayt al-mal*, or State Treasury, is entitled to the deceased's property not in the capacity of a legal heir but by way of escheat. The Malikis, on the other hand, hold the view that in such cases, the deceased has no right to make a bequest of more than one-third of his wealth because the *bayt al-mal* is regarded as the residuary heir and neither the ruler nor his representative has the right to give consent. But if the administration of the *bayt al-mal* is not as outlined by Islamic law and involves such things as corruption and the unfair distribution of property, the deceased is allowed to bequeath all his property in a manner to please Allah.[10]

Hibah in Islamic Law

The *hibah* is a mode of property disposition according to Islamic law. Unlike *fara`id* and *wasiyyah*, which become effective immediately upon the death of the deceased or the testator, a *hibah* is operative during the lifetime of the donor.[11] The Arabic term of *hibah* literally means *`atiyyah* or gift.[12] It is technically defined as a contract voluntarily made during the lifetime of the donor vesting the ownership of the corpus of property to a person without consideration.[13] It is different with *hadiyyah* and *sadaqah*. *Hadiyyah*, or present, is a gift based on respect or love, and *sadaqah*, or donation, is a gift to a person who is in need of the gift with the intention of gaining reward from Allah.[14] It is therefore understood that *hibah*, or gift inter vivos, in Islamic law, is a contract whereby the donor voluntarily agrees to transfer the absolute ownership of the gifted property in favour of the donee. Furthermore, such a transaction requires no return or exchange. *Hadiyyah* and *sadaqah* are components of *hibah*, though they are more specific in the sense that they require precise intention and reason from the donor.

Making a *hibah* contract is recommended based on the Qur`anic verse (2:215), which encourages Muslims to offer gifts among themselves.[15] There are also *hadiths* that read: "exchange gifts among yourselves so that love may increase

---

10 Barraj, Jumu`ah Muhammad, *Ahkam al-Mawarith fi al-Shariah al-Islamiyyah* (Amman: Dar al-Fikr, 1996). P 133.

11 Caroll, Lucy, "Definition and Interpretation of Muslim Law in South Asia: The Case of Gifts to Minors", ILS, 1:1 (1994) 8.

12 Ba`albaki, Ruhi, *Al-Mawrid – Qamus `Arabi-Inklizi*, 4th edn (Beirut: Dar al-`Ilm li al-Malayin, 1992), p 1201.

13 Al-Syarbini, al-Khatib, *Mughni al-Muhtaj* (Egypt: Mustafa al-Babb al-Halabi, 1958), vol 2, p 396.

14 Ibid, p 397. See also al-Zuhayli, vol 5, p 5.

15 The Qur`anic verse al-Baqarah (2:215) 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 knoweth it well'."

among you"[16] and "if any one seeks to take back a gift he is like a dog who returns to its vomit".[17] 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).[18]

Making a gift by way of *hibah* 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.[19] This is to ensure that the contract is based on the mutual consent of both parties.[20] The donor must be the legal owner of the gifted property, in good health, sound mind and possess legal capacity and the legal power of disposal. The donee must possess legal capacity to accept the offer otherwise the acceptance is not valid. However, a guardian can undertake the acceptance and taking possession in the case of minors, those of unsound mind or those who have no legal capacity.[21]

Taking possession of the property by the donee is necessary in order to prove the transfer of ownership. 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 Syāfi`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 Abu Bakr. In the Muwatta` of Imam Malik, there is a report from `A`isyah, which states that Caliph Abu Bakr made a gift in favour of `A`isyah of 20 *wasaq* (a weight) of dates. The dates had not been plucked from the trees by the time Abu Bakr was approaching death. Abu Bakr said to `A`isyah, "if you had taken possession of the dates they would have been yours. Now you shall distribute them in accordance with the law of inheritance among all the heirs".[22] It is also narrated that the Caliph Umar said, "What is the matter with some men who make gifts to their sons and then hold on to them. When the son of one of them dies he says that my wealth is in my hands, I did not give it to anyone. If his (own) son is dead he would say I had given this to my son. He who makes a gift and then does not permit it to the donee, retaining it

16 Al-Sanᶜānī, vol 3, p 92 and al-Syawkani, Muhammad bin `Ali bin Muhammad, *Nayl al-Awtar* (Egypt: Matba`ah Mustafa al-Halabi, 1250H), vol 5, p 347.

17 Al-San`ani, vol 3, p 93.

18 See al-Zuhayli, vol 5, p 7. The relevant Qur`anic verse al-Ma`idah (5:2) reads: "Help ye one another in righteousness and piety, but help ye not one another in sin and rancour".

19 Ibn Rusyd, Abi al-Walid Muhammad bin Ahmad bin Muhammad, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, 5th edn (Egypt: Syarikat Maktabah wa Matba`ah Mustafa al-Babb al-Halabi wa Awladihi, 1981), vol 2, p 329 and al-Syarbini, p 397.

20 In case of a dumb person, a sign is acceptable if it is understood and indicates the intention. See al-Syarbini, p 397.

21 See al-Zuhayli, vol 4, pp 143–145. This is a general principle applicable to the contracting parties of all types of contract.

22 Ibn `Abidin, vol 4, p 533 and al-Syarbini, vol 2, p 400.

till such time that he dies so that it is given to the heirs, then, such a gift is void".[23] 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.

In relation to this, it is imperative that the taking possession of the property by the donee is with the permission of the donor. If possession is taken without such permission, the transfer of ownership is invalid and as a result, the ownership remains with the donor.[24]

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.[25] 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.[26] 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.[27] 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.

It is submitted that taking possession of the property is necessary for the transfer of ownership. It is not the purpose of *hibah* that the donor remains in control of the property.[28] Looking into the literal and technical definitions of *hibah* itself, the transfer of ownership appears to be the most significant factor of establishing the contract. Mere acceptance of the offer becomes futile if the donor remains the owner of the property. The analogy made by the Mālikīs seems incorrect because the *hibah* contract is a contract of donation whereas a sale contract is a contract of exchange. In a sale contract, the seller is compelled to deliver the goods purchased in return for the consideration paid by the buyer, whereas in a *hibah* contract, the donor should not be compelled because he will not receive any consideration in return.

Therefore, the opinion of the majority, which is based on strong arguments, is to be preferred. The ownership of the *hibah* property under a valid *hibah* contract is completely transferred to the donee only when the donee has taken

23 See Ibn Rusyd, *Bidayah al-Mujtahid*, translated into English by Professor Imran Ahsan Khan Nyazee and reviewed by Professor Mohammad Abdul Rauf (Reading: Garnet Publishing, 2003), vol 2, p 400.

24 Al-Syarbini, p 400.

25 Ibn Rusyd, p 399. In a contract of sale, when the contract is valid, the ownership is therefore transferred to the purchaser. The seller is under obligation to transfer the possession of the property to the purchaser.

26 Ibid.

27 Ibid, p 400.

28 Caroll, "Lucy, Life Interest and Inter-Generational Transfer of Property Avoiding the Law of Succession", ILS, 8:2 (2001) 265.

possession of it. Prior to that, the contract remains incomplete. Without such delivery of possession, the donor remains the owner of the property.

As far as the term possession is concerned, the view that physical control over the gifted property by the donee is sufficient to constitute the acceptance is to be preferred because the documentation of permission is a matter of administration only. It should suffice that the donee can provide sufficient evidence of the *hibah* and the permission given by the donor.

When the *hibah* contract has been validly executed and the donee has taken possession of the gift, the ownership is completely transferred to him/her. As a result, the donor has no right at all to ask for the return of the gift. Where either the donor or the donee dies prior to the taking possession, their heirs are entitled to the right to give permission for possession and the right to take possession.[29]

Nomination

Nomination is a process by which an individual gives a direction to the person holding the relevant funds on his/her behalf to pay the funds to a named person on his/her death.[30] Likewise with a *waiyyah*, nomination takes effect upon the death of the nominator. In Malaysia, the National *Fatwa* Council issued a *fatwa* on October 9, 1973 that a nominee who is appointed 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.[31]

In this respect, as stated in the above *fatwa*, nomination is applicable to funds such as the Employees Provident Fund, Post Office Savings Bank, insurance and co-operative societies. Looking into the nature of these funds, they can be classified into two groups, namely savings accounts in the financial institutions and the proceeds of life insurance policies. According to Pawancheek Merican, a practising lawyer, the former is a statutory nomination whereas the latter is a nomination that has the effect of creating a trust in favour of the nominee.[32]

---

29 Al-Syarbini, p 401.
30 Sawyer, Caroline, *Principles of Succession, Wills & Probate*, 2nd edn (London: Cavendish Publishing, 1998), p 13.
31 See [1974] 1 MLJ x.
32 Merican, Pawancheek, *Islamic Inheritance Law*, 2nd edn (Kuala Lumpur: LexisNexis, 2005), p 146.

The Malaysian High Court in the case of *Re Bahadun bin Haji Hassan* did not follow the above *fatwa*.[33] In this case, the court decided that it was a complete gift from the insured to the nominee when he nominated the latter in his life insurance policy. The principle of binding precedent was strictly applied and the court followed the principle laid down in *Re Man Bin Minhat*,[34] even though the case was decided prior to the issuance of the *fatwa*. In this case, the High Court decided that when a person takes out a life insurance policy amounting to RM40,000 and nominates his wife as the receiver of the benefit, the wife is fully entitled to the insurance money when the insured person dies.

A nomination clause and the 1973 *fatwa* issued by Malaysian National *Fatwa* Council

With regard to the nomination under life insurance policy in Malaysia, the *fatwas* issued by the Islamic Religious Council appear to be inconsistent as far as the Syariah compliance is concerned. There have been *fatwas* issued on the illegitimacy of conventional life insurance but at the same time, there is a *fatwa* stating that the money paid by conventional insurance must be distributed among the insured's legal heirs. On June 15, 1972 for instance, the National *Fatwa* Council issued a *fatwa* invalidating the conventional life insurance contract because of the existence of the elements of *gharar*, *maysir* and *riba*. However, on September 20, 1973, the same council issued a *fatwa* that clearly states that it is the responsibility of the nominee appointed by the insured to distribute the money according to the *fara`id* law.[35]

Furthermore, analysing the judgments in *Re Bahadun bin Haji Hassan* and *Re Man Bin Minhat*, it appears that the judges understood that the insurance money belongs to the insured, rather than being divisible according to the *farā`id* law because it constitutes part of the insured's estate. The judges decided that the money should pass in its entirety to the nominee on the basis that it is a complete gift or *hibah* made by the insured to the nominee prior to his or her death. From these facts it can be seen that there is indeed no difference in essence between the 1973 *fatwa* and the judges' understanding. 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. In other words, the *fatwa* and the judges are of the common opinion that the insurance money belongs to the insured.

In May 1996, an announcement was made by the former Minister in the Prime Minister's Department, YB Datuk Dr Abdul Hamid Othman, that the *fara`id* principles had been incorporated in the Insurance Bill, which had been previously tabled in the Dewan Rakyat.[36] Section 167(1) of the Malaysian

33 [1974] 1 MLJ 4.
34 [1965] 2 MLJ 1.
35 [1974] 1 MLJ x.
36 See *The Sunday Star*, May 26, 1996.

Insurance Act 1996[37] therefore provides that when a Muslim nominee receives the policy money 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, s 167(2) provides that the nominee is under a responsibility to distribute the policy money in accordance with Islamic law.

An issue might arise with regard to the non-permissible or prohibited wealth that does not constitute an estate of the deceased according to the Islamic law. This clearly indicates the problem with the *fatwa* on nomination issued in 1973 which in effect requires the general application of the nominee status to all cases without examining in depth the case in dispute. With regard to s 167(2) of the Insurance Act, it is not clear whether the "Islamic law" stated in s 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 s 167(1), it is reasonable to assume that the term refers to the Islamic law of succession.

With regard to funds kept in financial institutions like the Employees Provident Fund and Pilgrimage Fund, there are two court cases that can be referred to. In *Re Ismail Rentah*,[38] the deceased was a member of a co-operative society and had nominated his daughter as nominee to receive his shares and benefits in the society upon his death. Raja Musa J held that such a nomination would not constitute a *hibah* because there was no transfer of ownership to the nominee. The court held that the nominee could receive the property as a trustee, in which case she would be under a responsibility to distribute it to the legal heirs under the *fara`id* law.

In this case, it appears from the judgment that the nomination by the deceased amounted to a trust document equivalent to the appointment of an executor. However, the judge came to his decision after considering the wording of the letter of nomination from which he concluded that it was apparently a bequest. It was held that since the nominee was an entitled legal heir and the other entitled legal heirs had not consented to the bequest, the bequest was invalid. The court 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. [39] The letter reads:

> Whereas I, Ismail bin Rentah, living at Terusan ... do nominate/appoint in the presence of two witnesses Maznah binti Ismail living at Terusan and who is related to me by way of being my child as being the person who

37 The Insurance Act 1996 (Act 553).
38 [1940] MLJ 77.
39 [1939] FMSLR 234.

> 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.

A similar approach was adopted in *Wan Puziah v Wan Abdullah bin Muda & Another*.[40] In this case, there were two nominees appointed. The first nominee was the deceased's husband but he died prior to her death. The second nominee was the plaintiff who was the adopted daughter of the deceased. She claimed her share in the deceased's savings in the Pilgrimage Fund. During her lifetime, the deceased had declared on the nomination form that upon her death, half of all her savings in the Pilgrimage Fund would be for the benefit of the plaintiff and the other half would be for her husband. The plaintiff contended that the nomination constituted a valid bequest. Her contention was, however, challenged by the defendants, who were nephews and heirs of the deceased. They contended that the nomination did not amount to a bequest and applied for the moneys to be distributed according to *fara`id* law.

Ismail Yahya J 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. Upon observing the pillars of a bequest in Islamic law and the clause of nomination applied by the deceased, he came to the conclusion that the nomination was in fact a valid bequest under Islamic law.

There is an Islamic maxim which states that the basis to be considered in forming a contract is the meanings, and not words and forms.[41] It means that in a contract of sale for example, parties to the contract are allowed to pronounce words which do not indicate a sale. He may use the word such as *hibah* in the offer and acceptance as long as the nature of the contract is exchange. The contract is valid because both parties indicate their consent to the contract, which constitutes the cause of obligation of all contracts in Islamic law.[42] Here, even though it is a nomination form and the nominee appointed is merely a trustee according to the 1972 *fatwa*, the wording 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 wording of the nomination clause.

---

40 [2001] JH June 235.

41 See Azzam, `Abd `Aziz Muhammad, *al-Qaw`id al-Fiqhiyyah* (Kaherah: Dar al-Hadith, 2005), p 370 and Mansuri, Tahir Muhammad, *Islamic Law of Contracts and Business Transactions* (New Delhi: Adam Publishers & Distributors, 2006), pp 26–27.

42 Nawawi, Razali, *Islamic Law on Commercial Transactions* (Kuala Lumpur: CT Publications, 1999), p 49.

Conclusion

Nomination is clearly different from a *hibah* under Islamic law. A *hibah* takes effect immediately whereas the nomination is intended to have a legal effect upon death. Arguably, the concept of nomination is originally typical of *wasiyyah*. It is clear that by looking at the clauses of the nomination as appeared in the above cases, there are similarities between nomination and *wasiyyah*. Both instruments deal with the transfer of property ownership and are intended to be effective upon death. However, problems might arise because under *wasiyyah*, it cannot be made in favour of legal heirs, who are commonly appointed as nominees, and the limit is up to one-third of the whole property.

Therefore, in order to fulfil the purpose of nomination, which is to smooth the process of distributing the money after the death of the member, the institution that regulates the nomination should introduce a clear provision which explains clearly the purpose and duties of the nominee. The wordings of the nomination clause must be different from a *wasiyyah* or a *hibah* under Islamic law. The implication of the 1973 *fatwa* should not be applied generally to all cases related to the function of a nominee. The nomination clause should be examined in depth in order to determine whether a nominee is a trustee or beneficiary.