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## BEST INTEREST OF CHILDREN IN THE DIVISION OF FAMILY BUSINESS AS MATRIMONIAL PROPERTY: THE CIVIL AND SHARIAH COURTS' PERSPECTIVES IN MALAYSIA

by

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### Abstract

*A family business is an interesting business structure as it connotes a structure in which the interests in ownership, management and business overlap upon one another. There is also a confinement of ownerships on family members to ensure business legacy of the family name. This confinement would be prejudiced in the case of divorce as the family structure shall be affected or broken by separation of the parent. In many cases, interest in the business shall be divided between the spouses according to their interest or contribution to the business. The case law shows that, the issue of the best interest of the child is seldom applied in determination and division of interest/shares in business as a matrimonial property; albeit the family business structure was initially meant for the children and for the continuation of the family name.*

*This issue might be resolved if the courts take into consideration the element of participation in business rather than the quantum of interest in the business in*

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determining and dividing the matrimonial property. The participation right ensures the continuity of the family ownership in the business despite the fact that a divorce has taken place between the parents; such right could be delegated or transferred by the divorced parties to the children in due course or in the future. This approach would ensure that the continuity of the business achieved the initial/main purpose of its establishment and would bestow long term benefits to the children.

The main objective of this paper is to highlight that 'the doctrine of favor filli' (best interest of the child) should be applied by the court in cases involving family business as a matrimonial property. This paper has two parts; the first part focuses on the definition and structure of family business with special reference to a survey made on Malaysian family businesses and the second part looks into the definition and division of matrimonial property in Malaysia with special reference to the approach of the court to ensure best interest of the children in the case of a matrimonial home. The research methodology which is adopted in this paper is by statutory and case law analysis.

## INTRODUCTION

The structure of a family business is unique compared to a non-family business as it combines three elements together under the name of the business. The family relationships, composition of owners and management structure, which intermingle with one another often, give rise to governance issues.

There are many writings, which describe and define family business. According to Chrisman, Chua and Sharma, there are 21 different definitions of family business in their review of 250 research articles.<sup>3</sup> Generally, it refers to a business structure in which the ownerships, the management and the decision making power are retained and intended to be for family members. The restrictions are structured as such from the beginning to establish a business legacy of the family name.

## THE MODEL

One of the models used in the study of family business is the system theory model.<sup>4</sup> According to this theory, the family firm is modeled as three overlapping and interdependent subsystems comprising of:

- 3 Chrisman, James J, Chua, Jess H and Sharma, P, (1996), *A Review and Annotated Bibliography of Family Business Studies*, Kluwer Academic Publishers: Boston. See also Ernesto J Poza, (2007), *Family Business*, SouthWestern: United States.
- 4 Ernesto J Poza, (2007), *Family Business*, SouthWestern: United States at p 6.

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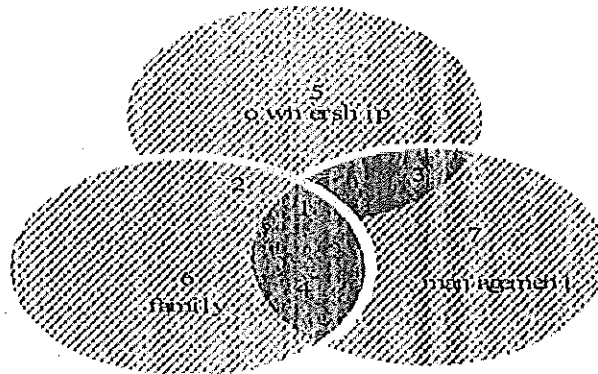
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- (1) family;
- (2) management; and
- (3) ownership.

Each subsystem maintains boundaries that separate it from the other subsystems and the general external environment in which the family business operates.<sup>5</sup>

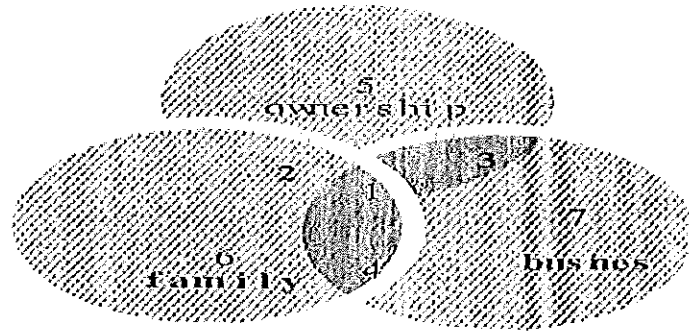
#### The system theory model of family business<sup>6</sup>



Another model which is used to explain elements of family business is the three-circle model.

#### The three-circle model<sup>7</sup>

- 5 Ernesto J Poza, *Family Business* at p 6. See also Alderfer, C, *Change Processes in Organizations* in Dunnette, MD (ed), (1976), *Handbook of Industrial and Organizational Psychology*, Rand McNally: Chicago.
- 6 Sources adapted from Gersick, K, Lansberg, I, Davis, J and McCollum, M, (1997), *Generation to Generation: Life Cycles of the Family Business*, Boston: Harvard Business School Press; Churchill, N and Hatten, K, (1987), *Non-Market Based Transfer of Wealth and Power: A Research Framework for Family Businesses* 11(3) *American Journal of Small Business* 51–64 and Ernesto J Poza, *Family Business* at p 7.
- 7 Sources adapted from Renato Taguiri and John Davis, (1997), *Bivalent Attributes of the Family Firm*; Peter Leach, (2007), *Family Business: The Essentials*, Profile Books: London at p 42.



The family component refers to a group of two or more persons related by blood (biology) and/or by a legal relationship (marriage, adoption and in some states common law marriage).<sup>8</sup> The purpose of a family is oriented toward people and relationships. As a result, family members may tend to approach relationships with one another in the same manner as they do in their family, rather than they would with a business colleague who is not from the same family.

The second component refers to business. A business is an economic unit, a commercial enterprise that produces, distributes and/or exchanges goods and services with customers.<sup>9</sup> The purpose of a business is to accomplish specific tasks as efficiently as possible and to realise a reasonable profit from the accomplishment of those tasks. People in business tend to relate to one another in a hierarchical manner based on defined roles (eg job descriptions) that are designed to further the business.<sup>10</sup>

The third component is ownership. An owner is someone who has a legal claim to the assets of the business and who may risk his or her own personal assets in hopes of realising a profit.<sup>11</sup> The purpose of ownership of a business is generally to realise a return on investment and to minimise the risk involved in the investment. In many cases, ownership in a family business may remain in

8 *The Unique Character of Family Business* retrieved from <http://www.cfs.purdue.edu/csr/ifb/family/character/html>.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*



the hands of one family member, or within a small group of family members. In a family business structure, these three components will be overlapping and creates three types of domain.<sup>12</sup>

In a single domain, it may involve:<sup>13</sup>

- (1) family only: this refers to family members who do not work in the business or have ownership;
- (2) business only: this refers to non-family employee; and
- (3) ownership only: this refers to outside shareholders.

In the double domain area, the combination could be:<sup>14</sup>

- (1) family and business — this commonly refers to employed family members, not owners;
- (2) family and owner — this commonly refers to family shareholders who do not work in the business; and
- (3) business and owner — this commonly refers to employee shareholders.

In the three domain area, all three components are overlapping, ie family, business and owner. This commonly refers to family members who work in the business and own the business. These family members probably have the clearest view on how profits should be divided between salaries, retained earnings and shareholder dividends.<sup>15</sup>

### MALAYSIAN FAMILY BUSINESSES

The report of a national survey covering 225 companies conducted by Grant Thornton and the Malaysian Institute of Management in 2002,<sup>16</sup> stated that the majority of family businesses in Malaysia are small scale enterprises and generally managed by the founder. Manufacturing, retailing or constructions are the notable sectors in which family business venture into most.<sup>17</sup> It is also found that most of the family businesses were initiated by people having six years or more work experience. This indicates that in Malaysia, people with appropriate experience commence family businesses.

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12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Malaysia's Family Business*, (2002), The Family & the Business International Survey Report published by Shamsir Jasani Grant Thornton and Malaysian Institute of Management.

17 *Ibid.*

The report also underlines the characteristics of family businesses in Malaysia, which can be summarised as follows:

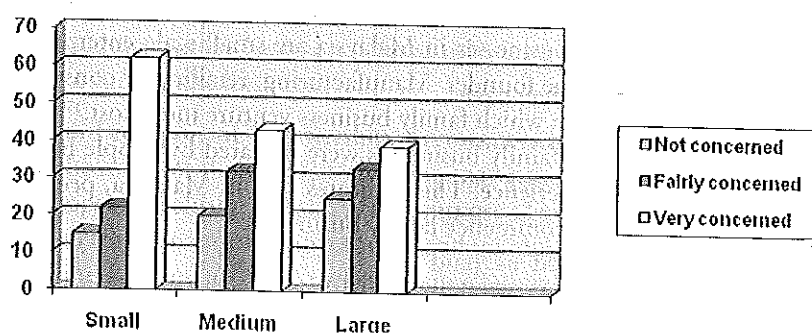
- (1) 59% of the business is still run by the founder and 30% are run by the second generation, the majority of whom are the children of the founder;
- (2) 65% of small scale enterprises are managed by the founders;
- (3) 55% of family businesses in small scale enterprises employ less than 51 people;
- (4) 35% of family businesses in the medium scale enterprises employ between 51–250 people;
- (5) 10% of family businesses from large scale enterprises employ more than 250 people; and
- (6) the main activity of family business lies in manufacturing (35%), followed by retailing (12.9%) and construction (10%).

### THE CONCERNS IN FAMILY BUSINESS

The report of the survey highlighted two main concerns in a family business structure:

- (1) means to finance the business; and
- (2) involvement / participation of family members.

Chart 1: Concerns over losing control if outsiders were to be involved in financing the business



The above chart shows that it is in small scale business that members are most concerned about losing control if they obtain external finance. For the

large scale businesses, the concern on external participation is not much on the financing aspect but rather on the possibility of change in the management system.<sup>18</sup> 52% of the respondents from e large scale businesses expressed their concern on the possibility of changes in the way the business is run if outsiders came into the picture.<sup>19</sup>

### FAMILY RELATIONSHIP

As regards to family involvement, the survey's report provided that 48% of large scale enterprises seem to be less concerned about bringing family members into the business as compared to the small scale (31%) and the medium scale enterprises (29%).<sup>20</sup> Nevertheless, majority of the respondents, regardless of the sizes of the business, strongly agree to that:<sup>21</sup>

- (1) children should be introduced to the business at an early age;
- (2) the children's education should be geared towards the business needs;
- (3) there can only be one management successor;
- (4) criteria should be set up to decide on how family members may join and leave the business;
- (5) the business is stronger when family members are involved;
- (6) parents should retire when their children are ready to take over the business;
- (7) founder and subsequent generations should always have a formal role in the business;
- (8) family and business affairs should be kept separate; and
- (9) professional advisers should understand the unique issues facing family businesses.

For the children's participation, the report highlighted that:<sup>22</sup>

- (1) 21% of the respondents wanted their children to be involved in the business; and
- (2) of the 24% of children involved in the family run business:
  - (a) 46.5% are the first child;

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18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*



- (b) 28.2% are the second child;
- (c) 3.7% are the third child; and
- (d) 11.4% are the fourth child.

The survey also seeks responses on outsiders' participation in the family business. It was found that only 39% of the respondents from the large scale business were concerned about outsiders coming into the business and taking control of the business whilst in medium scale businesses, 43% of the respondents expressed their concern about external participation in the family business.<sup>23</sup> On top of that, 44% of the respondents in medium scale businesses expressed their concern over losing control if outsiders were allowed to be involved in the family business.<sup>24</sup>

### OBSERVATION

It is evident from the writings and survey that one of the factors which are vital in sustaining a family business is participation and succession of the business by the children. There would be a repercussion to the family business when there is a divorce between the parents because the separation may directly affect the succession planning of the business if the children are not properly tied up to the business. The initial idea of setting up the family business so that it could be passed on and inherited by the next and continuing generation shall be affected by the divorce as the parties' interest in the business are divided as matrimonial property in accordance to the law which generally does not look at the issue of succession of the business and the long term effect of the interest in business to the children.

Part B of this paper discusses the definition and principles governing the division of matrimonial properties in Malaysia. A special reference is made to the court's approaches to matrimonial home due to lack of precedent which explicitly dealt with the division of interest in family businesses as matrimonial property. The analogy that both family business and matrimonial home is meant for the benefit of the family despite the separation of the parents is used to highlight the approach of the court in upholding the principle for the best interest of the children in relation to the division of matrimonial property.

### INTRODUCTION

The statutes in Malaysia are silent as regards to the definition of matrimonial property. Even though the Married Women Act 1957 (Revised 1990) is the

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

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main statute, which deals with married women's property, no reference is made to the term matrimonial property. The Law Reform (Marriage and Divorce) Act 1976 ('LRA 1976') also leaves the term undefined and this failure has led to uncertainty in deciding on what should or should not be included in the division. However, generally matrimonial property has been referred to any property, which is acquired through marriage either by joint effort of the parties or by the sole effort of the party. It also includes property, which is owned before marriage provided that it has been substantially improved by the other party or by both parties during their marriage.<sup>25</sup> In the case of *Ching Seng Woah v Lim Shook Lin*,<sup>26</sup> Shankar J said that:

... the expressions refer to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.<sup>27</sup>

The above definition clearly indicates that matrimonial property should cover everything that is acquired during the marriage. The definition is wide enough so as to cover the earning power of the spouse even though the quantification of the amount may lead to another dispute. The above finding corresponds to the decision of Lord Denning in the case of *Wachtel v Wachtel*<sup>28</sup> where matrimonial assets should refer to those things, which are acquired by one or the other, or both of the parties. This must be coupled with the intention that it should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The judge in this case also divides the matrimonial assets into two parts; assets 'of a capital nature' such as the matrimonial home and its furniture and 'revenue producing nature' which includes the earning power of husband and wife. The finding of Lord Denning conforms with the decision of Lord Diplock in the case of *Pettitt v Pettitt*<sup>29</sup> where matrimonial property or family assets means 'property whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children'.<sup>30</sup> The above cases show that

25 Refer to s 76(5) of the LRA 1976.

26 [1997] 1 MLJ 109 (CA).

27 *Ibid* at p 122.

28 [1973] Fam 72 at p 90.

29 [1970] AC 777 (HL).

30 *Ibid* at p 819.

the English courts by using the word 'family assets', describe matrimonial property as property in which both spouses should have some interest either because of the way in which it was acquired or because of the manner in which it was used.<sup>31</sup>

For Muslims, the definition section of the Islamic family law acts and enactments does define the terms. For instance, the Islamic Family Law (Federal Territories) Act 1984 ('IFLA 1984') defines it as a 'property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by *hukum syara*'.<sup>32</sup> The judges in decided cases also provided the definition of *harta sepencarian* which basically refers to any property acquired during the marriage in which both parties contributed to its acquisition. In the old case of *Hujah Lijah binti Jamal v Fatimah binti Mad Diah*,<sup>33</sup> Briggs J defined *harta sepencarian* as 'property acquired during the subsistence of their marriage by a husband and wife out of their resources or by their joint efforts. The acquisition referred to may be extended to cover enhancement of value by reason of cultivation or development'.<sup>34</sup> Pursuant to that, there was no reason for the wife, being a lawful widow, not to get one-half of the property bought originally from her savings which accumulated from a piece of land inherited from her parents, even though it was registered in the name of her deceased husband.

It is clear that *harta sepencarian* basically refers to any property which is acquired during a marriage, either by the joint effort or the sole effort of the parties as long as there is a contribution either directly or indirectly by the party who does not acquire the property. It is based upon the 'recognition of the part played by a divorced spouse in the acquisition of the relevant property and improvement done to it). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property acquired (during covertures). As long as the claimant has assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption'.<sup>35</sup>

### THE LAW ON MATRIMONIAL PROPERTY IN MALAYSIA

In Malaysia, the law that governs the division of matrimonial property is the LRA 1976. As its long title provides, it is an Act that provides for monogamous

31 See the *English Law Commission (Family Property Law)*, the Law Commission published Working Paper, No 42, para 0.24 at p 15.

32 Refer to s 2 of the IFLA 1984.

33 [1950] 1 MLJ 63.

34 *Ibid* at p 63.

35 *Ibid*.

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mariages and the solemnisation and registration of such marriages and to amend and consolidate the law relating to divorce and to provide for matters incidental thereto; the division of matrimonial property is specifically dealt with in s 76 of the Act. The Act which generally applies not only to all persons in Malaysia but also to those residing outside Malaysia whose domicile is in Malaysia<sup>36</sup> was enforced throughout Malaysia since the date of the enforcement of the LRA 1976 ie 1 March 1982.<sup>37</sup>

For Muslims, the application for the division of *harta sepencarian* is made to the Shariah Court under the respective state's Islamic family law acts or enactment. For the purpose of this paper, reference is made only to the law as codified in the IFLA 1984 which is the model followed by many other states in Malaysia.

#### LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

Section 76 of the Act reads as follows:

- (1) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties any proceeds of sale.
- (2) In exercising the power conferred by sub-section (1) the court shall have regard to —
  - (a) the extent of contributions made by each party in money, property or work towards the acquiring the assets;
  - (b) any debts owing by either party which were contracted for their joint benefit; and
  - (c) the needs of the minor children (if any) of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

- (3) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by the sole efforts of one part to the marriage or the sale of any such assets and the division between the parties any proceeds of sale.
- (4) In exercising the power conferred by sub-section (1) the court shall have regard to —

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36 See s 3 of the LRA 1976.

37 See PU (B) 73/1982.

- (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
- (b) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the courts think reasonable; but in any case the party by whose effort the assets were acquired will get a greater proportion.

- (5) For the purposes of this section, references to assets acquired during marriage include assets owned before the marriage by one party, which have been substantially improved during the marriage by the other party or by their joint efforts.

Referring to the above provision, it is clear that s 76 of the LRA 1976 deals with the power of the court, upon granting a decree of divorce or judicial separation to order the division of matrimonial assets acquired during a marriage. It requires the court to differentiate between those assets acquired by joint efforts from those acquired by sole effort. In the case of assets acquired by joint effort, the court is directed to incline towards equality of division while in the case of assets acquired by sole effort; the court is directed to ensure that the 'acquirer' shall get a greater proportion. However, in dividing such property, there are certain factors that the court has to take into consideration. For the joint effort property, the factors include the extent of the contribution made by each party in money, property or work towards the acquiring of assets.<sup>38</sup> Besides, any debts owed by either party which were contracted for their joint benefit will also be considered without undermining the needs of the minor children, if any, of the marriage.<sup>39</sup>

Similarly, for assets acquired by the sole effort of one party to the marriage, the court also has to look at several factors, namely the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family.<sup>40</sup> If there are minor children from the marriage, their needs shall be taken into account too, as provided for in s 76(4)(b) of the LRA 1976.

Section 76(5) of the LRA 1976 further elaborates that for the purpose of this section, assets acquired during a marriage includes assets owned before the marriage by one party as well. Nevertheless, it is subject to the condition that the claimed property must be substantially improved during the marriage by the other party or by their joint effort.

<sup>38</sup> Section 76(2)(a) of the LRA 1976.

<sup>39</sup> Section 76(2)(b) and (c) of the LRA 1976.

<sup>40</sup> Section 76(4)(a) of the LRA 1976.

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For the Muslim parties, the IFLA 1984 actually provides an identical provision to LRA 1976 except for the words 'matrimonial property' being substituted by *harta sepencarian* while 'divorce and judicial separation' are replaced with the words *talaq* and when making the order of divorce.<sup>41</sup>

### THE BEST INTEREST OF CHILDREN

Referring to the provision governing the division of matrimonial property as provided for in the LRA 1976 and the IFLA 1984, it is noted that needs of the minor children is one of the factors that the court has to consider in dividing the property regardless whether the property is a joint effort or sole effort property.<sup>42</sup> The reason is mainly because besides the parties themselves, the children are directly affected by the divorce and may suffer considerable emotional trauma when their parents break up.<sup>43</sup> To minimise the effect of divorce on children, the law emphasises that the children's rights or interests should be protected or at least their needs are adequately considered in dividing the property. In pursuant to this, it is evidently noted that the court has been very cautious in dealing with the division of matrimonial property especially in relation to the matrimonial home.<sup>44</sup> Normally, the parent who is awarded custody of the children is allowed to keep the matrimonial home so that the children can continue to live in the house with minimal disruption to their daily routine after the divorce.<sup>45</sup>

### ORDERS RELATING TO MATRIMONIAL HOME

There were a few orders made by the courts in relation to the matrimonial home including the order to postpone the sale until some specified time in the future, such as until the a child attains the age of majority, to transfer the matrimonial home to one spouse absolutely and to order the matrimonial home to be sold and to divide the proceeds of the sale between them. The order to postpone the sale was fundamentally to solve the immediate problem of accommodation for the wife and children without affecting both spouses'

41 Refer to s 58 of the IFLA 1984.

42 Section 76(2)(c) and (4)(b) of the LRA 1976 and s 58(2)(c) and (4)(b) of the IFLA 1984.

43 See Stanley, K, (1993), *Family Law*, MacMillan Press Ltd: London at p 172.

44 The term 'matrimonial home' generally refers to a dwelling house or other accommodation, which is occupied by spouses jointly as their home, as defined by Miller, JG, (1983), *Family Property and Financial Provision*, (2nd Ed), Sweet & Maxwell: London at p 59.

45 Leong Wai Kum, (1997), *Principles of Family Law in Singapore*, Butterworths Asia: Singapore at p 948.

interest in the matrimonial home.<sup>46</sup> With the intention to give a protection to a child at least until they complete their full time education, the order to sell the house is postponed until child reaches the age of majority with the presumption that after the age of majority, the child will be more self reliant.

This is best illustrated in the case of *Lim Tiang Hock Vincent v Lee Siew Kin Virginia*.<sup>47</sup> The Court of Appeal, in considering the needs of the two children who were under the custody of the mother, affirmed the decision made by the learned judge that the matrimonial home was not to be sold until the youngest daughter; Charlene Lim Yu-Shan attained the age of majority. The father's application to sell the house was therefore rejected. By such order, it means that the respondent and the children would have exclusive possession and enjoyment of the matrimonial home until the year 2003.

By referring to the English case of *Chamberlain v Chamberlain*,<sup>48</sup> the court in the case of *B Ravandran s/o Balan v Maliga d/o Mani Pilla*<sup>49</sup> also decided that the sale of the matrimonial home be postponed until the four children who were in the custody of their mother attain the age of majority where the proceeds will be divided equally thereafter. Similarly, without denying the fact that both parties are entitled to the share of the house, the court in the case of *Yeoh Kum Chin v Tan Gook Eng*<sup>50</sup> decided that the order of sale be postponed until the child reaches the age of 18 years (the child was then 14 years old). The court emphasised that:

To order a sale would in effect amount to ordering a change of environment for the child where so far, the close proximity of the house to the school has contributed positively to her being able to cope with her parents being away all day at work without getting into unhealthy activities. Having given this aspect much anxious consideration, I find that since the house plays an integral role for the child, I would refuse an order for disposal of the house until the child shall have reached the age of 18 years, at which time, the parties may dispose of the house and share the proceeds after outgoings on an equal basis.<sup>51</sup>

The above quotation evidently shows how the court is very concerned about the interest of the children which might be affected if they were to find another house to live in.

46 See Lowe, NV and Douglas, G, (1998), *Bromley's Family Law*, (9th Ed), Butterworths London at p 847.

47 [1991] 1 MLJ 274 (CA).

48 [1974] 1 ALL ER 33 (CA), where the court ordered the matrimonial home to be retained until the three children of the marriage who were living there with their mother had completed their full time education.

49 [1996] 2 MLJ 150 (HC).

50 [1996] 2 LNS 173 (HC).

51 *Ibid* at p 71.

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The needs of the children have been equally emphasised by the court in ordering the matrimonial home to be transferred to one spouse absolutely. In *Tham Khai Meng v Nam Wen Jet Bernadette*,<sup>52</sup> the judge of the Court of Appeal, LP Thean JA, stated as follows:

... the needs of children are also an important consideration. The children are still young, aged 10 and 8 only. Although the wife and the children are living with the wife's parents, they will eventually need a home of their own, a roof over their heads. We therefore should consider retaining (the property). Its location is ideal. Not only it is an independent house for the wife and the children to live in but also it has the benefit of adjoining the house of the wife's parents. The children will continue to require the support and care of the grandparents, while their mother has to go out to work to support herself. We are firmly of the view that the house should not be sold but transferred to the wife so that she and the children would have a roof over their heads ...<sup>53</sup>

Thus, the court in the above case decided not to order the matrimonial home to be sold but to be transferred to the wife absolutely upon her payment of certain amount of money as a consideration of such transfer.

In the earlier case of *Tan Poh Soon v Phua Sin Yin*,<sup>54</sup> the court has also demonstrated its deepest concern for preserving the interest of the retarded son who needed a house to stay in. Even though the court did not specifically mentioned about considering the child's needs, yet it is an undeniable fact that his needs must have played an important role in the judgment of the court in ordering the husband to transfer his declared half interest on the matrimonial home to the plaintiff subject to the plaintiff's payment of certain amount of money.<sup>55</sup> Similarly, in *Shirley Koo v Kenneth Mok Kong Chua*,<sup>56</sup> the court decided that the wife should get the matrimonial home so that she and her children could have a roof over their heads, which would afford them permanent security. In return, the court ordered the wife to forego all her claims on the other assets.

Thus, it is found that the parent who is awarded custody of the children will generally be allowed to keep the matrimonial home so that the children can continue to live there with minimal disruption to their daily routine after the

52 [1977] 2 SLR 27 (CA).

53 *Ibid* at p 38.

54 [1995] 3 SLR 368 (HC).

55 See also the case of *Ong Chin Ngoh v Lam Chin Kian* [1992] 2 SLR 414 (HC); *Fan Po Kie v Tan Boon Son* [1982] 2 MLJ 137 (HC) and the case of *Chia Gek Yong v Chng Hiang Keow & Yeow Hwee Ming (co-respondent)* [1987] 1 MLJ 93 (HC).

56 [1989] 2 MLJ 264 (HC).



divorce.<sup>57</sup> In other words, this factor tends to leave the majority property, viz the matrimonial home, with the wife, who should continue to care for the children.<sup>58</sup> In the case of *Choy Yoke Ying v Yong Yook Seng & Anor*,<sup>59</sup> the respondent was ordered to transfer his (half) share in the matrimonial home known as No 14, Jalan Setiarasa, Bukit Damansara, Kuala Lumpur to the petitioner absolutely for the benefit of the petitioner and their two children.

It is also important to note that the needs of minor children affected by divorce actually cover both present and future needs. The award of the matrimonial home extends to children who have been staying in the grandparents' house since birth until the divorce is granted. In such a case, it is foreseeable that the children would eventually need a home of their own. This is what actually happened in the case of *Tham Khai Meng v Nam Wen Bernadette*,<sup>60</sup> where the court ordered the wife to retain the property at No 14, Brightney Crescent, Singapore despite the fact that all this while, the children together with their parents have been staying with the wife's parents. However, in consideration of such transfer, the wife should pay to the husband a lump sum of \$1m as his share and to take over the entire liability to the OCB Finance Singapore Ltd. The wife thus obtained 80% of the value of the matrimonial property. By this, it shows that the Court of Appeal has demonstrated its deepest concern for preserving the living environment of the children not only at that particular time but also for their future needs.<sup>61</sup>

In other circumstances, the needs of minor children have also become a major concern of the court even though the matrimonial home has to be sold and divided. The court will only order the matrimonial home to be sold and divided in case both the husband and wife are still young and there are no children from the marriage or, in a situation where the child is already a minor.<sup>62</sup> This is best illustrated in the case of *Lim Bee Cheng v Christopher Lim Joo Peng*<sup>63</sup> where the marriage only lasted for three years with one child who has already reached the age of majority. Thus the court decided that the matrimonial home had to be sold and the proceeds were to be divided

57 Leong Wai Kum, *Principles of Family Law* at p 948.

58 Leong Wai Kum, *Law in Singapore on Division of Matrimonial Assets*, paper presented in a seminar on ancillary relief upon divorce, organised by the Malaysian Bar Council, 1 November 1998 at p 9. Please refer also to the case of *Chan Choy Ling v Chua Che Te* [1995] 3 SLR 667 (CA) where the wife who got a custody of their three children was awarded the matrimonial home so that she and the children have a house to stay in, instead of disposing of the property for sale.

59 [2004] 8 CLJ 105.

60 [1977] 2 SLR 27 (CA).

61 Leong Wai Kum, *Principles of Family Law* at p 949.

62 Hayes, M and Williams, C, (1995), *Family Law, Principles, Policy and Practice* Butterworths: London at p 650.

63 [1997] 4 MLJ 35; [1996] 1 AMR 1096 (HC).

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### SHARIAH COURTS' PERSPECTIVE

For Muslims, despite the fact that the provision in the IFLA 1984 is in pari materia with the LRA 1976 which clearly states that the court in dividing the *harta sepencarian* will consider also the needs of the children from the marriage<sup>64</sup> in dividing the joint and the sole effort property, practically, the Shariah Court in most of the cases mainly emphasises on the contribution made by both parties in acquiring the property. It is found that other factors including the needs of the children are not considered by the court in dividing the property.<sup>65</sup> Suwaid Tapah in his research pointed out that even though there are cases where the needs of the children have been argued to be considered by the court in dividing *harta sepencarian*, the court refused to entertain it.<sup>66</sup> This is best illustrated in the case of *Sidek bin Haji Awang v Halimah binti Musa*.<sup>67</sup> In this case, the respondent highlighted the needs of the children in dividing the *harta sepencarian*. However, the court decided that the needs of the children were not relevant by emphasising that generally, under no circumstances can the father be excused from maintaining his children. It was always on the appellant, as a father, who was responsible to give maintenance to the children. In addition, the father's property will be an estate for the children should he predecease them.

The Quran and hadith of Prophet Muhammad (SAW) frequently mentioned about the duty of the father towards his children in a number of verses. For example, the Quran states to the effect:

... But he shall bear the cost of their food and clothing on equitable terms ...<sup>68</sup>

Similarly, in Surah *at-Talaq*, it is mentions to the effect:

Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him ...<sup>69</sup>

In the hadith narrated by Aishah, once Hindun bin Utbah, said to the Prophet:

64. See s 58(2)(c) and (4)(b) of the IFLA 1984.

65. See the case of *Ramli bin Che Mat v Norina bt Muhammad* (2007) 21 Bhg II JH 243, *Mohamed Ainuddin bin Mohamed Nasurdin v Rohani binti Ismail* (2006) 21 Bhg I JH 54 and *Maimon binti Mohamad Zain v Mohammed Azmi bin Mohd Said* (2006) 21 Bhg I JH 34.

66. Suwaid Tapah, *Konsep dan Amalan Pembahagian Harta Orang-Orang Islam di Malaysia*, PhD Thesis, Universiti Malaya, (1996, unpublished) at p 340.

67. (1998) 12 Bhg II JH 241.

68. Surah *at-Baqarah* (2):233.

69. Surah *at-Talaq* (65):7. Refer also to Surah *at-Talaq* (65):1, 6.

O Messenger of Allah, Abu Sufyan is a miserly person. He does not provide for me and my son except whatever I take away myself secretly about which he does not know. The Prophet advised: 'Take whatever is sufficient for you and your son in a reasonable way.'<sup>70</sup>

From the above authorities, it is very obvious that in Islam, the father is bound to provide maintenance for his children.<sup>71</sup> Relying on this basic principle, the court seems reluctant to consider the needs of the children in dividing the *harta sepencarian*. Furthermore, other possible reasons are mainly due to the fact that the needs of the children have not been raised by counsel simply because the needs of minor children was not an issue in that particular case. In addition, another important point which led to the situation is the practice of *sulh* (mediation) which has been always encouraged in the Syariah Court. Since through the practice, the parties agreed to settle their cases by way of consensus agreement and amicable settlement between them and the fact that the *sulh* session is confidential in nature, consequently there are no reported cases as there is no argument in respect of the relevant provisions.

#### INTEREST IN BUSINESS AS A MATRIMONIAL PROPERTY

In the English case of *Wachtel v Wachtel*, Lord Denning MR held that the phrase 'family assets' is a convenient short way of expressing an important concept of matrimonial property. It refers to those things which are acquired by one or the other, or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The judge divides the matrimonial assets into two parts; assets 'of a capital nature' such as the matrimonial home and its furniture and 'revenue producing nature' which include the earning power of husband and wife.

If the definition in the *Wachtel* case is used as the judicial guideline of what is matrimonial property, then, there is no reason to exempt a divorced couple to claim their interest in the family business. As long as it can be proved that the business was established/acquired before or during their marriage with the intention that it was for continuing provision for them and their children.

70 Al-Bukhari, *Sahih al-Bukhari* (tr), Muhammad Muhsin Khan, Chapter *al-Nafaqah*, Volume VII, (6th ed), Kazi Publication, Lahore, 1993 at p 212.

71 The duty of the father to provide maintenance continues except in certain situations such as where the father is dead or his whereabouts are unknown or in a case where he is unable to maintain them, where in such cases, the duty will be transferred to a person liable under the *hukum syara'*. Please refer to s 72(2) of the IFLA 1984.

72 Based on the discussion held on 2008 with Tuan Dr Haji Naim bin Mokhtar, former Syariah Court judge, Petaling Jaya, Selangor, Malaysia.

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during their joint lives, and used for the benefit of the family as a whole, divorced parties should be entitled to claim some proportion of the business.

The principle which the court applied in the division of interest in business as matrimonial property is the 'participation/contribution test'. The case law highlighted that if the parties did not contribute to the business, direct or indirect or was never involved in the management of the business, direct or indirect, he/she would not be entitled to the business as part of the matrimonial property. Some degree of participation is required to indicate interest of the parties in the business.

In *Sivanes all Rajaratnam v Usha Rani alp Subramaniam*,<sup>73</sup> the Court of Appeal upheld the decision of the High Court that upon the divorce, the wife was entitled to a share of the clinic as matrimonial property because the court found that the wife had contributed to the setting up of the clinic by among others:

- (1) standing as guarantor for banking facilities;
- (2) selling the family car to tide over the difficult period; and
- (3) utilising joint savings in the opening of the clinic.

In *Koay Cheng Eng v Linda Herawati Santoso*,<sup>74</sup> the petitioner contended that the respondent was not entitled to any maintenance payments as she is a professionally qualified architect, licensed to practice in the UK and, hence, capable of earning a living in the UK, free from the responsibility of raising any children. The petitioner declared his monthly income at RM10,000. The respondent disputed this and submitted that the petitioner had failed to make a full and frank disclosure of his income. The petitioner also contended that the respondent is ineligible to a share of the matrimonial assets because she did not contribute towards the purchases of the properties. The respondent, on the other hand, submitted that she was entitled, under s 76(1) and (2) of the LRA 1976, to half of all the matrimonial assets, including the properties and motor vehicles owned by the petitioner, a share in the petitioner's ear, nose and throat ('ENT') clinic, and an equal share in the petitioner's provident fund contributed during the subsistence of the marriage.

The court held that the petitioner's contention that the respondent should not be paid any maintenance was unsustainable. The parties had been married for 17 years and the respondent had hoped for the marriage to survive. The respondent had sacrificed a career as an architect to follow the petitioner in his

73 [2002] 3 MLJ 273 (CA).

74 [2004] 6 MLJ 395; [2005] 1 CLJ 247 (HC).

various postings before they moved to Malaysia 11 years ago. It would be a grave injustice to not order maintenance in favour of the respondent.

The court also held that properties acquired by the parties in Malaysia were paid for mostly with the moneys repatriated from the UK. Some of the properties were subsequently disposed of and the proceeds were used to purchase other properties. The respondent was able to show a direct contribution in relation to the purchase of the properties in the UK. Consequently, she would be entitled to an equal share in the properties purchased in Malaysia. However, from the evidence, it was found that the respondent was never involved in the setting up or management of the petitioner's clinic and as such, she was unable to prove her claim of having contributed to the clinic.

Another interesting case law to highlight the approach of the court in deciding on the interest in business as part of the matrimonial property (for Muslims) is *Boto' binti Tabā v Jaafar bin Mubamed*.<sup>75</sup> In this case, the parties were married in 1966. At the time of the marriage, the plaintiff-wife worked as a coffee shop assistant and the defendant-husband carried on a fishmongery business in Dungun. The business of the defendant prospered and during the marriage, he bought the matrimonial home, a piece of land, four fishing boats, fishing nets and a fish stall. The marriage ended in a divorce in 1974 and on divorce, the defendant only paid the plaintiff her maintenance for the period of *iddah*. The plaintiff applied to the High Court for a declaration that she was entitled as *harta sepencarian* (matrimonial property) to one-half share in all the properties acquired during her marriage to the defendant and to one-half of the income derived from the properties since their divorce.

The court held that *harta sepencarian* is based on customs practiced by the Malays and rests upon the legal recognition of the part played by a divorced spouse in the acquisition of the relevant property and in improvements done to it, in cases where it was acquired by the sole effort of one spouse only. It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property. The fact that the plaintiff accompanied the defendant in his business trips and gave up employment because of the marriage, must amount to her joint efforts in the acquisition of those properties. Interestingly, the court further held in this case that even though the plaintiff did not take direct part in the defendant's fish business, her constant companionship was responsible for the defendant's peace of mind which enabled him to function effectively as a businessman. The evidence shows that she was helping the plaintiff's business.

75 [1985] 2 MLJ 98 (HC).

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indirectly as a partner in his business trips. As such, the properties which are the subject of the present suit are *harta sepencarian*.

From the case law, it is evident that interest in business as matrimonial property is subject to the court's discretion on whether there was sufficient contribution made by the spouses to the business. The division is always made according to the value of the shares rather than shareholding or rights of ownership/participating rights in the business. The right of participation in business and ownership are more extensive and long lasting compared to the monetary compensation of the value of the interest in the business as it involves the management's right and most importantly, the decision making power.

In the high profile divorce case of Datuk Seri Mohd Effendi Norwawi and Zariah Hashim @ Farida Effendi, instead of valuing the wife's interest in the business, the divorce settlements settled with the transfer of the ex-husband's shares in Encorp Utility Sdn Bhd to the ex-wife<sup>76</sup> and Madam Zariah retained the position as the non-independent executive director in the company.<sup>77</sup> This means that Madam Zariah obtained ownership and participation rights in the business. The effect of this settlement gives a more pertinent and long-term benefit to the ex-wife.

Applying this approach in a family business, it is observed that in dividing interest in a family business, it is more important for the court to look into the possibility of transferring the right of ownership/shareholding to the divorced parties as such interest could be transferred to or inherited by the children. The value of interest could still be justified/determined by using the contribution test and/or the sole and joint effort test but once the interest had been determined, it should not be quantified in monetary value but rather retained in its shareholding form so that the rights of ownership and participation in business could be transferred by the parents to the children when the time comes. The divorced parents could also benefit from their interest in the business and enjoy the benefits accrued from it before transferring the interest to the children, for example in the form of dividend and perks. If the interest in a family business is divided in accordance to its monetary value, for example, if the ex-wife got her proportion (in thousands), she will only get that amount of money once, and her ex-husband who continued the business on his own shall get more and long term benefits from the business. Not only will the ex-wife succumb to short term and limited benefits from such division of matrimonial

76 M Mageswari, 'Effendi case settled', *The Star*, 19 October 2006 retrieved from <http://www.thestar.com.my/news/story.asp?file=/2006/10/19/courts/15767577&sec=courts>.

77 See <http://www.igdexchange.com/bod.asp> at 5 Jan 2007.

property, the children who are under her custody would also not be able to enjoy the long term benefits which are due to them as planned by the earlier generation who set up the business for their grandchildren. The negative impact is not only on the ex-wife but more to the children who supposedly benefitted from the business if the divorce did not occur. The family business structure may also collapse as the succession plan is disrupted due to the breakup of the family continuation.

To ensure the continuation of the ownership, the court may also consider a similar approach which they applied against matrimonial home, i.e. giving supplementary orders to restrict parents from selling or affecting the interest in the business until their children are ready or capable to inherit them. The proposed orders would be able to preserve the initial idea of setting up the family business and to ensure that the succession planning is retained by the children despite a divorce between the parents.

## CONCLUSION

In deciding the divorce settlement and matrimonial property cases, the court normally refers to the statutory and judicial guideline. This is indeed commendable as the main method to justify legal judgment. Nonetheless, the court perceived that there are other aspects which need to be highlighted in determining the composition of matrimonial property, in particular when it comes to an interest in business.

It is clear from the discussion that the interest and needs of the children are one of the prime factors which the courts look into when it comes to the rights in a matrimonial home. It is noted that that in almost all cases, the matrimonial home is awarded to the wife who has the custody of the children or to order the sale of the matrimonial home to be postponed until the child attains the age of majority. The purpose is fundamentally to protect the children as much as possible from the consequences of a divorce as well as a desire to protect and relieve the party (usually the wife) who is left with the financial, mental and physical burden of the divorce.<sup>78</sup>

Similar to the matrimonial home, a family business is established and meant to continue for the children/family's benefits. Despite the divorce, the interests of the children should be a prime consideration to represent continuing interest of the family and a long term benefit to the children. This scenario

<sup>78</sup> The same point has also been highlighted by Michael L Rakusen, Hunt, D Peter, Bridget Jane, (1989), *Distribution of Matrimonial Assets on Divorce*, (3rd Ed), Butterworths, London at p 68.

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would not be possible with the existing court approach, whereby the division of matrimonial property in the business is divided according to pecuniary valuation rather than ownership rights in the business. In short, when the divorced parties' interest in the family business are divided according to the quantum of their contribution to the business, the issue of succession planning shall depart from the initial idea of setting up the family business, ie for the business to be passed from the father/mother to the children. The divorced parties will be taking their portion accordingly without realising that the division shall break the ties between their children and the business.

As such, in dividing the interest of divorced parties in a family business, it is important to take into consideration the 'best interest of the children' as the future owner of the business. This factor may not only provide a long term benefit to the children but may also ensure sustainability of the family business despite divorces. It is proposed that the Malaysian courts could expand its approach in deciding on the interest in a family business as matrimonial property by taking into consideration the long term interest of the children and the sustainability of the family business and not merely confine the distribution by reference to the amount of shares or value of the divorced parties' interest (money worth) in the business.