

STREAMLINING THE NOMINATION POLICY IN ESTATE ADMINISTRATION FOR MUSLIMS IN MALAYSIA

Wan Noraini Mohd Salim*

Akmal Hidayah Halim**

Muhammad Amrullah Drs Nasrul***

ABSTRACT

Nomination is a process whereby a person names someone to receive the benefit from the nominated estate if the person dies. In Malaysia, the effect of nomination clauses differs from one institution to another institution depending on their governing laws. It is observed that some policies on nomination seem to be inconsistent with the *fatwas* that a nominee is only a trustee. Hence, this study aims to examine the effect of nomination on the nomination-based products. It is significant to clarify the status of the nominee in each nomination-based product whether the nominee receives the benefit of the policy as the beneficiary or as the trustee. This study also aims to identify issues relating to nomination such as the application of *hibah ruqba* in *takaful*. In this study, the qualitative research method was adopted by using library research through the legal analysis of primary data, which includes legislation and case law, as well as secondary data such as journal articles, textbooks, and official documents. Several statutes have been identified as the subject of analysis, including the Islamic Financial Services Act 2013, Financial Services Act 2013, and Employees Provident Fund Act 1991. This study finds that a single federal law governing nomination throughout Malaysia is not feasible due to the existence of various entities. Thus, this study recommends that the relevant statutory provisions be revised in order to streamline the nomination policy in its nomination-based products.

Keywords: Nomination, Administrator, Estate Administration, *Takaful*, Tabung Haji, Employees Provident Fund.

*Assistant Professor at Department of Islamic Law, International Islamic University Malaysia, 53100, Gombak Selangor. Email: w.noraini@iium.edu.my (Corresponding Author)

**Associate Professor at Department of Legal Practice, International Islamic University Malaysia, 53100, Gombak, Selangor. Email: akmalh@iium.edu.my

***Assistant Professor at Department of Civil Law, International Islamic University Malaysia, 53100, Gombak, Selangor. Email: amrullah@iium.edu.my

PENYELARASAN POLISI PENAMAAN DALAM PENTADBIRAN HARTA PUSAKA UNTUK ORANG ISLAM DI MALAYSIA

ABSTRAK

Penamaan ialah satu proses di mana seseorang menamakan seseorang yang lain untuk menerima manfaat daripada harta yang dinamakan sekiranya orang itu meninggal dunia. Di Malaysia, kesan klausa penamaan berbeza dari satu institusi ke institusi lain bergantung kepada undang-undang pentadbiran mereka. Pemerhatian menunjukkan bahawa beberapa dasar mengenai penamaan seolah-olah tidak konsisten dengan fatwa bahawa penama hanyalah sebagai pemegang amanah. Oleh itu, kajian ini bertujuan untuk mengkaji kesan penamaan pada produk yang berasaskan penamaan. Adalah penting untuk menjelaskan status penama dalam setiap produk yang berasaskan penamaan sama ada penama menerima manfaat polisi sebagai benefisiari atau sebagai pemegang amanah. Kajian ini juga bertujuan untuk mengenal pasti isu-isu berkaitan penamaan seperti penggunaan *hibah ruqba* dalam takaful. Dalam kajian ini, method kajian kualitatif telah digunapakai dengan menggunakan kajian perpustakaan melalui analisa perundangan terhadap data primer seperti undang-undang dan kes-kes mahkamah serta data sekunder termasuk buku, artikel dan dokumen rasmi. Beberapa statut telah dikenalpasti sebagai subjek kepada analisa seperti Akta Perkhidmatan Kewangan Islam 2013, Akta Perkhidmatan Kewangan 2013 dan Akta Kumpulan Wang Simpanan Pekerja 1991. Kajian ini mendapati bahawa sebuah undang-undang persekutuan yang mengawal perundangan berkenaan penamaan di seluruh Malaysia tidak dapat dilaksanakan disebabkan wujudnya beberapa entiti yang lain. Oleh itu, kajian ini mencadangkan beberapa cadangan melalui semakan semula peruntukan undang-undang yang berkaitan untuk menyelaraskan dasar penamaan dalam produk berasaskan penamaan masing-masing.

Kata Kunci: Penamaan, Pentadbir, Pentadbiran Harta Pusaka, Takaful, Tabung Haji, Kumpulan Wang Simpanan Pekerja.

INTRODUCTION

When a Muslim dies, the properties will go to the legal heirs with a specific portion based on the Islamic law of inheritance. However, this process is not easy as the property is kept in different institutions and is subject to various procedures that are time-consuming. Due to these difficulties, nomination policies have been adopted by some institutions. Nomination is a process where a testator appoints an individual or a body to be the nominee of a specific property and the nominee will administer the property of the person upon the death of the testator.¹ The main purpose of the nomination is to accelerate the process of claiming the deceased's estate. It should be noted that the effect of the nomination depends on the policy and the laws that are used in the specific institutions.

Nomination policies play a great role in the distribution of a deceased person's estate. In Malaysia, these policies are governed by contracts and statutory provisions. Due to a variety of sources, it is imperative for the implementation of a streamlined policy on the nomination, especially for Muslim policy owners, as they are subjected to divine laws from the *al-Qur`ān* and *ḥadīth*.

Issues on nomination among Muslims often arise after the demise of a person leaving money in specific funds such as the Employees Provident Fund, the Pilgrimage Fund, *takaful* products and even insurance. To date, a few newly established products have been established under the Pilgrimage Fund and Takaful naming a specific person as the nominee to receive the money upon the death of the account holder. The issue on the effect of nomination is not new. It can be traced back to 1940 in the case of *re Ismail Rentah*.² Since then, the effect of nomination among Muslims varies from one case to another and from one institution to another. Generally, the nomination clause

¹Mohd Khairy Kamarudin, Azwan Abdullah and Siti Fariha Mohamad, "Nomination Practice in Malaysia: A Review on the Requirements and Conditions from Islamic Perspective," *Intercontinental Journal of Finance Review* 3, no. 10 (2015): 1, https://www.researchgate.net/publication/283346654_Nomination_Practice_In_Malaysia_A_Review_on_the_Requirements_and_Conditions_from_Islamic_Perspective.

²*Re Ismail Bin Rentah, Deceased Haji Hussain Bin Singah v Liah Binti Lerong & 3 Others* [1940] MLJ 98.

makes the nominee a trustee and the property shall be distributed to the legal heirs of the deceased according to the law of *farā'id*.³ However, some institutions treat the nominee as the receiver of the property and the nomination as a conditional gift. The incorporation of the concept of conditional gift in the form of *hibah ruqba*, which was introduced by the Shariah Advisory Council of the Central Bank of Malaysia in 2003, to the Islamic Financial Services Act 2013 has contributed to the different forms of nomination adopted by the *takaful* operators.⁴ Other examples of nomination-based products are the Employees Provident Fund and Tabung Haji, which will be referred to throughout this paper.

The existence of various nomination provisions by various financial institutions reflects the lack of uniformity in the nomination policy. Such circumstances result in difficulty for the public, stakeholders and the relevant authorities to understand the concept of nomination. This is due to the absence of a specific law on nomination applicable to all institutions. This research, therefore, seeks to examine the existing law on the status of nominees and to study the feasibility of having a single federal law governing nomination throughout Malaysia. This research proposes to employ doctrinal research methodology by analysing relevant laws and literature. This research is significant as the outcome will serve as the platform to improve nomination policy and remove the discrepancy in the effect of nomination.

The first part of this article will focus on the literature review. The second part of this article will give an insight into the historical background of nomination in Malaysia and its effect. The third part will deal with nomination-based products and their effects. This part is important to understand the current effect of nomination in nomination-based products. The fourth part will summarise the effect of

³“Kedudukan Orang Yang Dinamakan Oleh Si Mati Sebagai Penama,” JAKIM, accessed January 3, 2024, <http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/11876>.

⁴*Hibah ruqba* refers to the situation where a person gives a gift to another person with the condition that if the other person dies earlier than the first person, the donated item will be returned to the first person and if the first person dies earlier than the other person will remain as the donated item for the other person. See Jamal al-Din Muhammad Mukarram, *Lisan al-Arab*, (Beirut: Dar Sadir, n.d.), 4:603, <https://waqfeya.net/book.php?bid=4077>.

nomination in the nomination-based products. Lastly, this article will also discuss the feasibility of having a single federal law governing nomination for Muslims throughout Malaysia.

PART I – LITERATURE REVIEW

Md Yazid and Iknor Azli in their article discuss the effect of nomination on Muslims from the Islamic perspective.⁵ However, the discussion focuses more on the theory of nomination from an Islamic perspective and less on the product that applies the nomination concept. The only product mentioned is Tabung Haji which follows the *fatwa* given by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs. Furthermore, the work of Md Yazid and Iknor Azli was published in 2002 and there have been many significant changes and amendments taken place in Malaysia especially relating to the concept of *hibah ruqba* which was introduced by the Shariah Advisory Council in 2003.

The writing by Abd Kadir highlighted the same level of relevancies with Md Yazid and Iknor Azli's work.⁶ Other than the similar parts discussed in both articles, Abd Kadir pointed out a few related information such as the decisions of the court in the past on the effect of nomination, the effect of nomination in *takaful* products in accordance with Takaful Act 1984 and the effect of nomination in accordance with Co-operative Society Act 1993. All of this information would be relevant in detailing the discussion of the current research. However, this article was published back then in 1997.

In both articles, the authors highlighted that the effect of a nomination does not make the nominee the beneficiary rather, he is the trustee of the property. This is consistent with the *fatwa* in 1978.⁷ This

⁵Md. Yazid Ahmad and Iknor Azli Ibrahim, "Amalan Penamaan Harta Orang Islam di Malaysia: Satu Tinjauan Ringkas Menurut Syariah Islamiah," *Jurnal Pengajian Umum* 3, (2002): 63-74, http://journalarticle.ukm.my/1718/1/malim_v.3_2002.pdf.

⁶Abd Kadir Hj Mohammad, "Harta Penama Bukan Harta Pemberian dan Wasiat," *Jurnal Syariah* 5, no. 2 (1997): 163 - 165, <https://ejournal.um.edu.my/index.php/JS/article/view/22974/11489>.

⁷"Nominee (Penama)," JAKIM, accessed on January 3, 2024, <http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/15194>.

position was applied in *Takaful Act 1984*,⁸ *Co-operative Society Act 1993*⁹ and *Tabung Haji*.¹⁰

However, it is important to highlight the resolution passed by the Shariah Advisory Council of Bank Negara on 21st April 2003. The resolution provides that the participants of any *takaful* can give the *takaful* benefits as *hibah* as it is a right of the participant itself.¹¹

Concerning the effect of the resolution, Nurdianawati Irwani and Nazliatul Aniza have thoroughly discussed the effect of the nomination adopted by the *takaful* operators in their article.¹² Based on the article, the *Takaful Act 1984* does not expressly provide any rules regarding the recipient of the *takaful* benefits. Therefore, *takaful* operators adopted different views on the effect of nomination. Some of them did not clarify the status of the nominee as beneficiary or trustee in their *takaful* policy while some stated that the nominee is responsible for distributing the benefits according to the Islamic law of inheritance. In addition, the writers also highlighted the resolution issued by the Shariah Advisory Council of Bank Negara which allows the participant to give the *takaful* benefits as *hibah*. However, the writer did not highlight the inconsistencies between the resolution passed by the Shariah Advisory Council and the *fatwa* issued by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs which provides that the nomination merely makes the nominee the trustee of the property.¹³ Rather, the writers stated that there is no

⁸*Takaful Act 1984*, s 65(1).

⁹*Co-operative Society Act 1993*, s 24(1)(a)

¹⁰Md Yazid and Ibnor, 74.

¹¹Bank Negara Malaysia, *Resolusi Syariah Dalam Kewangan Islam*, 2nd ed. (Kuala Lumpur: Bank Negara Malaysia, 2010), 85 - 87.
https://www.bnm.gov.my/documents/20124/761709/shariah_resolutions_2nd_edition.pdf/3844f55b-8c0f-23ea-5a2a-9874dc416a04?t=1593546461329.

¹²Nurdianawati Irwani Abdullah and Nazliatul Aniza Abdul Aziz, "Case Studies of the Practice of Nomination and Hibah by Malaysian Takaful Operators," *ISRA International Journal of Islamic Finance* 2, no. 2 (2010): 92-93,
https://www.researchgate.net/publication/263619534_Case_Studies_of_the_Practice_of_Nomination_and_Hibah_by_Malaysian_Takaful_Operators.

¹³"Nominee (Penama)," JAKIM, accessed January 3, 2024, <http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/15194>.

formal *fatwa* regarding the provision of *hibah* in family *takaful* despite the *fatwa* being clear on the effect of any nomination in any nomination-based products. It should be highlighted that the resolution passed by the Shariah Advisory Council was later incorporated into the Islamic Financial Services Act 2013. Lastly, the article did not focus on and suggest streamlining the effect of nomination. The article only highlights the effect of nomination which is adopted by the *takaful* operators.

In addition to the above articles, Muhammad Amrullah et al, have highlighted the effect of the nomination specifically on the *takaful* products and Employees Provident Fund.¹⁴ However, the authors did not discuss the effect of nomination on other nomination-based products such as the Pilgrimage Fund and Insurance. Furthermore, they did not touch on the possibility of streamlining the nomination policy for all nomination-based products.

Apart from the above articles, Safinar et al, have discussed the issue of nomination in *takaful* benefits from the perspective of objectives of Shariah, where the authors opined that the application of conditional *hibah* in *takaful* benefits does not reflect the objectives of Shariah-based on several reasons.¹⁵ The application of conditional *hibah* in *takaful* has also been discussed by Md. Habibur et al.¹⁶ However, the authors in both articles did not discuss the effect of nomination for other nomination-based products such as the Pilgrimage Fund and Insurance and Employee's Provident Fund nor discuss the possibility of streamlining the nomination policy for all the

¹⁴Muhammad Amrullah bin Drs Nasrul and et al, "Administration of the Deceased's Estates: An Analysis to the Effect of Nomination," *The European Proceedings of Social and Behavioural Sciences*, (2018): 218 - 225. <https://doi.org/10.15405/epsbs.2018.12.03.20>.

¹⁵Safinar Salleh and et al, "The Objectives of Shari'ah in Nomination for the Payment of Family Takaful Benefits," *Emerging Issues in Islamic Finance Law and Practice*, (2019): 33-51, <https://www.emerald.com/insight/content/doi/10.1108/978-1-78973-545-120191009/full/html?skipTracking=true>

¹⁶Md. Habibur Rahman and et al, "Application of *Umra and Ruqbain* Disbursement of Family Takaful Benefit: An Analysis from Shariah Perspective," *Asian Academy of Management Journal* 2, no. 1 (2019): 107-123, http://web.usm.my/aamj/24s12019/aamj24s12019_8.pdf

nomination-based products. Therefore, there is a need to study the possibility of streamlining the nomination policy in Malaysia.

PART II – DEVELOPMENT OF THE PRACTICE OF NOMINATION AND ITS EFFECT IN MALAYSIA

The development of the effect of nomination can be seen from decided case, *fatwa* issued by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs, the resolution passed by the Shariah Advisory Council of the Central Bank of Malaysia and the Act of Parliament. This section will investigate the case laws, *fatwa*, the resolution passed by the Shariah Advisory Council and several statutory provisions related to the practice of nomination. Consequently, this section will highlight how the effect of nomination may be different from one to another.

Highlighted Case Law in Malaysia

Pursuant to the above topic, there are several significant case laws that will be discussed in this section. These decided cases are important in providing a better understanding of matters pertaining to nomination.

*Re Ismail Rentah*¹⁷

In this case, the deceased had nominated his daughter as the nominee to receive his share in the Malay Servants' Co-operative Credit Society Limited in the event of his death. Later, the deceased died. The main issue in this case is whether the deceased's share in the Society passed to his daughter as the sole beneficiary according to the nomination clause or to the legal heirs according to Islamic Law.

The judge in this case decided that the share in the Society should be given to all legal heirs according to Islamic Law. The judge in this case had laid out two important Islamic principles that need to be considered in this case. Firstly, a man may make an *inter vivos* gift of a definite ascertainable thing. Secondly, a man may also give a testamentary gift so called will but subjected to two important

¹⁷*Re Ismail Bin Rentah Deceased Haji Hussain Bin Singah v Liah Binti Lerong & 3 Others* [1940] MLJ 98.

conditions. Firstly, the bequest must not exceed one-third of the property. Secondly, the bequest must not be given to any one of the legal heirs of the deceased except with the consent of the other legal heirs. After considering this principle, the judge decided that the letter of nomination is governed by the law of wills, but the will is bad as the deceased bequeathed the share to his daughter, who is one of the legal heirs. As the will is bad, the court decided that the share should not be given to the daughter of the deceased as the beneficiary but should be given to the legal heirs according to Islamic Law. Furthermore, the court highlighted that for the Malays, the nomination does not make the nominee the beneficiary of the share.

*Re Man bin Minhat*¹⁸

The deceased in this case had participated in an insurance policy and had nominated his wife as the beneficiary of the insurance benefit in the event that he died. Later the deceased died. The issue is whether the money payable under the policy should be given to the nominee as the beneficiary or should be part of the deceased's estate to be distributed among the legal heirs.

The court in this case held that the policy money should be given to the nominee as the beneficiary of the policy benefit. This decision is due to two reasons. Firstly, Section 23 of Civil Law Ordinance 1956 provides that the policy benefit shall not form part of the deceased's estate in the event that the deceased had expressed the benefit of the policy to be given to the deceased's wife. Secondly, Islamic law does not disentitle the widow to take beneficially as an *inter vivos* gift through a trustee because the court considered the nomination as an *inter vivos* gift or trust created in favour of the widow.

The decision of this case had become an issue as the decision contradicted Islamic Law. Any gift enforceable after the death of the deceased should be considered as a will and not an *inter vivos* gift. Therefore, if the Islamic Law of Will is applicable, the deceased's wife shall not receive the policy benefit as she is one of the legal heirs of the deceased and the legal heir cannot be the beneficiary of the will except with the permission of other legal heirs. Furthermore, the judge in this

¹⁸*Re Man bin Mihah, Decd* [1965] 2 MLJ 1.

case did not apply the *ratio* in the case of *re Ismail Rentah* although the judge in the case of *re Ismail Rentah* has correctly decided on the principle of nomination according to Shariah.

*Re Bahadun bin Haji Hassan*¹⁹

The deceased in this case had participated in a life insurance policy and one of the terms agreed upon by the deceased is the sum assured should be paid to his wife in the event she predeceases him. Later, the deceased died. The issue in this case is whether the policy benefit should be given to the widow as a nominee or should form part of the estate of the deceased and be distributed according to Islamic Law.

The court in this case decided that the money should be given to the widow as the beneficiary of the policy for several reasons. Firstly, considering the fact that the deceased participated in the insurance company and named the widow as the nominee, the court stated that it is the deceased's intention that the widow received the money in the event of the deceased's prior death. Secondly, the court, on the same page as the court in the case of *re Man bin Minhat*, stated that the gift contingent upon the death of the participant is valid according to Islamic Law.

Similar to the case of *re Man bin Minhat*, the decision in this case became an issue as it contradicted Islamic Law.

*Wan Puziah v Wan Abdullah bin Muda & Anor*²⁰

The Plaintiff was the deceased's adopted child who had no blood ties with the deceased. Before the death of the deceased, the deceased had bequeathed half of the money in Tabung Haji account for the Plaintiff. Later, the deceased died. The issue in this case is whether the nomination makes the nominee the beneficiary under the concept of *wasiyyah* or otherwise. The court in this case had allowed the application of the Plaintiff to be the beneficiary of half of the money in Tabung Haji account.

¹⁹*Re Bahadun bin Haji Hassan* [1974] 1 MLJ 14.

²⁰*Wan Puziah bt Wan Awang v Wan Abdullah bin Muda & Anor* [2015] 4 SHLR 15.

Although there is a *fatwa* which states that the nominees appointed under Employees Provident Fund, Post Office Savings, Bank, Insurance and Co-operative Society should enforce the will or become the *wasi*, the court did not apply the *fatwa* as Tabung Haji is not specifically mentioned in the *fatwa*. The court further looked into Tabung Haji's nomination form and applied the rule of wills under the Shariah. As the half portion of the money in Tabung Haji account was less than one-third of the estates of the deceased and the nominee is not the legal heir of the deceased, it is a valid will under the Shariah. Therefore, the court allowed the application of the Plaintiff to be the beneficiary of the half portion of the savings in the Tabung Haji account.

The decision made by the High Court Judge is in line with Shariah although the judge adopted a different view from the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs. According to the Committee, the nominee under the nomination-based products is a trustee or a *wasi* and shall distribute the policy benefit to the legal heirs according to the law of *farā'id*. The High Court Judge therefore applied the rules of *wasiyyah* as the plaintiff is not the legal heir of the deceased and the money which is entitled by the plaintiff is not one-third of the deceased's estate.

***Fatwa* Issued by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs**

Due to the inconsistent decision of the courts, the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs issued a *fatwa* in 1978 which stated as follows:

“Nomination by Muslims in any organization or institutions where their property was kept in is invalid if the nominee is the beneficiary of the property. However, the nomination is valid if the nominee becomes the trustee to distribute the property in accordance with shariah.”²¹

In addition to this *fatwa*, another *fatwa* was issued by the *Mufti* of the Federal Territories in 2001 which states as follows:-

²¹Jakim, “Nominee (Penama)”.

“The nominees appointed under Employees Provident Fund, Post Office Savings, Bank, Insurance and Co-operative Society should enforce the will or become the wasi. The nominees may receive money from the sources and should distribute the money to the legal heirs according to the laws of *farāidh*.”²²

Although the *fatwas* seem similar, there are two differences that need to be highlighted. The first difference is the term used in the *fatwas*. The term used in the former *fatwa* is ‘Shariah’, while in the latter *fatwa*, the laws of ‘*farāid*’. It can be inferred from the term used in the former *fatwa* that the nominee may be the beneficiary of the property under *wasiyyah* but subject to the *wasiyyah* rules. However, due to the term ‘laws of *farāid*’ which are used in the latter *fatwa*, the nominee is only a trustee to distribute the property in accordance with the law of *farāid*. The second difference is the bindingness of the *fatwas*. The *fatwa* in 2001 binds Muslims in Federal Territories as it was gazetted. The Administration of Islamic Law (Federal Territories) Act 1993 provides that any *fatwa* that is gazetted shall be binding on every Muslim resident in the Federal Territories unless he is permitted by Islamic Law to depart from the *fatwa* in matters of personal observance, belief, or opinion.²³ The *fatwa* in 1978 however did not bind the Muslims as it was not gazetted.

Resolution by Shariah Advisory Council of the Central Bank of Malaysia

Shariah Advisory Council of the Central Bank of Malaysia passed a resolution on 21st April 2003 in relation to the nomination of the *takaful* policy as follows:

1. Takaful benefit can be used for hibah since it is the right of the participants. Therefore, participants should be allowed to exercise their rights according to their choice as long as it does not contradict with Shariah;

²²“Kedudukan Orang Yang Dinamakan Oleh Si Mati Sebagai Penama,” JAKIM, accessed January 3, 2024, <http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/11876>.

²³Administration of Islamic Law (Federal Territories) Act 1993, Section 34(3).

2. The status of hibah in takaful plan does not change into a will (wasiah) since this type of hibah is a hibah ruqba, in which the hibah is an offer to the recipient of hibah for a specified period. In the context of takaful, the takaful benefit is both associated with the death of the participant, as well as the maturity of the certificate. If the participant remains alive on maturity, the takaful benefit is owned by the participant but if he dies within such period, then hibah shall be executed;
3. A participant has the right to revoke the hibah before the maturity date because conditional hibah is only deemed to be completed after delivery is made (qabdh);
4. Participant has the right to revoke the hibah and transfer it to other parties or terminate the takaful participation if the recipient of hibah dies before maturity; and
5. The takaful nomination form has to be standardized and must stipulate clearly the status of the nominee either as a beneficiary or an executor (wasi) or a trustee. Any matter concerning the distribution of *takaful* benefit must be based on the contract. Participants should be clearly explained on the implication of every contract being executed.²⁴

From this resolution, it is understood that in *takaful*, the *takaful* participants may make the nominee as the beneficiary of the *takaful* benefit.

The resolution passed by the Shariah Advisory Council of the Central Bank of Malaysia had become an issue as it is totally different from the *fatwa* issued by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs.

Statutory Provisions

There are several statutory provisions that are related to the effect of nomination. Firstly, Section 142 and Schedule 10 of Islamic Financial Services Act 2013 which incorporates the resolution passed by the Shariah Advisory Council of the Central Bank of Malaysia on 21st April 2003. This provision governs the practice of nomination in family

²⁴Bank Negara Malaysia, *Resolusi Syariah Dalam Kewangan Islam*, 85-87.

takaful and personal accident *takaful*. Secondly, Section 130 and Schedule 10 of the Financial Services Act 2013 which governs the practice of nomination in insurance policy. Thirdly, Regulation 9(2) of Employees Provident Fund Regulation 2001 which governs the practice of nomination in the Employees Provident Fund. Lastly, Regulation 8(1)(a), Regulation 8(1)(c) and Schedule (Regulation 4 and 7) of Tabung Haji (Deposits And Withdrawals) Regulations 2002 which govern the practice nomination in Tabung Haji. Further discussion on these provisions shall be discussed in the subsequent part.

PART III – ANALYSIS OF NOMINATION-BASED PRODUCTS AND THEIR EFFECT

The following discussions explain in detail the nomination-based products and their effect. The findings are further summarised in Table 1 in Part IV of this article.

Takaful

“*Takaful*” means an arrangement based on mutual assistance under which *takaful* participants agree to contribute to a common fund providing mutual financial benefits payable to the *takaful* participants or their beneficiaries on the occurrence of pre-agreed events.²⁵ *Takaful* products were first governed by the Takaful Act 1984, an Act of Parliament that regulates the *takaful* business in Malaysia.²⁶ The Takaful Act 1984 did not explain the effect of nomination towards the nominee. It only provides that when the *takaful* participant dies, the *takaful* benefits shall be paid to the proper claimant.²⁷ Under the Takaful Act 1984, the term “the proper claimant” is defined as a person who claims to be entitled to the sum in question as executor of the deceased, or who claims to be entitled to that sum under the relevant law.²⁸ Therefore, *takaful* operators adopted different views on the effect of nomination. Some did not clarify the status of the nominee as beneficiary or trustee in their *takaful* policy, while some stated that the

²⁵Islamic Financial Services Act 2013, s 2.

²⁶Preamble of Takaful Act 1984.

²⁷Takaful Act 1984, s 65 (1).

²⁸*Ibid.*, s 65 (4).

nominee is responsible for distributing the benefits according to the Islamic law of Inheritance.²⁹ It should be noted that the Takaful Act 1984 has since been repealed by the Islamic Financial Services Act 2013.

According to the Islamic Financial Services Act 2013, there are two forms of nomination available in Family Takaful Certificate and Personal Accident Takaful Certificate products.³⁰ The first form is that the nominee receives the *takaful* benefits in his or her capacity as the executor of the *takaful* benefit. This is in line with the *fatwa* issued by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs in 1978.

The second form is that the nominee receives the *takaful* benefit as the beneficiary under the concept of *hibah ruqba*. *Ruqba* is one of the types of conditional gifts discussed by the jurists. An example of *ruqba* is when a person gives a gift to another person with two conditions.³¹ Firstly, if the person giving the gift dies earlier than the person receiving the gift, the latter will receive the gift. Secondly, if the person receiving the gift dies earlier than the person giving the gift, the gift will be returned to the latter.

This is in line with the resolution issued by the Shariah Advisory Council of the Central Bank of Malaysia on 21st April 2003. Although the second form of nomination has been stipulated in the Islamic Financial Services Act 2013, it is an issue that is thoroughly discussed and debated. The prevalent opinion is that the underlying principle on this matter is called *hibah*, the actual principle is *wasiyyah* as the condition attached to it is the death of the *takaful* participant. Therefore, the *takaful* operator is bound by the conditions in *wasiyyah* such as the amount of the property received and the condition for the beneficiary of such property.³²

²⁹Nurdianawati and Nazliatul.

³⁰Paragraph 6(1) of Schedule 10 of Islamic Financial Services Act 2013.

³¹Jamal al-Din Muhammad Mukarram.

³²Mohd Kamil Ahmad and Joni Tamkin Borhan, "Penggunaan Hibah Bersyarat (Berta'liq) Dalam Masalah Pembahagian Manfaat Takaful: Analisis Hukum," *Jurnal Syariah* 25, no. 25 (2017): 63, https://www.researchgate.net/publication/313765162_Penggunaan_Hibah_Bersyarat_Bertaliq_Dalam_Masalah_Pembahagian_Manfaat_Takaful

Conventional Insurance

Conventional insurance was first governed under the Insurance Act 1996. The Insurance Act 1996 clearly provides that for Muslims, a nominee, on the death of the policy owner, shall be the executor and not the beneficiary and shall distribute the policy money in accordance with the Islamic law of inheritance.³³

Although the Insurance Act 1996 was repealed in 2013 by the Financial Services Act 2013, a similar provision remains. For a Muslim, the nominee is not the beneficiary; rather, the nominee is the executor and shall distribute the policy money according to the will and the law applicable to the policy owner.³⁴ In addition, referring to the *fatwa* issued by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs in 2011, an insurance policy is a product that is non-compliant with Shariah. Due to this, only the principal amount can be inherited while the balance should be given to the religious department or donated to needy persons.³⁵

Employees Provident Fund

Employees Provident Fund was first governed under the Employees Provident Act 1951. During the early stage of enforcement, the Employees Provident Act 1951 did not provide specific provisions relating to nomination. The said Act was later repealed through the passing of the Employees Provident Fund Act 1991. The Employees Provident Fund Act 1991 was enacted to govern the scheme of savings for employees' retirement and the management of the savings for retirement purposes and for matters incidental thereto.³⁶

According to the Employees Provident Fund Rules 1991, for Muslim members, a nominee will be treated as an executor or

_Analisis_Hukum_The_Application_of_Conditional_Hibah_in_Takaful_Benefit_Distribution_A_Juristic_Analysis.

³³Insurance Act 1996, s 167.

³⁴Paragraph 6(1) & (2) of Schedule 10 of Financial Services Act 2013.

³⁵“Status Pampasan Polisi InsuransKonvensionalSelepasKematianPembeli Polisi,” JAKIM, accessed January 3, 2024, <http://e-smaf.islam.gov.my/e-smaf/index.php/main/mainv1/fatwa/pr/10274>.

³⁶Preamble of Employees Provident Fund Act 1991.

administrator to the member's credit.³⁷ Although the Employees Provident Fund Rules 1991 was repealed, a similar status can be seen in the Employees Provident Fund Regulation 2001 whereby for Muslims, the nominee is the executor of the fund, not the beneficiary and shall distribute the assets of the deceased according to Islamic law.³⁸

Tabung Haji

Tabung Haji was initially governed by the Lembaga Urusan dan Tabong Haji Act 1969. This Act established a corporation, known as Lembaga Urusan dan Tabong Haji, to manage funds related to the pilgrimage.³⁹ According to the case of *Wan Puziah v Wan Abdullah bin Muda & Anor*, the effect of nomination prior to 1975 is that the nominee becomes the beneficiary according to the Islamic Law of wills under *hukum syarak* based on the nomination form used at that time.⁴⁰ However, after 1975, the nomination carries a different effect in Tabung Haji. By virtue of Section 25 (4) of the Lembaga Urusan Dan Tabong Haji Act 1969, the Federal Government introduced a regulation called the Lembaga Urusan Dan Tabung Haji (Deposits and Withdrawals) Regulations 1975, which deals with the deposits and the withdrawals of the money of the participants. Under the Lembaga Urusan Dan Tabung Haji (Deposits and Withdrawals) Regulations 1975, upon the death of the depositor, the nominee shall receive the amount in the account of the depositor with the terms of such nomination.⁴¹ Therefore, the effect of nomination is clear as it depends on the term of such nomination under the Lembaga Urusan Dan Tabung Haji. However, the Lembaga Urusan Dan Tabong Haji Act 1969 was repealed by the introduction of the Tabung Haji Act 1995 and the Lembaga Urusan Dan Tabung Haji (Deposits and Withdrawals)

³⁷Employees Provident Fund Rules 1991, Rule 34 and Form EPF 4.

³⁸Employees Provident Fund Regulation 2001, Regulation 9(2).

³⁹Preamble of Lembaga Urusan dan Tabong Haji Act 1969.

⁴⁰*Wan Puziah bt Wan Awang v Wan Abdullah bin Muda & Anor* [2015] 4 SHLR 15.

⁴¹Lembaga Urusan Dan Tabung Haji (Deposits and Withdrawals) Regulations 1975, Regulation 7(1)(b).

Regulations 1975 was superseded by the Tabung Haji (Deposits and Withdrawals) Regulations 2002.

At first, the effect of nomination under the Tabung Haji (Deposits And Withdrawals) Regulations 2002 is that the nominee is appointed from the legal heirs and, upon the death of the depositor, shall distribute the amount in the Tabung Haji account in accordance with *Hukum Syarak*.⁴² Therefore, from the Tabung Haji (Deposits And Withdrawals) Regulations 2002, it is clear that the law applicable to the effect of nomination is the law of *farā'id* and the rule of *wasiyyah* is not applicable as the nominee is appointed from among the legal heir of the depositor.⁴³ However, in a later amendment of the Tabung Haji (Deposits And Withdrawals) Regulations 2002, there are additional provisions to introduce the concept of *hibah amanah*.⁴⁴ The concept was later incorporated into one of the products of Tabung Haji which is the “Hibah Amanah TH”.

Hibah Amanah TH is a gift from the depositor to the recipient where the assets will be held by the depositor as trustee and the ownership will be transferred to the recipient upon the death of the depositor.⁴⁵ The depositor of Hibah Amanah TH has the option to make either Hibah Amanah TH in whole or to combine Hibah Amanah TH and Nomination. This means, the depositor will name a person to be the recipient and may also name another person to be the nominee. The nominee, in this instance, is responsible for distributing a certain percentage of the Hibah Amanah TH in accordance with Shariah rulings.⁴⁶ Meanwhile, the recipient will be the beneficiary of the product.⁴⁷ Hibah Amanah TH involves two types of nomination.

⁴²Tabung Haji (Deposits and Withdrawals) Regulations 2002, Schedule [Regulations 4 and 7].

⁴³*Ibid.*

⁴⁴Tabung Haji (Deposits and Withdrawals) (Amendment) Regulations 2017.

⁴⁵“Hibah Amanah,” Tabung Haji, accessed January 22, 2024, <https://www.tabung haji.gov.my/ms/simpanan/perkhidmatan/hibah-amanah-th#:~:text=Hibah%20Amanah%20TH%20merupakan%20pemberian,qa bul%20antara%20Pemberi%20Hibah%20Amanah>

⁴⁶Tabung Haji (Deposits And Withdrawals) Regulations 2002, Regulation 8(1)(a) and Schedule (Regulation 4 and Regulation 7).

⁴⁷*Ibid.*, Regulation 8(1).

Firstly, the nomination of the recipient under Hibah Amanah TH and secondly, the nomination of the nominee under Hibah Amanah TH.

Therefore, it can be concluded that nomination under Tabung Haji carries two effects. Firstly, if it is under the concept of *hibah amanah*, the nominee, which is called the “recipient” shall be the beneficiary of the money deposited under the Hibah Amanah TH. Secondly, if it is not under the concept of *hibah amanah*, the nominee, that is called “the nominee”, shall receive the money as a trustee and shall distribute the money in accordance with the law of *farāid*.

Summary of Nomination-Based Products and Effect

According to the nomination-based products above, the effect of nomination is different from one product to another. Below is the list of the nomination-based products and their effects which were reviewed in this study:

Table 1: Effect of Nomination in Nomination Based Products

Type of Product	Nomination Policy	Effect of Nomination	Law
Family Takaful Certificate and Personal Accident Takaful Certificate	Nomination	Wasi/ Executor	Section 142 and Schedule 10 of the Islamic Financial Services Act 2013
		Beneficiary (under <i>hibah ruqba</i>)	
Insurance	Nomination	Nominee is the executor and not the beneficiary	Paragraph 6 of Schedule 10 of Financial Services Act 2013

EPF	Nomination	Nominee is the executor to administer the assets of the deceased.	Regulation 9(2) of EPF Regulation 2001
Tabung Haji	Nomination	<i>Wasi</i> / Trustee	Regulation 8(1)(a) and Schedule (Regulation 4 and 7) of Tabung Haji (Deposits and Withdrawals) Regulations 2002
	Nomination + Hibah Amanah	<i>Wasi</i> / Trustee + Recipient	Regulation 8(1)(a), Regulation 8(1)(c) and Schedule (Regulation 4 and 7) of Tabung Haji (Deposits And Withdrawals) Regulations 2002
	Hibah Amanah	Recipient	Regulation 8(1)(c) of Tabung Haji (Deposits And Withdrawals) Regulations 2002

PART IV - DISCUSSION AND FINDINGS

In order to streamline the nomination policy, analysis of the forms of nomination adopted by the institutions which offer nomination-based products is important. There are different forms of nomination adopted by the *takaful* operators, insurance operators, EPF and Pilgrimage Fund. There are a few main reasons for the different forms adopted.

Incorporation of the Concept of *Hibah Ruqba*

The incorporation of the concept of conditional gift, which was introduced by the Shariah Advisory Council of the Central Bank of Malaysia in 2003, to the Islamic Financial Services Act 2013 has contributed to the different forms of nomination adopted by the *takaful* operators. There are concerns arise regarding the validity of the *hibah ruqba* applied in *takaful* policies due to several reasons related to its incorporation.⁴⁸ Firstly, the application of *hibah ruqba* will lead to the disappearance of the laws of *farāid*. In one *hadith* narrated by Abu Hurairah which states as follows:-

عَنْ أَبِي هُرَيْرَةَ، قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ "أَبَاهُزِرَةَ تَعْلَمُوا الْقَرَائِصَ وَاعْلَمُوهَا فَإِنَّهُ نِصْفُ الْعِلْمِ وَهُوَ يُنْسَوْنَ أَوَّلَ شَيْءٍ يُنْتَزَعُ مِنْ أُمَّةٍ".

It was narrated from Abu Hurairah that the Messenger of Allah said:

“O Abu Hurairah. Learn about inheritance and teach it, for it is half of knowledge, but it will be forgotten. This is the first thing that will be taken away from my nation.”⁴⁹

From the *hadith*, the Prophet has cautioned the Muslims that the law of *farāid* is the first knowledge that will be taken away. By applying the concept of *hibah ruqba* in *takaful*, the laws of *farāid* will not be applied. This is because the resolution passed by the Shariah

⁴⁸Saba' Radwan Jamal Elatrash and Younes Soualhi, “The Practice of Takāful Benefit (Nomination) in the Context of IFSA 2013: A Critical Appraisal,” *ISRA International Journal of Islamic Finance* 8, no. 1 (2016): 201, https://www.researchgate.net/publication/304748258_The_Practice_of_Takaful_Benefit_Nomination_in_The_Context_of_Ifsa_2013_A_Critical_Appraisal

⁴⁹“Chapters on Shares of Inheritance,” SUNNAH.COM, accessed January 22, 2024, <https://sunnah.com/ibnmajah:2719>

Advisory Council of the Central Bank Malaysia on 2nd August 2005 provides that *takaful* benefit will not form part of the estate of the policy owner. Therefore, the laws of *farāid* will not be applied in *takaful* policy.

The second reason for the reservation of the scholars on the validity of *hibah ruqba* is the encroachment of the concept of *hibah ruqba* applied in the *takaful* policy to *wasiyyah* rules.⁵⁰ The condition imposed to make the gift effective is the death of the *takaful* participants. This concept resembles the concept of *wasiyyah* and, therefore, is subject to the *wasiyyah* rules. These include the one-third rule and the prohibition of *wasiyyah* to legal heirs.

The last reason for the reservation of the scholars concerning the validity of *hibah ruqba* is to avoid the concept of *hibah ruqba* to be applied to other nomination-based products. Although it is clear that *hibah ruqba* can only be applied to *takaful* products,⁵¹ upon the demise of the donor, it might open a floodgate to other nomination products as well. If this happens, the law of *farāid* will no longer be applied to other nomination products. As a result, there will be no property left to be distributed according to *farāid*, since the properties will be disposed of through *hibah ruqba*.

The Combination of Two Concepts in a Product

The second reason for the different forms adopted in the nomination effect is the combination of two concepts such as gift and trust that can be seen in the Hibah Amanah TH. This is a new concept that departs from the general rule of the nominee being the administrator or executor of the estate. The validity of this concept has not been discussed by jurists. However, due to the combination of the two

⁵⁰Syed Ahmad Salman and Sheila Nu Nu Htay, "Nomination and Hibah Issues in Malaysian Takaful (Islamic Insurance) Industry," (paper presented at the 2nd International Conference on Current Trends and Challenges in Management, Engineering, Computer Application and Technology, Vishwakarma Hall, Deogiri Institute of Engineering and Management Studies, Aurangabad, India, March 22-23, 2013), http://irep.iium.edu.my/29628/1/Nomination_And_Hibah_Issues_In_Malaysian_Takaful_%28Islamic_Insurance%29_Industry.pdf.

⁵¹15.3 Hibah Policy Document

concepts, it has departed from the general rule where the nominee is the *wasi* and shall distribute the benefit according to the law of *farāid*.

Difficulty in Streamlining the Nomination Effect

The main difficulty in streamlining the nomination effect is the incorporation of the resolution passed by the Shariah Advisory Council of the Central Bank of Malaysia in the Islamic Financial Services Act 2013. This has departed from the general rule as had been laid by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs in 1978. From the angle of legislation, it is difficult to amend any concept that has been incorporated to become the law. Secondly, the different types of nomination which are governed by various statutes such as IFSA, EPF Act, and Tabung Haji Act has made it impossible to streamline the nomination policy.

Thus, this study proposes a few recommendations via the revision of the relevant statutory provisions in order to streamline the nomination policy in its nomination-based products. Firstly, there is a need to amend the Islamic Financial Services Act 2013 by re-evaluating the position of the nominee as the beneficiary of *hibah ruqba* in *takaful*. Secondly, the effect of the nomination policy in Tabung Haji should be further reviewed so that it will not be inconsistent with Islamic Law. Alternatively, a new Act may be legislated to repeal the provisions related to the effect of nomination. The new law shall prescribe a streamlined policy on the effect of nomination to Muslims in all nomination-based products.

CONCLUSION

Based on the discussion above, the effect of nomination differs from one product to another depending on the institution which offers the product and its governing law. Some laws provide the nominee to be the *wasi*, while other laws allow the nominee to be the beneficiary. Although there is a *fatwa* decreed by the Muzakarah of the Fatwa Committee, of the National Council for Islamic Affairs, there is still inconsistency applied by various institutions. This creates confusion among the public on the effect of nomination. Therefore, there is a need

to streamline the nomination policy to prevent any further inconsistencies in the future.

Further research should be conducted to observe policymakers' understanding of the need to streamline the nomination policy and their preparedness to amend the law. Besides, further research should also be done on any other nomination-based products that will exist in the future.

ACKNOWLEDGEMENT

This article is funded by the International Islamic University Malaysia (IIUM). The authors thank Mr. Ammar Al-Imtiyaz bin Abdul Bahri @ Abdul Bari, our Research Assistant who had contributed a lot in the completion of this article.

REFERENCES

- Abdullah, Nurdianawati Irwani, and Abdul Aziz, Nazliatul Aniza. "Case Studies of the Practice of Nomination and Hibah by Malaysian Takaful Operators." *ISRA International Journal of Islamic Finance* 2, no. 2 (2010). https://www.researchgate.net/publication/263619534_Case_Studies_of_the_Practice_of_Nomination_and_Hibah_by_Malaysian_Takaful_Operator.
- Ahmad, Md. Yazid, and Ibrahim, Ibnor Azli. "Amalan Penamaan Harta Orang Islam di Malaysia: Satu Tinjauan Ringkas Menurut Syariah Islamiah." *Jurnal Pengajian Umum* 3, (2002). http://journalarticle.ukm.my/1718/1/malim_v.3_2002.pdf.
- Ahmad, Mohd Kamil, and Borhan, Joni Tamkin. "Penggunaan Hibah Bersyarat (Berta'liq) Dalam Masalah Pembahagian Manfaat Takaful: Analisis Hukum." *Jurnal Syariah* 25, no. 25 (2017).
- Bank Negara Malaysia. *Resolusi Syariah Dalam Kewangan Islam*, 2nd ed. Kuala Lumpur: Bank Negara Malaysia, 2010. https://www.bnm.gov.my/documents/20124/761709/shariah_resolutions_2nd_edition.pdf/3844f55b-8c0f-23ea-5a2a-9874dc416a04?t=1593546461329.
- Drs Nasrul, Muhammad Amrullah, Halim, Akmal Hidayah, Mohd Salim, Wan Noraini, Abdul Manap, Siti Nuramani. "Administration of the Deceased's Estates: An Analysis to the Effect of Nomination." *The European Proceedings of Social and Behavioural Sciences*, (2018). <https://doi.org/10.15405/epsbs.2018.12.03.20>.
- JAKIM. "Kedudukan Orang Yang Dinamakan Oleh Si Mati Sebagai Penama. Accessed January 3, 2024. <http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/11876>.
- Jamal Elatrash, Saba' Radwan, and Soualhi, Younes. "The Practice of Takāful Benefit (Nomination) in the Context of IFSA 2013: A Critical Appraisal," *ISRA International Journal of Islamic Finance* 8, no. 1 (2016).
- Kamarudin, Mohd Khairy, Abdullah, Azwan, and Mohamad, Siti Fariha. "Nomination Practice in Malaysia: A Review on the Requirements and Conditions from Islamic Perspective."

- Intercontinental Journal of Finance Review* 3, no. 10 (2015).https://www.researchgate.net/publication/283346654_Nomination_Practice_In_Malaysia_A_Review_On_The_Requirements_And_Conditions_From_Islamic_Perspective.
- Md. Habibur Rahman, Abdullah, Faruk, Ghazaliu, Puspa Liza, Osmani, Noor Mohammad. "Application of *Umra and Ruq bain* Disbursement of Family Takaful Benefit: An Analysis from Shariah Perspective." *Asian Academy of Management Journal* 2, no. 1 (2019). http://web.usm.my/aamj/24s12019/aamj24s12019_8.pdf
- Mohammad, Abd Kadir Hj. "Harta Penama Bukan Harta Pemberian dan Wasiat." *Jurnal Syariah* 5, no. 2 (1997). <https://ejournal.um.edu.my/index.php/JS/article/view/22974/11489>.
- Muhammad Mukarram, Jamal al-Din. *Lisan al- Arab*. Beirut: Dar Sadir, n.d. 4:603. <https://waqfeya.net/book.php?bid=4077>.
- Salleh, Safinar, Halim, Akmal Hidayah, Ibrahim, Uzaimah, Abdullah, Mohamad Asmadi. "The Objectives of Shari'ah in Nomination for the Payment of Family Takaful Benefits." *Emerging Issues in Islamic Finance Law and Practice*, (2019).
- SUNNAH.COM. "Chapters on Shares of Inheritance." Accessed January 22, 2024, <https://sunnah.com/ibnmajah:2719>
- Syed, Ahmad Salman, and Htay, Sheila Nu Nu. "Nomination and Hibah Issues in Malaysian Takaful (Islamic Insurance) Industry." (paper presented at the 2nd International Conference on Current Trends and Challenges in Management, Engineering, Computer Application and Technology, Vishwakarma Hall, Deogiri Institute of Engineering and Management Studies, Aurangabad, India, March 22-23, 2013), http://irep.iium.edu.my/29628/1/Nomination_And_Hibah_Issues_In_Malaysian_Takaful_%28islamic_Insurance%29_Industry.pdf.
- Tabung Haji. "Hibah Amanah." Accessed January 22, 2024. <https://www.tabung haji.gov.my/ms/simpanan/perkhidmatan/hibah-amanah-th#:~:text=Hibah%20Amanah%20TH%20merupakan%20pe mberian,qabul%20antara%20Pemberi%20Hibah%20Amanah>