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**NOMINATION STATUS IN ISLAMIC AND CIVIL LAW**

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***Abstract***

This article discusses the concept of nomination and status of nominee for Muslims estate from the Islamic and Civil Law perspectives in Malaysia. The discussion focuses on nominated estates (Employee Provident Fund, Pilgrimage Fund, Insurance Compensation and Takaful Benefit), opinions from Islamic Scholars, *fatwas* regarding to nomination in Malaysia and its differences among other estate planning instruments. This study also compares the differences between the Islamic and Civil law perspectives regarding to nominated property. In Malaysia, the main problem on nomination is the nominee does not distribute the nominated property to the legal heirs due to the assumption that the property belong to nominee absolutely. According to the Islamic law, the nominated property is categorized as inheritance estate which is subjected to *faraid* regulations and the nominee acts as a wasi (trustee) who is accountable to allocate that estate to the legal heirs. From Civil Law perspectives, nomination will facilitate the distribution of estate without Grant of Probate, Letter of Administration or Distribution Order which takes a lengthy time progress. This study recommends that the nomination should be one of the Islamic estate planning instruments since its function can accelerate the distribution of deceased estate to legal heirs and avoid the failure of estate distribution.

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**Keywords:** Nomination, nominee, nominated property, islamic law , civil law.



## 1. Introduction

Every deceased person will leave behind inheritance estate to their heirs irrespective of the value. This estate could be immovable (land and house) and movable assets (car, saving and investment account). Estate distribution through *faraid* is one of the distribution and management instruments for the Muslims (Ahmad Razimi, 2016). The *hukm* and method of *faraid* distribution are indicated clearly in Al-Quran and As-Sunnah. However the way to administer inheritance estate is not clearly defined (Hassan & Abdul Rashid, 2019; Nasrul & Mohd Salim, 2018). Nevertheless, the distribution of inheritance estate through *faraid* method is compulsory for Muslims as stipulated in Surah An-Nisa', verse 11 which means:

“Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased Left brothers (or sisters) the mother has a sixth. (The distribution in all cases ('s) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah. and Allah is All-knowing, All-wise.”

Essentially, the rules of estate distribution among Muslims and non-Muslims in Malaysia are different based on Federal Constitution. Muslim estate distribution is subjected to State Jurisdiction while non-Muslims estate distribution is subjected to Federal Jurisdiction. This matter is mentioned in List II, State List, Federal Constitution which empowers Syariah Court as an institution to resolve the matters relating to Islamic law. However, Syariah Court's role is only to determine the deceased's heirs, issue the *Faraid Order (Perintah Faraid)* which indicate the legal heirs and their portions, and other document validations such as *wasiyyah* (bequest) and *hibah* (inter vivos). If there are cases which relate to probate and administration issues, the heirs must refer to the Civil Court (Kamarudin & Abdullah, 2016; Muhammad Serji & Shapiee, 2018; Nasrul & Mohd Salim, 2018; Zulkafli & Ahmad, 2016).

## 2. Problem Statement

At the present time, there is a significant increase of unclaimed inheritance estate from years to years. Based on a record in 2005, there were approximately 900,000 land titles in Malaysia still registered under the names of the deceased. In 2007, unclaimed inheritance estate was RM40 billion and 2014 was RM52 billion. In addition, current unclaimed inheritance estate is almost RM60 billion (Ahmad Baharul Ulum, Mohamad Naser, Mohd Zahari, Mohd Ramli, & Amran, 2017; “Estate worth RM60bil left unclaimed,” 2016; Md Azmi & Mohammad, 2015; Sabirin, 2014). One of the substantial factors that contributes to this issue is the confusing and lengthy claiming process. There are various agencies which have jurisdiction to process the estate such as Amanah Raya Berhad, Civil Court and Small Estate Distribution Unit (*Unit Pembahagian Pusaka Kecil*) (Ahmad Razimi, 2016; Nasrul & Mohd Salim, 2018; Zulkafli & Ahmad, 2016). Nomination is one of the estate distribution instruments that will facilitate the claiming process. Nominated estate is not subject to the estate claiming process through above agencies

(Kamarudin, Abdullah, & Mohamad, 2015). However, the study regarding to the nomination is still scarce

### 3. Research Questions

1. What is nomination concept generally?
2. What is Islamic Law opinion towards nomination?
3. What is nomination status from Civil Law?
4. How nomination practice is importance in estate management?

### 4. Purpose of the Study

This study aims to discover the issue of nomination based on the Islamic and Civil perspectives and how it can be a significant instrument to lessen the increasing trend of unclaimed inheritance estate.

### 5. Research Methods

This study applies qualitative approach by using literature survey in order to understand the nomination concept and nomination from Islamic and Civil Law perspectives. Nomination from Islamic law, this study discuss the practice based on *fatwa* that are issued by National Fatwa Council (Malaysia). Nomination from Civil perspectives in Malaysia, this study refers to four main statutes which are Insurance Act 1996 (repealed), Takaful Act 1984 (repealed), Financial Services Act 2013 and Islamic Financial Services Act 2013.

### 6. Findings

#### 6.1. Nomination Concept.

Nomination is one of the process in which the depositor or investor names an individual/individuals as an executor of his/her account after the death. In other words, nominee is an individual who is authorized to withdraw the fund without going through the relevant agencies. The asset which has been named is known as nominated property (*harta penamaan*). Generally, nominated property can be defined as the property that has been named on one nominee or more by the owner to be handed over the deceased estate (Hassan & Abdul Rashid, 2019).

In Malaysia, nomination practices are applied to various types of property which depend on its categories. The first category, is monthly contribution such as Employee Provident Fund (EPF) (*Kumpulan Wang Simpanan Pekerja*), cooperative contributor and company. The second is saving account in financial institution such as saving account Pilgrimage Fund (*Tabung Haji*). The last category is the share certificates, mutual funds and insurance or Takaful (Islamic insurance) policies (Mohammad Shapien & Markom, 2018; Sarip, 2017). The requirement to appoint the nominee is subjected to all depositors and contributors. The nominee is accountable to allocate the nominated property to the legal heirs based on *faraid* (Islamic inheritance method) (Hassan & Abdul Rashid, 2014). Nominee who claims the Muslim's estate must sign the Undertaking Letter (*Surat Aku Janji*) where any failure to comply with the Undertaking Letter will affect the nominee from the point of law in which legal action can be taken

against the nominee. However, in other countries such as Singapore and Bangladesh, the appointed nominee is the sole beneficiary of the nominated property estate due to different lifestyle, economic, locality and sociocultural factors (Alma'Amun & Kamarudin, 2014; Mian & Rashid, 2013; Mustar & Nor Muhamad, 2014).

## 6.2. Nomination from the Islamic Law

In general, the deposited fund of deceased person in any financial institutions is considered as an estate that should be distributed to the legal heirs or beneficiaries according to Distribution Act 1958. Nevertheless, there is an issue that always arises when the deposited fund is in joint account under the deceased name and other parties. Practically, the joint account is subjected to the terms and conditions that are set by the financial institutions. Typically, one of the clauses is 'Survivorship Clause' where joint account holders agree that in the event of death of one account holder, the remaining balance will be paid to the account holder who is still alive (Halim & Arshad, 2014).

However, the rights and conditions of Muslims and non-Muslims are different. For Muslims, nomination is a process to simplify and accelerate the payment of contributions and the nominee is only an executor and not as single beneficiary based on National *Fatwa* Council 1973:

“Nominee of the funds in the Employee Provident Fund, Post Office Savings Bank, Insurance and Co-operative Societies are in the position of persons who carry out the will of the deceased or the testator. They can receive the money of the deceased from the sources stated to be divided among the persons entitled to them under the Islamic law of inheritance”

Several *fatwas* from other states such as Perak and Kelantan have decided otherwise. They concluded that the nomination is a will and subjected to Islamic will condition (Nor Muhamad, 2011).

The position of nominated property can be divided into three categories:

1. Property that has been given during the life of property's owner and the appointed person has absolute right.
2. Will property appointed to a person as a nominee.
3. Property which is subjected to the Islamic law of inheritance. Nominee is only as an executor and must divide them according to *faraid*.

If nominated property is considered as will or *hibah* property, it must adhere to the requirement and condition of the Islamic will and *hibah* which need the *lafaz*, witnesses, the allowable rate of distribution and to whom the property will be distributed. Nomination also will be considered as a will if the nominee is not one of the legal heirs but the rate is not more than 1/3 from the total fund. However, this is rarely practised by the property's owner. Nomination and *hibah* is similar to the civil law perspective where the nominee is the sole beneficiary of the fund. For Muslims, the fund is subjected to *faraid* and the nominee is accountable to distribute to the legal heirs. *Hibah* is a gift during lifetime of donor and donee compared to nomination where the property will be handed over to the nominee after the death of the nominator (Daud, Jamaluddin, & Mat Hussin, 2018; Hassan & Abdul Rashid, 2019; Mohamad Puad, Jamlus Rafdi, Ahmad Sanusi, & Sarip, 2018; Noordin, Ismail, Abd Rahman, Haron, &

Abdullah, 2016; Nor Muhamad, 2017). Table 01 summarize the differences between nomination, will and inter vivos.

**Table 01.** Differences between nomination, will and inter vivos.

	<b>Nomination</b>	<b>Will/Wasiyyah</b>	<b>Inter vivos/hibah</b>
<b>Effective time</b>	After the death of nominator	After the death of testator	During lifetime of donor
<b>Total amount can be given</b>	Nominated property only	1/3 from total asset	unlimited
<b>Beneficiaries</b>	Legal heirs based of <i>faraid</i>	Non legal heirs	Anybody

### 6.3. Nomination from the Civil Law

Nomination is the process of nominating a nominee to facilitate the distribution of estate without any intervenes among inheritance estate agencies. On the other hand, unnominated property will be withheld until the heirs obtain the inheritance estate distribution order (such as Grant of Probate, Letter of Administration or Distribution Order) which takes a lengthy time progress (Kamarudin, Ibrahim, Ahmad, Abdullah, & Mohamad, 2016).

Discussions on insurance or Takaful policies often lead to the issue of insurance compensation or takaful benefits and whether it is considered as the estate of nominator or not (Abubakar, Zahid, & Markom, 2014; Alma'Amun & Kamarudin, 2014; Daud, Redzuan, & Yakob, 2017). Table 02 demonstrates the differences nomination practice in Insurance Act 1996 and Takaful Act 1984.

**Table 02.** Differences nomination practice in Insurance Act 1996 and Takaful Act 1984

<b>Insurance Act 1996</b>	<b>Takaful Act 1984</b>
Section 167. (1) "A nominee, other than a nominee under subsection 166 (1), shall receive the policy moneys payable to the nominee on the death of the policy owner as an executor and not under solely as a beneficiary and any payment to the nominee shall form part of the estate of the deceased policy owner and be subject to his debts and the licensed insurer shall be discharged from liability in respect of the policy moneys paid."	Section 65. (1) "When a participant, in relation to any family solidarity certificate or solidarity certificates, dies and on his death takaful benefits are payable under the certificate or certificates, the operator may make payment to a proper claimant such sum of the solidarity moneys as may be prescribed without the production of any probate or letters of administration and the operator shall be discharged from all liability in respect of the sum paid."
Section 167. (2) "Subsection (1) applies to a nominee of a Muslim policy owner who, on receipt of the policy moneys, shall distribute the policy moneys in accordance to the Islamic law."	

Based on this act, it is clear that insurance compensation for Muslim must be allocated according to the Islamic law (*faraid*). However, for takaful benefit, the payment will be made to 'proper claimant' without any explanation regarding to benefit distribution. For the current act, it is clear that nominee is

only an executor. In addition, for Takaful policies, the nominee can be a sole beneficiary if the takaful participant choose conditional hibah in the nomination form (Jamal Elatrash & Soualhi, 2016; Kamarudin & Alma'amun, 2013; Mohammad Shapien & Markom, 2018; Othman, Mohamed Said, Muda, & Nor Muhamad, 2017). This matters are stated in Section 130(6) Financial Services Act 2013 and Section 130 (3) Islamic Financial Services Act 2013. As summary, Table 03 illustrates differences nomination practice in Financial Services Act 2013 and Islamic Financial Services Act 2013.

**Table 03.** Differences nomination practice in Financial Services Act 2013 and Islamic Financial Services Act 2013

<b>Financial Services Act 2013</b>	<b>Islamic Financial Services Act 2013</b>
Section 130. 6. (1) "A nominee, other than a nominee under subparagraph 5(1), shall receive the policy moneys payable on the death of the policy owner as an executor and not solely as a beneficiary and any payment to the nominee shall form part of the estate of the deceased policy owner and be subject to his debts and the licensed insurer shall be discharged from liability in respect of the policy moneys paid."	Section 130. 3. (1) "A nominee under subparagraph 2(1) shall receive the takaful benefits payable under a takaful certificate either as an executor or as a beneficiary under a conditional hibah, as the case may be, as stated in the nomination form by the takaful participant."

In Re Ismail bin Rentah [1940] MLJ 77, the court has decided that the shares and profit of cooperative company which were handed over to the nominee after the death of shareholder as inheritance estate. However, in Re Man bin Minhat [1965] 2 MLJ 1 and Re Bahadun bin Haji Hassan [1974] 1MLJ 4, the court decided otherwise in which nominated property was absolute property of the nominees and not as inheritance estate. Based on these two cases, the court recognized hibah for insurance compensation after the death of insurance policyholder (*Al-Qabd* (possession) occurred after the death of donors). However, these cases have been criticized that the judges should pay attention to Section 25, Civil Law Act 1956 which clearly stated the application nomination for Muslim shall be subjected to the Islamic law. Based on that section, there is no part in that law which will affect the Islamic law of inheritance estate distribution (Buang, 2006).

The position for insurance premium and takaful contribution is similar to the nominee for EPF where the EPF nominee should act as an executor who is accountable to allocate the fund to *faraid* legal heirs. However, there is no specific provision in the Employee Provident Fund Act 1991 and it is only stated in internal rules. Consequently, for any nominees who do not perform their responsible as an executor, there is no legal action that can be taken. Likewise, it is similar for nominees position at Tabung Haji saving account which rely on Tabung Haji Rules. The difference is that Tabung Haji only permits the legal heirs of the account holders as nominee. If the appointed nominee is not from legal heirs, the nomination is void.

#### **6.4. The Importance of Nomination in Estate Management**

The issue of unclaimed estate is a result of delay in claiming the estate. There are a lot of abandoned lands that are not managed well either in rural or urban areas. These idle lands without any owners will result in an unpleasant environment, criminal activities and hindrance for area development.

At the same time, it will lead to the trouble of gaining financial support from official agencies for cultivation activities (Mohd Shafiai & Moi, 2015). The problem is getting worse due to the lack of responsiveness among the society towards the prominence of estate planning and assumption that *faraid* is the only method of distribution (Kamarudin, Ibrahim, Ahmad, Abdullah, & Mohamad, 2016). Therefore, individual estate planning is a crucial to address this problem.

Nomination is one of the wealth management planning which is fast and less costly. Each fund in any financial institutions, will become inheritance estate after the death of depositors. Hence, the depositor should nominate an individual or more as nominees for the nominated fund. Nominee is responsible to claim the fund from the financial institutions and can do transaction. The mean of transaction is the nominee must distribute the fund to legal heirs and does not take it as sole beneficiary. The nominees can also receive that fund if they are part the legal heirs (Hassan & Abdul Rashid, 2019).

By the nomination, the process of claiming inheritance estate is not necessarily through probate and administrative process. In other words, the inheritance estate is no longer claimed through Small Estate Division Unit, Amanah Raya Berhad or Civil High Court as that estate is not bound by the Small Estate (Division) Act 1955 or Probate and Administration Act 1959. This will reduce the management cost and time for inheritance management.

However, there exists a significant problem in the status of nominee whether as an absolute owner or an administrator based on the Islamic law. Some Muslims confuse with the function of nomination because of their lack of knowledge and assume that nomination is similar to other estate planning instruments such as *hibah* (inter vivos), *hadiah* (gift) and *wasiyyah* (bequest). There is also a possibility that the contributor appoint the unqualified nominees who is dishonest and unjust. The nominee does not distribute the nominated property to the legal heirs or conceal the information pertaining to that property. Therefore, Kamarudin, Abdullah, & Mohamad, (2015) recommended that the nominee should be an individual who is capable and has mutual consent to manage the trust. It will ensure that the legal heirs obtain their right.

## 7. Conclusion

There exist a variety of instruments that can be applied to plan and manage the estate upon the death of the owner. However, nomination instrument is seen as an easier way for a person in managing their estate, particularly for saving and investment account which have specific laws and regulations. Although the nomination practice involves many parties to deal with, it is the most practical estate management. Moreover, there is no specific requirement for nominees for property which sometimes involved non-Muslims as nominees for the Muslim estate.

Hence, financial institutions which provide nomination service should play proactive roles to promote this practice by launching or having awareness campaigns. These can avoid confusion and misunderstanding among Muslims who assume that nomination and *hibah* are similar. This practice is also able to increase the contributors' trust to implement nomination so that the management of estate can be resolved immediately, the distribution to the legal heirs can be done effectively and the unclaimed estate problems can be avoided.

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