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**ADMINISTRATION OF THE DECEASED'S ESTATES: AN
ANALYSIS TO THE EFFECT OF NOMINATION**

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Abstract

In the administration of estate, the asset related to nomination is governed under the nomination rules set by the different authorities, which gave rise to several nomination effects. Some of these nomination prevents the asset to be distributed to the rests of beneficiaries, other than the nominee. Other nomination effect grants the authority to the nominee as an administrator to that particular asset, without considering the capacity and ability of such nominee in distributing the asset. While the purpose of nomination is to ensure a quick and smooth process in extracting the deceased's asset, the differences in the nomination effect tend to cause confusion, leading to disputes between the nominee and the beneficiaries in claiming the ownership of the estate. This paper discusses the position of the asset under nomination through the analysis of provisions under the Islamic Financial Services Act 2013 in relation to the administration and the distribution of the deceased's estate. The research is conducted through the means of a library-based method which utilises written materials in several sources including journal articles, statutes, textbooks and cases. The finding in this study indicates that the lack of control by the institutions over the nomination process has led to the adverse implication involving the disputes between the parties. It is therefore suggested that the lawmaker needs to amend the nomination rules in order to harmonise the rights of the nominee and the beneficiaries of the deceased's estates respectively.

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Keywords: Administration of Estates, Nomination, Islamic Financial Services Act 2013, Administrator, Takaful, Conditional Hibah.



1. Introduction

Before the implementation of the Islamic Financial Services Act 2013 (IFSA 2013), the lack of specific ruling as to the nomination in *takāful* led to various types of nomination offered by the *takāful* operators. These nomination effects are mostly represented in the form of inheritance asset or *hibah* (gift) as provided by the *takāful* operators. There were no standard rules as to how nomination under *takāful* should be treated since it is separately based according to the practice of the *takāful* operators (Abdullah and Abdul Aziz, 2010). The implementation of the IFSA 2013 which has the effect of repealing several Acts including the Takaful Act 1984, governs the rules under nomination relating to *takāful* benefit and brings significant changes to the practice of nomination by the *takāful* operators (Miskam and Nasrul, 2013).

1.1. Nomination

Accounts with the nomination are treated differently as compared to other inheritance assets as the effect of nomination varies in accordance with the intention of the account holder. The purpose of nomination, among others, is to enable the nominee to claim the proceeds from the account without having to wait for the issuance of letters of representation from the administrative bodies. In this case, statutes relating to inheritance matters such the Wills Act 1959 and Probate and Administration Act 1959 for instance, are not applicable to the assets under nomination especially those assets involving non-Muslims participants since they are not treated as inheritance assets (Ismail, 2009). Unlike other inheritance assets which require letters of representation and other related documents, nomination bypasses such requirement which therefore, significantly saves the beneficiary from incurring additional time and expenses. As convenient as it sounds, the irony lies within the nomination effect itself as it tends to be a subject of dispute among the family members which occur after the death of the account holder. Misconception as to the position of the nominee, for example, is one of the possible factors which led to arguments between the beneficiaries.

In practice, the nomination is only effective when a person has been named as a nominee by the policy owner or the account holder. In other words, the nomination is optional as it only takes effect upon the fulfilment of nomination requirement imposed by the institution. Nominated asset will be subjected to the nomination rules (Abu Bakar, Zahid & Markom, 2015). The absence of nomination will render the asset to be in a similar position with other inheritance assets, whereby the letters of representation will be required for the extraction of these assets. This rule applies to all types of nomination irrespective of the different type of accounts by various institutions.

The status of nomination remains as long as no change is made to the list of the nominee or until the nominee predeceases the policy owner or the account holder (Abu Bakar, Zahid & Markom, 2014). Among the issue under nomination is the inconsistent effect as to how the asset should be treated. In other words, there is uncertainty as to whether the nomination asset should be addressed as inheritance asset or such asset belongs entirely to the nominee. This is due to the different effect of the nominated asset, causing difficulty in estate administration and leading to misunderstanding to the beneficiaries as to whether they are entitled to such asset.

It should be noted that nomination rules differ between Muslim and non-Muslim subjects. Since this study focuses on the nomination under the IFSA 2013, the central discussion covers the nomination involving Muslim participants in relation to the *takāful* benefit.

1.2.Nomination under the Islamic Financial Services Act 2013 (IFSA 2013)

Under the IFSA 2013, the provision regarding the status of *takāful* benefit under nomination is provided by Section 146 and Schedule 10 of the Act. Under this provision, the nomination of *takāful* is available in two forms. The first form is, the nominee receives the *takāful* benefits in his capacity as an administrator. In this case, the *takāful* benefit would be treated as inheritance asset and the nominee is responsible to distribute the *takāful* benefit to the beneficiaries in accordance with the rule of *fara'id* (Noor & Abdullah, 2008). The proceeds from the *takāful* benefit do not solely belong to the nominee as he is only entitled to a secured portion of such proceeds in his capacity as the beneficiaries under *fara'id* (Elatrash & Soualhi, 2016). From one point of view, nomination under this context is considered beneficial to the beneficiaries in relation to the administration of the estate as no letters of representation is needed since such asset falls under the nomination rule, yet the distribution is made in accordance to the inheritance rule. The appointment of the nominee as the administrator can safeguard a fair distribution of asset in line with the rules of inheritance, including *fara'id* and distribution under mutual consent. This goes in line with the very principle of the *takāful* itself which serves as a risk reduction instrument in Islamic financial and wealth planning (Alma'amun & Kamarudin, 2014). Nevertheless, the nominee is expected to be honest in distributing the asset as to avoid any unwanted case of keeping the asset for himself. This problem may happen if the nominee failed to understand his role as the administrator where such ignorant could lead to disputes among beneficiaries.

The second form of nomination is where the nomination is to be treated as conditional *hibah*. This nomination is quite new in the current practice in comparison to the first form, although certain *takāful* provider has introduced the similar concept previously. Literally, the nominee in this situation will receive the proceeds as a gift from the deceased upon his death. In other words, he receives the proceeds without having to distribute it to others. Such effect is relatively similar to the nomination of non-Muslim cases under EPF account where the nominee is entitled to the whole sum of the asset.

Under this position, the *takāful* benefit is not subject to the inheritance distribution, hence disregards the issue of whether the deceased died testate or intestate as these two determine how the asset are to be distributed. In other words, the *takāful* benefit shall be received solely by the nominee as gift by the *takāful* holder. However, unlike any other normal gift, the concept of *hibah* in this case, is conditional upon certain pre-determined rules such as the gift will only take effect after the death of the deceased. Also, the gift itself is not absolute as it can be revoked by the *takāful* holder at any time during his lifetime.

In relation to the effect of nomination, it should be understood that IFSA 2013 is empowered to overrule another ruling which was previously enforced in relation to the *takāful* benefit. This is stated in Paragraph 13(2) of the Tenth Schedule which states:

“This schedule shall have full force and effect notwithstanding any inconsistent with or contrary to any other written law relating to probate, administration, distribution or disposition of the estates of deceased persons, or in any practice or custom in relation to these matters.”

The above provision is considered as a prevailing section which supersedes all other regulations and previous practices in relation to the nomination of *takāful* benefit. This means that upon the enforcement of IFSA 2013, the effect of nomination in *takāful* shall only be restricted to these two options. Therefore, other practices by the *takāful* operators which are inconsistent with this ruling are no longer applicable. It is now under the discretion of the *takāful* participant either to treat the nominee as an administrator or as a recipient under the conditional *hibah*.

2. Problem Statement

The implementation of the provision in relation to nomination under the Islamic Financial Services Act 2013 gives rise to a different position of the *takāful* benefit. The option given to the *takāful* participant in treating the nomination either as inheritance asset or as conditional *hibah* leads to confusion as to the differences in the nomination effects. The existence of several types of nomination under IFSA 2013, as well as nomination from other statutes, tends to cause confusion and misconceptions to the people regarding how asset with nomination should be treated. Difficulties arise out of these misconceptions, for example when the nomination is treated as conditional *hibah* where the beneficiaries may think that they have been deprived of their rights over the deceased's asset. This situation leads to dissatisfaction among the beneficiaries and could result in disputes among the family members.

3. Research Questions

1. What are the types of nomination available under the Islamic Financial Services Act 2013?
2. How does the nomination under Islamic Financial Services Act 2013 affect the rights of the beneficiaries under the administration of estates?

4. Purpose of the Study

This paper seeks to analyze the provision in relation to the nomination under the IFSA 2013. Each variety of nomination is examined to determine its effect to both the nominee and the other recipient, if any. This paper also compares between the nomination under the IFSA 2013 and nomination from other statutes, namely the Financial Services Act 2013 and the Employees Provident Fund Act 1991 in determining the similarities and the differences between each type of nomination.

5. Research Methods

This study applies a qualitative research methodology in examining the status of nomination under the Islamic Financial Services Act 2013. In relation to this, the author adopts a library-based research through a reference on various primary and secondary sources. These sources include statutes, past theses,

journal articles, textbooks, case law and others. As for statutes for example, analysis of several main statutes relevant to the nomination including but not limited to Islamic Financial Services Act 2013, Financial Services Act 2013 and Employees Provident Fund Act 1991 is made. In addition, a brief comparison between the three different statutes is explained in this paper.

5.1. Overview of Nomination under the Financial Services Act 2013 (FSA 2013)

To elaborate on the point, nomination under the Financial Services Act 2013 (FSA 2013) and Employees Provident Fund (EPF) account will be made as an example and comparison to IFSA 2013. In relation to insurance, the current nomination under the life insurance and personal accident policy are governed by the FSA 2013. The details on the nomination are provided by Section 130 cross-refer to Schedule 10 of the Act. Unlike Islamic Financial Services Act, the effect of nomination in FSA 2013 can be divided into three options, depending on the parties who are named as nominees. In the first option, the nomination shall be treated as a trust to three categories of persons namely the spouse, child and the parents of the policy owner. For instance, if the policy owner named his child as the nominee, the policy money shall then be given to the wife as a trust. In this situation, a competent trustee will be in charge of managing the trust to ensure that the children will get the trust benefit according to the determined period. This goes in line with the concept of insurable interest under the common law where the insured's immediate family members are assumed to have insurable interest over the life of the insured.

As the policy money takes in form of a trust, the nominee who is the recipient shall enjoy the proceeds in accordance with the trust rules. In this case, the policy money is not treated as an inheritance estate and therefore not subject to distribution to other beneficiaries. In addition, the money received is not subject to any of the deceased's liabilities. This means that the policy money cannot be used to settle any liabilities owned by the deceased as trust is a different subject altogether. From a positive point of view, this nomination provides a sort of security to the trust receiver as the trust money will not be treated as a debt settlement instrument, unlike other types of the inheritance estates. In practice, the trust proceeds will be channelled to the beneficiary periodically for a specified period determined by the trustee and not in a lump sum. This is to ensure that the welfare of the beneficiary is secured until the exhaustion of the trust fund. On a negative side, allowing the policy owner to choose any of the three means that, the other two persons might be left out, contrary to the inheritance rules where the deceased's spouse and children are given priority which can be seen in Section 6 of the Distribution Act 1958. The creation of a trust under nomination, however, only applicable to the parties who are non-Muslims.

The second option of the nomination treats the nominee as the administrator of the policy money. Similar to the option provided under IFSA 2013, the nominee, in this case, acts as an administrator for the policy money whose duty is to distribute the money in accordance with the inheritance distribution rule. The practice is similar to EPF and nomination under the first option in IFSA 2013, except that this option applies to non-Muslims as well. In other words, the policy money will be distributed according to whether the deceased died testate or intestate which are governed by the Wills Act 1959 and Distribution Act 1958 respectively. Contrary to the first option, the policy money is considered as the deceased's estate, which is similar to the other type of inheritance estate.

The third option bears similarity with EPF account in relation to the non-Muslim whereby the nominee, other than the parties mentioned in the first clause, receives the money as the sole recipient without having to distribute it to others. This option is inter-related to the second choice where the policy owner is authorised to decide whether to treat the nomination as a second or a third option. In any case, the insurer must notify in the nomination form the status of nomination as decided by the policy owner. Again, these three forms of nomination shall only takes effect if there is nomination made by the policy owner.

5.2.Overview of Nomination under the Employees Provident Fund Act 1991

Disputes among the Muslim subjects are mainly due to the unclear status of the nomination and nominee. The position of the nominee, however, is clear in cases involving the non-Muslims as the law provides that the nominee shall be the exclusive recipient of the deceased's nominated account. The effect of nomination in this context is that the nominee is considered as the sole recipient of the account. For instance, if the deceased's mother was named as the only nominee, nomination entitles her as the owner of the proceeds from the account, even if there are other beneficiaries. This is because nomination asset is not subject to inheritance distribution should there be a valid nomination made.

The position of nomination in EPF account for Muslim nominees, however, is different. Under the rule set by EPF, a nominee is regarded as a recipient of the asset in the capacity of an administrator for that account. Upon obtaining the said money, he must then distribute it to other beneficiaries under *fara'id* or upon mutual consent, subject to the agreement by other beneficiaries. The same position has been issued in Fatwa made by the National *Fatwa* Committee in 1973. The ruling states that upon the obtainment of the account money, the distribution should then be made according to the inheritance distribution as EPF account is considered as inheritance asset and this justifies as a reason why the nominee receives the money in his capacity as an administrator. Thus, the method of distribution of the nomination account is treated in accordance to the inheritance rules.

The position of the nominee is regarded as similar to the personal representative of the deceased's estate which is to distribute the money to other beneficiaries based on the entitled portion. However, he is only accountable to the EPF account, not other assets. Therefore, both the nominee and the personal representative of the deceased' estate must understand the limitations of their roles. It is important to note that the role of the nominee and the personal representative appointed by the administrative bodies should not overlap with each other. Although both share the same task, the scope of the nominee in distributing the money is only restricted to the EPF proceeds. In this situation, the personal representative needs to ensure that the nominee is distributing the money accordingly.

6. Findings

The varieties of the nomination status as to the *takāful* and insurance has been standardized with the enforcement of the Islamic Financial Services Act 2013 and Financial Services Act 2013. However, there is an inconsistency between the two, namely in relation to the nomination. Nomination as regards the nominee being the administrator who needs to distribute the asset in accordance with the rule of

fara'id holds a clear position where the *takāful* benefit is treated as inheritance asset (Abdullah, Arifin, Omar & Napiyah, 2012). On the other hand, nomination in the form of conditional *hibah* denotes an unclear position as to *takāful* benefit. This is due to the position of the conditional *hibah* itself which the scholars and academics still have some reservation towards the validity of such instrument. According to Ahmad and Tamkin Borhan (2017), the conditional *hibah* resembles that of a *wassiyah* (will) since both instruments take effect after the death of the owner, or in this case, the *takāful* holder. Therefore, the rules pertaining to *wassiyah*, including the one-third rule apply in this matter. This position allows the other beneficiaries to challenge the distribution of the asset being made solely to the nominee. Overall, this may complicate the matter as both parties are in disagreement between each other. It is feared that the inconsistency will cause misunderstanding among the beneficiaries, especially for Muslim parties in relation to the effect of nomination under *takāful*. Such inconsistency could lead to disputes among the parties due to the misunderstanding on the true effect of the nomination and as to whether they are entitled to the asset or otherwise.

Moreover, a misconception among the public can still occur as there are other types of asset which are also subject to nomination such as bank account, trust fund, pilgrimage fund, and others, and each of these accounts differ as to its nomination effect (Kamarudin, Abdullah & Muhamad, 2015). A thorough understanding among the beneficiaries is deemed important to prevent any unwanted disputes which likely to happen due to the misconception regarding the status of nomination.

7. Conclusion

This study has reviewed the provisions of the Islamic Financial Services Act 2013 in relation to nomination. The purpose of this study is to analyze the two different nomination forms as stated in the Act. With the introduction of the Islamic Financial Services Act 2013, the various types of nomination offered by the previous *takāful* provider have been reduced to two, where the *takāful* benefit is treated as inheritance asset or conditional *hibah*. This is part of the effort of the policy maker in standardizing the various practice by *takāful* operators in relation to the nomination, in line with its aim of improving the Syariah compliance products in Malaysia. It is found that despite the existence of clear ruling pertaining nomination under the Islamic Financial Services Act 2013, such nomination could lead to conflict between the nominee and beneficiaries due to the inconsistencies between the two nomination types. The option to treat the *takāful* benefit as conditional *hibah* may cause dissatisfaction among the beneficiaries as they are not entitled to the asset except for the nominee. Also, the status of conditional *hibah* is still subject to criticism and debate among the scholars and academic, rendering the status of such product unviable. Further improvement on the current ruling is essential to ensure that the *takāful* product. It is suggested that the lawmaker needs to improve the overall nomination rules in order to harmonize the rights of the nominee and the beneficiaries of the deceased's estates respectively. As for the IFSA 2013, the provision pertaining to the position of condition *hibah* should be revisited as re-evaluated as to its status and validity. As for other types of nomination, the uniformity of the nomination effect will reduce the misconceptions of the public regarding the various nomination effects.

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