

THE INSURANCE ACT 1996: RIGHTS OF THE NOMINEES OF A MUSLIM POLICY OWNER AND A NON-MUSLIM POLICY OWNER

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Introduction

The court in *Re William Phillips' Insurance*¹ held that in general, the moneys payable on a policy effected by a person on his own life belongs to him. The policy owner may deal with the policy and its proceeds in accordance with the policy. He may dispose the policy moneys by will. He may direct the insurer to remit the policy moneys to a named or identified third party upon his death. This is generally known as a nomination and it may be effected by the policy owner either at the time or after the policy is incepted. Just like a will, the nomination takes effect only upon the policy owner's death. The owner of a policy on the life of another person has similar rights. The policy owner may nominate a third party to receive the policy moneys when the insured event happens.²

In most instances, the policy owner intends the nominee to receive the policy moneys as a beneficiary, and it is the perception of the general public that the nominee is legally and beneficially entitled to the said moneys. However, this perception is not always correct. At common law, if the insurer fails to pay the nominee, the nominee has no recourse against the insurer.³ This is due to the application of the doctrine of privity.

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1 (1883) LR 23 Ch 235, at 247.

According to the doctrine of privity, a person who is not a party to a contract cannot sue on the contract. He also cannot be sued on the contract. The Privy Council in *Kepong Prospecting Ltd and Ors v Schmidt*⁴ had affirmed the application of the doctrine in Malaysia, and the Federal Court in *Capital Insurance Bhd v Cheong Heng Loong Goldsmith (KL) Sdn Bhd*⁵ had held that the doctrine applies to an insurance contract. Thus, unless one of the exceptions to the doctrine applies, a third party to a contract cannot enforce the contract even if the contract was made for his benefit. Fortunately, the Insurance Act 1996 (Act 553) confers enforceable rights on the nominee of the policy moneys payable on the death of the policy owner. The nominee has the right to give a good discharge to the insurer, and it thus follows that the nominee can sue the insurer if the insurer fails to remit the policy moneys to him within the time prescribed by the Act.

In this paper, the writer will discuss whether the nominee is entitled to receive the policy moneys as a beneficiary or as an executor of the policy owner's estate. The discussion will be carried out in two parts, namely, the nominee's status at common law and the nominee's status under the Insurance Act 1996.

Position of a Nominee at Common Law

At common law, a major concern is whether the nominee is entitled to receive the policy moneys payable on the death of the

2 *Re Engelbach's Estate* [1924] 2 Ch 348.

3 *Ibid.*, at 353.

4 [1968] 1 MLJ 170.

5 [2005] 6 MLJ 593.

policy owner, as a beneficiary or merely as a representative of the policy owner's estate. As opined by Raja Musa AJ in *Re Ismail bin Rentah*,⁶ nominating a person to receive a fund does not necessarily mean that that person is to receive the funds beneficially. Much depends on the circumstances of the case.

Needless to say, the position of the nominee as a beneficiary is clear where the nominee was also named by the policy owner in his will as the beneficiary of the policy moneys. In this situation, it is immaterial that the 'nomination' did not comply with the procedure prescribed in the policy. However, where the nomination complied with the terms of the policy, but not the requirements of a valid will, the nominee's entitlement is uncertain. The authorities are conflicting. Fortunately, the trend is moving towards giving effect to the intention of the policy owner. The nominee is to receive the policy moneys as a beneficiary if that was the intention of the policy owner.

In *Re Policy No 6402 of the Scottish Equitable Life Assurance Society*,⁷ Mr Sanderson effected a policy on his life "for behoof of Miss Harriott Stiles", and provided in the policy that Miss Stiles and her legal representatives would be entitled to receive the policy moneys payable on Mr Sanderson's death. Miss Stiles died in 1870 and Mr Sanderson died in 1900. The issue before the court was whether Miss Stiles' estate was entitled to the policy moneys. The court held that the legal representative of Miss Stiles "would be the person entitled to receive the moneys at law and to give a receipt for it, in equity the money belonged to the legal representatives of Mr Sanderson, who took out the policy".⁸

6 (1940) 9 MLJ 98, at 100.

7 [1902] 1 Ch 282.

8 *Ibid*, at 287.

In *Re Burgess's Policy*,⁹ a mother effected a policy "for the benefit of her children". The issue before the court was whether the policy moneys belonged to the mother's estate or her children. The court held that since no interest passed to the children by reason merely of them being mentioned in the policy, the moneys should be released to the mother's legal representatives. The nominees were not entitled to the moneys.

In *Re Engelbach's Estate*,¹⁰ a father effected an endowment policy on his daughter's life for her benefit. He nominated her to receive the policy moneys. Despite the policy owner's clear intention to benefit his daughter,¹¹ the court ordered the insurer to pay the moneys to the father's personal representatives. The moneys belonged to the father's estate.

In *Re Sinclair's Life Policy*,¹² the policy owner effected a policy and named his godson as the nominee. The policy was deposited with the godson's father. Farwell J, who had no doubts that the policy owner intended to benefit his godson,¹³ held that the godson was not the beneficiary of the moneys. The learned judge ordered the moneys be remitted to the executors of the policy owner's estate. Farwell J also commented that if the godson had received the policy moneys, he would hold it as a constructive trustee for his godfather's estate.¹⁴

9 [1916] 85 LJ Ch 273.

10 *Supra*, note 2.

11 *Ibid.*, at 355-356.

12 [1938] Ch 799.

13 *Ibid.*, at 802.

14 *Ibid.*, at 805.

These four decisions are contrasted with that of *Re Schebsman*,¹⁵ where the husband nominated his wife to receive the compensation in the event of his death. The English Court of Appeal held that the husband's intention was that his wife should receive the moneys as a beneficiary and therefore she could retain and enjoy the moneys. As per *du Parc* LJ:¹⁶

"It is open to (the) parties to agree that, for a consideration supplied by one of them, the other will make payments to a third person for the use and benefit of that third person and not for the use and benefit of the contracting party who provides the consideration. Whether or not such an agreement has been made in a given case is clearly a question of construction, but, assuming that the parties have manifested their intention so to agree, it cannot, I think be doubted that the common law would regard such an agreement as valid and as enforceable (in the sense of giving a cause of action for damages for its breach to the other party to the contract), and would regard the breach of it as an unlawful act....

I now turn to the agreement in the present case to seek in the document itself the answer to the question whether the parties intended that, after the debtor's death, the company should be under an obligation to make payments to Mrs. Schebsman for her own benefit, and the debtor's personal representatives should be under a corresponding obligation to accept payment to Mrs. Schebsman for her own benefit as a fulfillment of the contract. It seems to me to be plain

15 [1944] 1 Ch 83.

16 *Ibid.*, at 101-103.

on the face of the contract that this was the intention of the parties.”

These are conflicting authorities. It is submitted that the results in *Re Sinclair's Life Policy* and *Re Engelbach's Estate* were unjust. They would not have happened had the courts given effect to the clear intentions of the policy owners to benefit their respective nominees. In connection with this, reference should be made to the views expressed by Lord Reid and Lord Upjohn in *Beswick v Beswick*¹⁷ that *Re Schebsman* was rightly decided. If the policy moneys were released to the nominee whom the policy owner intended to benefit, then the nominee should be allowed to retain them for his benefit.

In Malaysia, the High Court in *Manonmani v Great Eastern Life Assurance Co Ltd*¹⁸ did not follow the English courts' decisions in *Re Engelbach's Estate* and *Re Sinclair's Life Policy*. In *Manonmani*, the mother filed an application in the High Court for the determination of, among others, the question whether she was the sole beneficiary of all moneys payable under a whole life policy and if so, an order that the moneys be paid to her. Eusoff Chin J looked at the circumstances of the case. The deceased effected two policies on his life after his marriage. In one policy, he named his mother as the beneficiary, and in the other policy, he named his wife and child as the beneficiaries. These clearly showed that the deceased effected the first policy to benefit his mother.¹⁹ The deceased policy owner could have revoked the mother's appointment as the sole beneficiary under the policy but he did not do so. Thus, her interest in the policy was still subsisting when the policy owner died. The

17 [1968] AC 58, at 71 and 96.

18 [1991] 1 MLJ 364.

19 *Ibid.*, at 369.

learned judge gave effect to the deceased's clear intention and held that the mother was the sole beneficiary of the policy moneys.

It is submitted that *Manonmani* was rightly decided. The nominee should be entitled to receive the moneys as a beneficiary if that was the intention of the contracting parties. The court should fulfill and not hinder the policy owner's intention just as in all other general contracts.²⁰

In fact, this is the present position in the United Kingdom if the nomination is subjected to the Contracts (Rights of Third Parties) Act 1999 (UK).²¹ The Act confers on a third party the right to enforce a contractual term if the contract provides that he may do so²² or the term purports to confer an enforceable benefit on him.²³ It follows that if the policy owner and insurer intend to benefit the nominee, then the nominee should receive the policy moneys as a beneficiary, and not as an executor. This is also the position in Singapore, for Singapore has also enacted the Contracts (Rights of Third Parties) Act 2002. The Singapore Act is based substantially on the United Kingdom's 1999 Act. Thus, the rights of a nominee in the United Kingdom or Singapore are strengthened with the enactment of the said statutes. A nominee has the rights to sue the insurer for the policy moneys and retain the moneys as a beneficiary if such were the intention of the policy owner and the insurer.

20 Beale, H.G. (et al.) (Ed), *Chitty on Contracts*, (29th ed., 2004), Sweet & Maxwell, London, at para. 12.72

21 The nominee can enforce the benefit conferred on him. See Beatson, J., *Anson's Law of Contract* (28th ed., 2002), Oxford University Press, Oxford, at 445 and the illustration in para. 7-34 of the English Law Commission Report No. 242, *Privity of Contract: Contracts for the Benefit of Third Parties*, (1996), on which the Contracts (Rights of Third Parties) Act 1999 (UK) was based.

22 Section 1(1)(a) of the Contract (Rights of Third Parties) Act 1999 (UK).

23 Section 1(1)(b) together with s.1(2) of the Contracts (Rights of Third Parties) Act 1999 (UK).

Rights of a Nominee under the Insurance Act 1996

In Malaysia, the Insurance Act 1996 came into effect on 1 January 1997.²⁴ There are provisions in the Act which prescribe the procedure for the nomination of moneys of a life policy and a personal accident policy effected by a person on his own life providing for payment of policy moneys on his death,²⁵ and the rights of the nominee. They are found in Part XIII of the Act. Section 172 provides that:

“(1) This Part shall have effect in relation to a policy which is in force on or after the effective date, and in relation to a nomination made before, on or after the effective date, notwithstanding anything contained in the policy, and nothing contained in a policy shall derogate from, or be construed as derogating in any manner or to any extent from, this Part.

(2) This Part shall have full force and effect notwithstanding anything inconsistent with or contrary to any written law relating to probate, administration, distribution, or disposition, of the estates of deceased persons, or in any rule of law, practice or custom in relation to these matters.”

Since Part XIII governs all nominations of policy moneys made before, on and after the Act came into force, it follows that the rights of a nominee of the policy moneys payable on the death of the policy owner are governed by the Act with effect from 1 January 1997.

24 PU(B) 580/1996.

25 Section 162 of the Insurance Act 1996.

In this Part of this paper, the writer will discuss the position of the nominee of a non-Muslim policy owner and the position of the nominee of a Muslim policy owner. It will be shown that if the policy owner dies a Muslim, the role of the nominee may be different in view of the Islamic law pertaining to insurance and the Islamic law of succession.

Rights of a Nominee of a Non-Muslim Policy Owner

The rights of a nominee of a non-Muslim policy owner towards the policy moneys are prescribed in s.167(1) of the Insurance Act 1996. The provision reads:

“A nominee, other than a nominee under subsection 166(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”.

The section clearly provides that the nominee who claims for the policy moneys upon the policy owner's death, shall receive them as an executor. At no time is the policy or its moneys beneficially vested in the nominee.²⁶ The moneys form part of the deceased policy owner's estate. As the nominee is merely an executor of the policy moneys, he has to settle the deceased policy owner's debts with the moneys before distributing the balance in accordance with the laws of succession applicable to the deceased. The only exception is where s.166(1) of the Insurance Act 1996 applies to the nomination.

26 Unless he is entitled to it under the laws of succession applicable to the deceased policy owner.

Section 166(1) of the Insurance Act 1996 provides that a trust is created when a non-Muslim policy owner nominates his spouse or child, or his parent when he has no spouse or child living at the time of nomination, to receive the policy moneys payable upon his death.²⁷ The said nominee will enjoy the rights stipulated in s.166, instead of the rights of an ordinary nominee under s.167 of the Insurance Act 1996. For ease of reference, s.166(1) is reproduced below:

“A nomination by a policy owner, other than a Muslim policy owner, shall create a trust in favour of the nominee of the policy moneys payable upon the death of the policy owner, if-

- (a) the nominee is his spouse or child; or
- (b) where there is no spouse or child living at the time of nomination, the nominee is his parent”.

Thus, where first, the policy owner is a non-Muslim; and secondly, the nominee is the policy owner’s spouse or child, or his parent who is nominated when he does not have a spouse or child living, a trust under s.166 is created in favour of the nominee. The trust takes effect under s.166 and the nominee receives the policy moneys as a beneficiary. The discussion that follows is on the rights of a nominee who is not a nominee under s.166(1). Section 167(1) of the Insurance Act 1996 provides that the “insurer shall be discharged from liability in respect of the policy moneys paid” to the nominee. Therefore, if the insurer fails to remit the moneys to the nominee, the nominee has recourse against the insurer. This is a statutory exception to the doctrine of privity. However, s.167(1)

27 What distinguishes an ordinary nomination from a trust under s.166 is the relationship between the policy owner and his nominee.

does not provide that the nominee receives the policy moneys as a beneficiary. Instead, it provides that the nominee receives the policy moneys as an executor.

One important issue is whether a policy owner can circumvent the effect of s.167 by expressly providing that the nominee is to receive the policy moneys as a beneficiary. It is submitted that he cannot do so in view of s.172(1) of the Insurance Act 1996. Section 172(1) expressly provides that nothing in the policy shall derogate from Part XIII of the Act and s.167 is in this Part. It is immaterial that the policy or the nomination was effected before the Act came into force. Thus, the principle in *Re Schebsman*²⁸ and *Manonmani v Great Eastern Life Assurance Co Ltd*²⁹ that the nominee shall be entitled to receive the policy moneys as a beneficiary if that was the intention of the policy owner, does not apply even where the nomination was effected before the Insurance Act 1996 came into effect.

A policy owner who effected the nomination prior to the Insurance Act 1996 might have intended his nominee to receive the policy moneys for his own benefit. And following the principle in *Re Schebsman* and *Manonmani*, his intention would have been given effect if not for s.172 of the 1996 Act. The nominee would have received the policy moneys as a beneficiary if the policy moneys were payable before 1 January 1997. The effect of s.172(1) causes injustice to such nominee.

Further, a policy owner who effects a nomination after the Insurance Act 1996 came into force on 1 January 1997 may be ignorant of the combined effect of s.167 and s.172 on the nominee's

28 *Supra*, note 15.

29 *Supra*, note 18.

role with regard to the policy moneys. This is despite s.163(3)(a) which requires an insurer to display in the nomination form that the policy owner has to assign the policy moneys if he intends his nominee, other than his spouse or child, or his parent who is nominated when he has no living spouse or child, to receive them as a beneficiary. It is possible for a policy owner to effect the nomination with the intention and hope of benefiting the nominee. Unfortunately, with the abrogation of the principle in *Re Schebsman* and *Manonmani* by s.172, the policy owner's intention will not be given effect.

If the policy owner wishes to benefit his nominee, he has to assign, bequeath or create a trust over the policy moneys in favour of the nominee. Unfortunately, an assignment, unlike a nomination, attracts stamp duty. Further, if the policy owner wishes to bequeath the policy moneys to his nominee, he has to effect a will which complies with the procedure laid down in the Wills Act 1959 (Act 346, Rev. 1988). The requirements of a valid will are more stringent compared to a nomination. With regard to a trust, he has to declare his intention to create a trust clearly and unequivocally in a document separate from the policy. In view of s.172 of the Insurance Act 1996, he cannot declare the trust in the policy itself.

Rights of a nominee of a Muslim policy owner

In this Part, the writer will discuss the rights of a nominee of a Muslim policy owner. It will be shown that his position is much different from the position of the nominee of a non-Muslim policy owner due to first, the status of the life policy under Islamic law; and secondly, s.167(2) of the Insurance Act 1996. These issues are discussed below.

The first and foremost issue is on the status of a policy governed by Part XIII of the Insurance Act 1996 and the moneys payable under the policy under Islamic law. A policy under Part XIII of the Act is defined in s.162 as a life policy and a personal accident policy effected by a policy owner upon his own life providing for payment of policy moneys on his death. It pertains to a conventional insurance policy and it is trite that a conventional insurance policy is *haram* (prohibited). It has the elements of *gharar* (uncertainty), *maisir* (wager) and *riba* (interest). As such, the nominee of a Muslim policy owner should surrender the policy moneys in excess of the premiums paid for the inception and continuance of the policy, to *Baitulmal*.³⁰ In the ensuing discussion, reference to the policy moneys means the total premiums paid for the policy unless where the policy is not *haram*.

The second issue pertains to the status of the nominee, *i.e.* whether he is an executor or beneficiary of the policy moneys. In this connection, s.167(2) of the Insurance Act 1996 expressly provides that the nominee of a Muslim policy owner shall also receive the moneys as an executor and shall distribute them "in accordance with Islamic law". For ease of reference, s.167(2) is reproduced below.

"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 with Islamic law."

Further, s.172(2) provides, *inter alia*, that s.167(2) "shall have full force and effect notwithstanding anything

30 Rafiah Salim, "Part XIII of the Insurance Act 1996: Payment of Policy Moneys under a Life Insurance Policy or Personal Accident Insurance Policy" (1997) 24 *Journal of Malaysian and Comparative Law* 55, at 84.

inconsistent with or contrary to any written law relating to probate, administration, distribution, or disposition, of the estates of deceased persons, or in any rule of law, practice or custom in relation to these matters". However, it is submitted that s.172(2) cannot exclude the application of *fatwas* issued by the various states' religious authorities or state legislations on the law of inheritance applicable to Muslims. This is due to the following reasons.

First, a *fatwa* is a legal ruling issued by a recognized Muslim authority in any unsettled or controversial question of or relating to Islamic law. A *fatwa* is binding and effective against a Muslim domiciled in the state once it is gazetted.³¹ It then forms part of the law applicable to the Muslims domiciled in the state. Since s.167(2) requires the nominee to distribute the policy moneys "in accordance with Islamic law", he should comply with the *fatwa* on the distribution of the moneys.

Secondly, Article 74 of the Federal Constitution provides that:

"(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the

31 Pawancheek Marican, *Islamic Inheritance Laws in Malaysia*, (2004), Malayan Law Journal, Kuala Lumpur, at 150. For a discussion on the procedure for the issuance of *fatwas* in Malaysia, see Zaini Nasohah, 'Pentadbiran Institusi Fatwa di Malaysia dan Negara Brunei Darulssalam', (2003) 2 *Ikim Law Journal* 117.

matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.”

Muslim personal law including that relating to succession and gifts are found in List 2 of the Ninth Schedule to the Federal Constitution. Thus, they are matters which are solely within the jurisdictions of the states' legislatures. Each state's legislature and religious authority have the power to enact laws and issue *fatwas* respectively on these matters to govern the Muslims who domicile in that state. Parliament can legislate on these matters only with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. As the Insurance Act 1996 is a federal legislation, the relevant provisions on matters relating to succession and gifts in the Act should not apply to Muslims who do not domicile in any one of the Federal Territories. Thus, the application of s.172(2) of the Insurance Act 1996 to Muslims who do not domicile in the Federal Territories can be questioned on constitutional grounds.

Therefore, it is important to study the Islamic principles pertaining to nomination. One important issue is whether a nomination effected by a Muslim policy owner has the effect of a valid will. In this connection, it may be useful to stress that a will made by a Muslim is valid if it complies with *Hukum Syara'*. It is not necessary for the will to be in writing. It may be made orally or by gesture in the presence of two persons who are competent to act as witnesses according to Islamic law.

With regard to the issue whether a nomination effected by a Muslim policy owner has the effect of a valid will, reference may be made to the cases of *Re Ismail Rentah*,³² *Re Man bin Mihah, Deceased*³³ and *Re Bahadun bin Haji Hassan, Deceased*.³⁴ In *Re Ismail Rentah*, the deceased was a member of a co-operative society and had nominated his daughter to receive the moneys standing in his account with the society. According to Raja Musa AJ, the nomination was a bequest. However, the bequest was not valid under Islamic law because it was made to an heir and the other heirs did not consent to it.³⁵

Subsequent to *Re Ismail Bin Rentah*, the High Court in *Re Man bin Mihah, Deceased* and *Re Bahadun bin Haji Hassan, Deceased* had to decide on the issue whether a trust under s.23 of the Civil Law Ordinance 1956 was created when a Muslim policy owner nominated his wife to receive the policy moneys which were payable on his death. According to s.23 of the 1956 Ordinance, a trust would be created when a person effected a policy on his life for the benefit of his spouse and children or any of them.

In *Re Man bin Mihah*, Suffian J held that a trust under s.23 was created, and the beneficial interest in the policy belonged to his wife since the policy was effected. The trust was the policy owner's gift to his wife. It was not a testamentary disposition. Thus, the policy moneys should be paid to the wife for her own benefit. In *Re Bahadun bin Haji Hassan*, Abdul Hamid J followed the precedent set by Suffian J in *Re Man bin Mihah*.

32 *Supra*, note 6.

33 [1965] 2 MLJ 1.

34 [1974] 1 MLJ 14.

35 *Supra*, note 6, at 100. The learned judge also said that to nominate a person to receive a fund does not necessarily mean that that person is to receive the funds beneficially.

It must be stressed that the decision in *Re Ismail Bin Rentah* was on the status of a nomination of the moneys deposited with a co-operative society. And the decisions in *Re Man bin Mihat* and *Re Bahadun bin Haji Hassan* pertained to the application of s.23 of the Civil Law Ordinance 1956 to a Muslim. The courts did not discuss the issue whether a nomination by a Muslim policy owner under normal circumstances tantamounts to a bequest.

Since there is no decided case on the issue whether a nomination effected by a Muslim policy owner has the effect of a valid will, reference is made to the *fatwas* issued by the various state religious authorities and the National *Fatwa* Council. There are numerous *fatwas* on the status of a nomination, and it is unfortunate that their effects are not uniform.³⁶ Some of the *fatwas* rule that a nomination is not a bequest. Since the policy moneys are to form part of the residuary estate of the deceased policy owner, the nominee is to divide the moneys according to *faraid*. It is clear then that the nominee is to receive the moneys as an executor. Yet, there are some *fatwas* which rule that the nomination is a bequest in favour of the nominee.³⁷ It is of particular interest that the Malaccan legislature has enacted in s.133A of the Administration of Muslim Law Enactment 1959 (No. 1 of 1959) that even though the nominee of a Muslim policy owner is to distribute the policy moneys payable on the death of the policy owner in accordance with Islamic law, the moneys are "deemed to be a bequest in favour of the nominee by a will duly made by the nominator". For ease of reference, s.133A is reproduced below.

36 According to Zaini Nasohah, 'Pentadbiran Institusi Fatwa di Malaysia dan Negara Brunei Darussalam' (2003) 2 *Ikim Law Journal* 117, at 127-130, there were few *fatwas* issued by the respective Muslim authorities on the same matter which were similar. However, there is a general consensus to streamline the administration of Muslim laws in the various states.

37 Pawancheek, *supra*, note 31, at 160-161.

“Any person nominated to receive monies payable on the death of the nominator under any law, shall receive and hold the monies for the benefit of the estate of the nominator and shall pay the monies to the executor or administrator of the estate of the nominator, as the case may be, and the executor or administrator shall distribute the monies in accordance with Muslim law;

Provided that for the purpose of the distribution of the assets of the nominator in accordance with Muslim law, the monies payable under nomination to the nominee shall be deemed to be a bequest in favour of the nominee by a will duly made by the nominator.”

In the situation where the nomination is deemed a bequest in favour of the nominee, the nominee's rights to the policy moneys depend on certain Islamic principles in the law of succession and the circumstances of the case. The applicable Islamic principles are as follows. First, a Muslim can bequeath only one third of his estate to his non-heirs. Secondly, the deceased Muslim's estate is to be distributed according to *faraid*. An heir's entitlement is fixed. Any bequest exceeding an heir's prescribed entitlement is not valid unless the deceased's other heirs consent to it after his (the testator's) death.³⁸

Therefore, the rights of the nominee with regard to the policy moneys depend on the following. If the nominee is not the deceased policy owner's heir, the nominee is the beneficiary for the whole of the policy moneys if the policy moneys and the deceased policy owner's other testamentary dispositions do not exceed one

38 *Siti bt Yatim v Mohamed Nor bin Bujali* (1928) 6 FMSLR 135; *Amamullah bin Haji Ali Hassan v Hajjah Jamilah* [1975] 1 MLJ 30.

third of his estate after payment of his debts. If the threshold is breached, the nominee will receive only a proportionate part of the policy moneys as a beneficiary and the balance as an executor.³⁹ However, where nominee is the deceased policy owner's heir, the nominee's entitlement to the policy moneys as a beneficiary depends on whether the policy moneys exceed the nominee's entitlement under *faraid*. If they have exceeded, the nominee is not entitled to the excess portion unless the deceased's other heirs have consented to it after the policy owner's death.

Conclusion

At common law, the entitlement of a nominee towards the policy moneys payable upon the death of the policy owner is uncertain. The authorities are conflicting. However, the trend is moving towards giving effect to the intention of the policy owner. The nominee is to receive the policy moneys as a beneficiary if that was the intention of the policy owner.

Under the Insurance Act 1996, the status of the nominee of a non-Muslim policy owner is legislated. Section 167(1) provides that he receives the policy moneys as an executor. The only exception is where the nominee is the policy owner's spouse or child, or his parent who was nominated when he had no living spouse or child. The policy owner cannot circumvent the effect of s.167(1), except through an assignment, a bequest or a trust over the policy moneys in favour of the nominee.

Comparatively, the position of a nominee of a Muslim policy owner is uncertain even though s.167(2) of the Insurance Act 1996 provides that he will distribute the policy moneys in accordance

³⁹ Pawancheek Marican, *supra*, note 31, at 123.

with Islamic law. This is due to the different *fatwas* issued by the respective states' religious authorities with regard to the status of a nomination. This uncertainty is not limited to a nominee of a policy subject to Part XIII of the Insurance Act 1996, which admittedly is *haram*. There is also uncertainty whether the nomination of a *takaful* certificate is a bequest. This uncertainty will persist until the various religious authorities streamline their *fatwas* pertaining to the role and status of a nominee of an insurance policy or a *takaful* certificate. The states' legislatures should also enact legislations which are *pari materia* on the same matter. As was discussed above, it is insufficient for Parliament to enact new laws or amend existing ones to regulate the position of a nominee, for such laws do not apply to Muslims who domicile in states other than the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.