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LEGAL ISSUES CONCERNING INSURABLE INTEREST AND PERMISSIBLE TAKAFUL INTEREST AT THE TIME OF DEATH UNDER CONVENTIONAL AND FAMILY TAKAFUL CONTRACTS

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ABSTRACT

The aim of this article is to examine the legal issues concerning insurable interest and permissible takaful interest at the time of death under both life assurance and family takaful. The analysis reveals the current Malaysian statutory approach of requiring insurable interest only at the time of the inception of the contract is similar to English law. This may lead to undesirable consequences as people will explore the possibilities of tampering with these loopholes to make illegal gain for self -benefit. Unfortunately, the study shows that there are unresolved issues when the permissible takaful interest lost in the midst of the takaful contract. This article adopts the legal analysis approach as its methodology. It is recommended that there should not be additional requirements for insurable interest in life assurance at the time of death of the life assured as it may make it more difficult for the beneficiaries to receive the benefits under the contract of life assurance and may not deter the intention to commit murder. As for the family takaful, compulsory nomination procedure with direct payment to a nominee who is a trustee should be inserted into the legislation to ensure the well–being of the trustee are protected.

Keywords: Life assurance; Family takaful; Permissible takaful interest; Takaful benefits; Nominee.

1. INTRODUCTION

The life assurance is a contract with element of chance and uncertainty or in other words an aleatory contract. Under English law, insurable interest for life assurance is only required to exist during inception of the policies and not upon death or maturity of policies. This may lead to undesirable consequences as people will then explore the possibilities of tampering with these loopholes or vacuum in law to make illegal gains for self-benefit. This prompted an English author, (Mortimer, 1801) who wrote that:

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> ‘Another manner of spending the vacation formerly was, in insuring on the lives of such unfortunate gentleman, as might happen to stand accountable to their country for misconduct. I am not willing to disturb the ashes of the dead, or I could give an instance of this cruel pastime, the parallel of which is not to be met within the history of any civilised nation: but I hope we shall hear no more of such detestable gaming…

Similar views are held by commentators who consider it as a wager against public policy and of immoral tendency. The element of insurable interest is introduced in order to eliminate the wagering element in life assurance. This article will review the controversies surrounding the position of insurable interest at the time of death for life assurance and family takaful contracts under various perspectives as developed under English and Malaysian laws including Shariah laws. The analysis revolves around how the laws address the issue in light of possible abuses following the lacuna since there is no certainty a relationship that is built on love would last. Apart from that, there are also inconsistencies in the concept and its application especially under family takaful contracts.

2. THE GENESIS OF THE POSITION OF INSURABLE INTEREST IN LIFE ASSURANCE UNDER ENGLISH LAW

Section 1 of the Life Assurance Act 1774, (UK 1774 Act) provides that any policy of assurance without insurable interest shall be ‘null and void to all intents and purposes whatsoever’. Section 3, UK 1774 Act further states that the assured would be able to only recover the amount to the value of his or her interest. A literal reading of both sections may indicate that insurable interest should exist both at the time of policy inception and at the time of loss which will equate the position to be similar to that of indemnity insurance. (Lawry & Rawlings, 2004 p. 181). The requirements of insurable interest in life assurance is stated in that insurable interest is only required at the time when the contract is made, that is, at inception. There is no requirement to prove that the insurable interest still exist when a claim arises on death or maturity of the policy. The timing requirement for insurable interest is recognised in the landmark case of *Dalby v. The India and London Life Insurance Company* [1854] 139 E.R. 465 15 C.B. 365, CCP (Dalby’s case). A life assurance contract was arranged on the life of the Duke of Cambridge with the claimant company, Anchor Life. Anchor Life then reinsure the life assurance risk with the defendant. Although the original insurance was cancelled by the Duke of Cambridge, the reinsurance contract was kept in force until the Duke died. The defendant reinsurer then denied liability that the claimant no longer had an interest because the original insurance was cancelled. Thus, they did not have to pay out. The court held that requirements of UK 1774 Act were satisfied because it did not require that the interest should exist at the time of loss. Parke B, interpreting the effect of section 3 of the UK 1774 Act, stated that the section is requiring insured to ‘value his interest at its true amount when he makes the contract’ (Lowry & Rawlings, 2004, p. 322) and not indicative of requiring insurable interest to exist nor the value of such interest at the time of death.

The interaction between sections 1 and 3 of the UK 1774 Act may be summed up in the judgement of *Langley J in Feasey (representing Syndicate 957 at Lloyd’s) v. Sun Alliance Assurance Corporation of Canada* [2002] EWHC 868 (Comm) when he stated that: -

> 'In my judgement there is no requirement to be found in section 3 to enter into any detailed examination of the values of insurable interests with or without the benefit of any hindsight. Nor is it required that a court should examine and assess whether a given value was arrived at without negligence or reasonably. The underlying purpose of Section 3 is derived from Section 1: to outlaw recovery of the proceeds of what is properly to be described as gaming or wagering'.

The decision in Dalby's case can be criticised on the ground that Anchor Life did not suffer any form of financial losses since it did not have any contractual responsibility to pay upon the death of the Duke of Cambridge. Therefore, the decision in this case legitimises a gambling or wagering contract and is inconsistent with the Act. It may be argued that the purpose for which the contract was formed was already defeated, or frustrated. Therefore, the party who can claim benefit on such contracts losses his right to claim the benefits originally intended. In a similar circumstance in the case of *Krell v Henry*, [1903] 2 KB 740 Vaughan William, J commented that –

> "I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract".

What is even more worrying being the fact that the same principle established in Dalby's case also applies in the death of the insured for a personal insurance policy as set out in the decision of *Shilling v. Accidental Death Insurance Co* [1858] 2 H. & N42. The significance is that this is regarded as a casualty insurance policy and as such a non-life policy. It would appear that the timing for the requirements of insurable interest for casualty insurance is similar to life assurance which is only upon inception of the policy of assurance.

There is however criticism levelled against the basis of the decision in Dalby's case by many prominent legal scholars (Lawry & Rowlings, 2004). Lawry & Rowlings argue that Dalby's case was a decision for which the judiciary responded to the "chorus of disapprobation" that followed the decision in Godsall v. Boldero, (1807) 9 East 72, where it was held by the court that insurable interest should exist at the time of death as it was influenced by the provision in section 3 of UK 1774 Act. Lord Ellenborough CJ in this case in rejecting the recovery by the claimant stated that life insurance is a contract of indemnity and as such subjected to the normal application of the principle of indemnity, applied the rule as laid down by Lord Mansfield in the context of marine insurance and stated that:

> 'It is contradiction in terms, to bring an action for an indemnity, where, after the whole event, no damage has been sustained'.

Dalby's case took into considerations commercial reality where insurable interest is only deemed necessary at the time of inception of contract of life assurance and not thereafter. Two grounds by Parke B were analysed by the authors (Lawry & Rowlings, 2004) and the first of these were, that it was incorrect to equate life assurance with indemnity insurance. The reason for this is that in computing the premium for life assurance, the underwriter would have measured the interest of the holder of the policy at that point. As stated by Parke B, it would be "contrary to justice, and fair dealing, and common honesty" (See Dalby's case, at p. 391) if the happening of events were to results in the holder of the policy losing interest for which he has paid premium. The second point

which is related to the first point, Parke B, stated that life assurance is different from other forms of insurances, where indemnity insurances seeks to compensate for the happening of specific loss whereas a life assurance is a type of contract that seeks to pay a specific amount upon the death of the life assured.

The authors argued that this conclusion is fundamentally objectionable. The basis for the arguments is established on the grounds of loss of the premium and the promise to pay on death and not indemnity. In considering the first ground for the arguing that the reassured in this case Anchor Life, had lost it premium if their claim is not met, it would appear superfluous as the argument needs to be examined in the perspective of what was contracted for with the original assured (Wright, or the Duke of Cambridge) was insurance on contingencies affecting his life. Wright had already cancelled this contract, and what Anchor Life would have lost is their chance to gamble as they would have collected premium up to the date of cancellation of the policy and their financial position would not have made much worse had Wright died after that as he would not been able to claim on a cancelled contract of insurance. If law were promulgated to also terminate Anchor's Life interest upon the termination of the original contract of assurance by Wright, Anchor Life would not be much worse off financially. It is indeed strange that the court in this case deems it appropriate to side with the interest of the insurance company and opposed the public interest undertaken by UK 1774 Act.

The authors also argue that the premise of life assurance is a contract predicated upon the contractual obligation to pay upon the happening of death of life assured. Therefore, life assurance is incapable of measurement on the basis of indemnity. The life assured's death can never be fully compensated or fully made good by payment of certain sum of money. This legal principle has resulted in two distinct legal developments that differentiated life assurance from indemnity types of insurances. The first of the distinction is the legal notion that a man has an unlimited insurable interest on his own life. The limit on one's own life is determined by financial affordability where a man can plan the financial needs of his family based on the premium that he can afford to pay in his lives.

3. LAW REFORM FOR INSURABLE INTEREST REQUIREMENTS IN LIFE ASSURANCE AND ENGLISH LAW

The controversies surrounding the issue have attracted the Law Commission and the Scottish Law Commission to publish two papers to seek views from various stakeholders pertaining matters relating to insurance law and the second paper published in 2008 on the issues pertaining insurable interest. The complexity of the law surrounding insurable interest was acknowledged in terms of requirements for the purpose of establishing a valid insurance contract and at which point of time interest need to exist. (Law Commission and Scottish Law Commission, 2008).

As for Life Assurance, the Law Commissions were clear that a person has an unlimited insurable interest in their own life and that of their spouses too. Nevertheless, the Law Commissions highlighted the issue that of children who has no insurable interest on their parents but will clearly benefit from their status of dependency if insurance is available to them. Conversely, a parent also does not have insurable interest on the life of their children, with a minor exception to be found in the Friendly Societies Act 1992 where it is stated that a parent can insure the lives of their children

without insurable interest and if the child is below ten years of age, the limit of insurance is up to the amount of £800 only. Finally, in the consultation paper, the Law Commissions also sought opinions on group life assurance which is commonly arranged by companies to pay for death in service benefits to their employees. The death in service benefit is arranged as a payment to the deceased employee's families should they die while being in the employment of the said companies. It is usually arranged as a form of a discretionary trust and on the death of the live assured the trustees have the discretion to decide who will benefit from the payment of the life assurance policy.

This arrangement of life assurance cover for large group of people may also be compared to the more recent decision of *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, where Weller J regards that in insurance arrangement covering a large group of people as with group life assurance, "employers…are deemed to have an insurable interest in their employee's lives for more than the amount of their notice period." (Law Commission, at p. 21 – 22). Comments from the Law Commissions however considered that Weller J had stretched the requirements for pecuniary interest of Steamship Mutual, the claimant in this case in order to reach a fair result of the contract but in doing so blurred the lines for insurable interest and the Law Commissions commented that "If the law on insurable interest is unnecessarily complicated and prevents parties from being bound to legitimate contracts that they have negotiated freely then it is difficult to see the justification for it in its current form."(Law Commission, at p. 26). The Commission nonetheless maintains that where the requirement of insurable interest in life assurance exists only at inception, it is possible for a life policy to have effectively become a gambling contract by the time of a claim. (at p. 30). Policyholders may act on the motivation of being rewarded by large sums of money upon the early death of life assured and the lax laws that currently governs the payment of such monies.

The Law Commissions summarized the issues confronting the principle of insurable interest as follows:

1. They recommend that one of the options to consider is to abolish the requirement of insurable interest altogether, which is similar to the approach taken in Australia. Theoretically speaking, it is therefore possible for anyone in Australia to enter into a contract of life assurance on the life of another provided there insurers are willing to take such risks.

2. The second option is to reform the existing rules of insurable interest to relax the restrictions they impose by:

(1) Expanding the class of natural affection and introduce a list of relationships giving rise to the right to insure. Canada and Spain have taken this approach. In Malaysia there is a similar list in the current Financial Services and Islamic Financial Services Acts 2013.

(2) The class of potential financial loss can be expanded to someone with a reasonable expectation of loss rather than the traditional legal and equitable interest.

3. A further option would be to allow insurance on the life of another as long as the life insured consents to the insurance being taken out. Other jurisdictions (notably Spain and Canada and some American states) have adopted this approach. The same approach is adopted in the latest provisions of the Financial Services and Islamic Financial Services Acts 2013.

4. THE REQUIREMENTS OF INSURABLE INTERESTS IN THE LIFE ASSURANCE LAW OF MALAYSIA

Section 5(1) of the *Civil Law Act 1956* makes particular reference to life and fire insurance. This section provides that:

> "In all questions or issues which arise or which have to be decided in the States of West Malaysia ... with respect to the law of ... marine insurance, average, life and fire insurance ... the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

Therefore, English law has often been referred to for guidance in resolving legal issues in the field of insurance law and since the Malaysian Act in 1963 has made provision on the requirements for insurable interest for life assurance, the provisions contained in section 40 of the Insurance Act 1963 will apply.

The law governing the requirements of insurable interest for life assurance in Malaysia was first introduced in the Insurance Act 1963. Section 40 of the Insurance Act 1963 consist of five sub-sections and sub-sections (1) and (2) are the most relevant to the discussion on application of insurable interest to life assurance contracts in Malaysia. Section 40 of the Act provides that:

> (1) A life policy insuring the life of anyone other than the person effecting the insurance or a person connected with him as mentioned in sub-section (2) shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected; and the policy moneys paid under such a policy shall not exceed the amount of that insurable interest at that time.

Sub-section (1) of the Act mirrors the provisions in section 1 and 3 of the Life Assurance Act 1774 catering both; the right of avoidance in life assurance contracts where insurable interest is absent and limits the amount of claims to the interest that existed at the time the contract is effected.

Sub-section (2) of the Act provides that the lives are excepted from sub-section (1), besides that of the person effecting the insurance, are those of that person's wife or husband, of that person's child or ward being under the age of majority at the time the insurance is effected, and of anyone on whom that person is at that time wholly or partly dependent.

Sub-section 2 is a departure from the English laws on insurable interest for life assurance. In English law only spouses have unlimited insurable interest over each other and no other family relationship provides such insurable interest. The rationale for this is consistent with how insurable

interest in defined in English law, where insurable interest arises from the interest that a person has on the subject matter of insurance, in this case the life of another person, which is recognised by law and quantifiable in pecuniary terms. Family relationships such as the one that a son or a daughter may have with their parents or in turn the one that they may have with their own children, are not quantifiable in pecuniary terms as they are emotional values which is impossible to compute. Unlike the family relationship between spouses which is governed by the marriage contract and where financial calculations are possible as witnessed when the marriage breaks up and properties and or other assets are divided between them.

The Malaysian statutory approach of requiring insurable interest only at the time of the inception of the contract is similar to English law and specifically the discussion of Dalby's case. The requirements for insurable interest for life assurance is found under section 128 Financial Services Act 2013, Schedule 8. Paragraph 3 of Schedule 8 addresses issues relevant to insurable interest with regards to life assurance contracts.

Paragraph 3(1) provides that a life policy insuring the life of anyone other than the person effecting the insurance or a person mentioned in subparagraph (3) shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected. This is merely a restatement of the common law position established in Dalby's case. What is clearly missing is the same requirement to exist at the time of claim. The possible abuse as discussed earlier still remains and Parliament had missed the golden opportunity to redress the lacuna.

Paragraph 3(2) states that as for a group life policy, the policy shall not be void by reason only that the group policy owner did not have, at the time when the insurance was effected, an insurable interest in the lives of the persons insured under the policy. This is a reflection of practicality of the conduct of the business owner (or in most cases, that of companies employing new staff), wherein the person may be included in a group life policy before actually reporting to work and effectively a legally recognised insurable interest would not have existed.

Paragraph 3(3) further provides that a person shall be deemed to have an insurable interest in the life of another person if that other person is:

(a) his spouse or child;
(b) his ward under the age of majority at the time the insurance is effected;
(c) his employee; or
(d) a person on whom he is wholly or partly dependent for maintenance or education at the time the insurance is effected.

This is an interesting paragraph, as it establishes the premise of one person having insurable interest over the other based on emotional familial ties for items (a), and (b), item (d), may or may not be as reading the provision disjunctively would suggest that as long as the person has some form of financial dependence then this would create insurable interest needed for insurance contract to be valid, and lastly on the basis of contract in item (c). Paragraph 3(3) has established under Malaysian law that other familial relationship may have the requisites of insurable interest, whereas none exist under similar circumstances in English law. Although the legal premise is established under paragraph 3(3), which partially fulfils the definition of insurable interest, the fact that the relationship must be one which is quantifiable in pecuniary terms is difficult to establish for other

pure familial relationship such as children and parents. This emotional ties cannot be quantified in financial terms.

Nevertheless, the insured may lose insurable interest at a later date for persons categorised as (b), (c) and (d) as stated above. These provisions in the statute are open to abuse and manipulation. Once insurable interest is no longer present, the insured may still collect insurance benefits from the life assured as insurable interest is only required at the inception of the contract and not at the time of death. This is the lacuna that may be exploited by unscrupulous person who may use the financial motivation to ensure the untimely demised of person assured under the life assurance contracts.

A way to overcome this is to ensure that the provision under Schedule 10, Section 130 Paragraph 6 (2) (1) is enforced to become mandatory, that is it is a must and not as it is now provided which is 'may nominate'. Legislation should be amended to ensure that where the insured takes out a life assurance contract on people whom he or she may lose insurable interest at a future date, that the appointment of nominee is mandatory to ensure that this requirement for insurable interest to exist at inception of contract do not turn into a financial motivation for nefarious activity such as murder. Paragraph 4 (1) further provides that where the policy owner dies after having made the nomination then insurer shall effect payment to the nominee upon the death of the policy owner. Paragraph 5 (1) further states that a nomination by the policy owner shall create a trust (a) if the nominee is the wife or children; or where the nominee is (b) the parents. This will not form part of the policy owner estate (Schedule 10, Section 130, Paragraph 5 (2) of the Financial Services Act 2013, Act 758), and effectively ensuring that other creditors do not have access to the benefit payments that are meant for the family and parents.

The current Malaysian statutory approach of requiring insurable interest only at the time of the inception of the contract is similar to English law and specifically the discussion of *Dalby v India & London Life Assurance Co* [1854] 15 CB 365. As such in Malaysia, the issue of not requiring insurable interest at the time of death, loss or claim would also produce similar concerns as the lacuna in law will be exploited for financial gains in ensuring the premature end to the life of the life assured.

5. RESOLUTION OF THE SHARIAH ADVISORY COUNCIL ON REQUIREMENTS FOR PERMISSIBLE TAKAFUL INTEREST

The SAC has resolved that the concept of insurable interest does not contradict the *Shariah* (Shariah Advisory Council, 2010, p 91) and may be applied in *takaful* where the concept is referred to as "permissible *takaful* interest". A permissible *takaful* interest exists in general *takaful* when a person with legal and financial interests in a particular subject is deemed to have permissible *takaful* interest. As for family *takaful*, the permissible *takaful* interest exists whenever there is a clear relationship between two parties that involves the elements of affection, emotional interdependence, and reasonable expectation of loss in terms that are material or psychological (Shariah Advisory Council, 2010, p 95). In this situation, a person is deemed as having permissible *takaful* interest on his spouse, children, employees (for an employer) and any other individual who is dependent on him in any way permissible in *Shariah*. In the event where a *takaful* contract is being concluded that involves a third party who is of permissible *takaful* interest, the participant or

certificate holder shall obtain the consent of the third party, unless the third party is a child of minor age.

A key element introduced by the *Shariah* Council as a general principle is that permissible *takaful* interest shall exist at the time the contract is concluded and at the time of incident or *takaful* benefit is made (Shariah Advisory Council, 2010, p 92). This would mean that there is a requirement for insurable or permissible *takaful* interest at the time the *takaful* cover is granted and at the time when a claim is made on the *takaful* cover.

However, the permissible *takaful* interest is considered as no longer in existence if a particular relationship with the third party has ended during the in-force period of the *takaful* certificate. Therefore, upon death of the third party, the participant or certificate holder is not entitled to receive the *takaful* benefit as beneficiary. This position is modified with the introduction of the Islamic Financial Services Act 2013, where even when the participant no longer possesses permissible *takaful* interest, the *takaful* operator has an option of paying the benefits to the participant.

6. THE BASIS OF SHARIAH ADVISORY COUNCIL RULING

The SAC explained that the justification for allowing the concept of insurable interest to operate within *takaful* practices is due to the fact that under the concept of *tabarru` takaful*, participants mutually agree to guarantee each other from any form of risks acceptable in *Shariah* by a commitment to contribute. Obviously such an arrangement with its inherent flexibility would enable the unscrupulous to manipulate the arrangement for their own interests or to enrich oneself in a similar way to wagering in the conventional insurance practise. As such, the *Shariah* principle known as *sad zarai`* (blocking the means that may lead to harmful results), the concept of permissible *takaful* interest is viewed as a mechanism to avoid such moral hazard or manipulation (Shariah Advisory Council, 2010, p. 93).

Nevertheless, the Islamic Financial Services Act which became law from March 2013 provides a more comprehensive definition to permissible *takaful* interest and replaces all other legal definitions of permissible *takaful* interest for family *takaful* contracts. All other non- family *takaful* contracts such as motor *takaful*, fire *takaful* and marine cargo *takaful* contracts is subjected to the definition provided by the *Shariah* Advisory Council (Shariah Advisory Council, 2010, p. 92)

6.1. Permissible Takaful Interest as provided by the Islamic Financial Services Act 2013

Permissible Takaful Interest is recognized by the Islamic Financial Services Act 2013. It is clear from the provisions contained in the Islamic Financial Services Act 2013, Schedule 8, Paragraph 3, sub-paragraphs (2) and (3), that a person who obtains a *takaful* contract must have a permissible *takaful* interest if he or she is entering into the *takaful* contracts covering the life or lives of others. Sub-paragraph (3) renders *takaful* contracts without permissible interest to be void. The permissible *takaful* interest is similar to that of the conventional law insurable interest as required under the Financial Services Act, 2013(Act 758) of Malaysia and the intention for requiring the presence of permissible *takaful* interest is to avoid contracts with elements of wagering (Salleh, Ibrahim & Zahraa, 2014, p. 391). The absence of permissible *takaful* interest at the inception of the contract will render the contract void as this indicates elements of a wager (Islamic Financial

Services Act 2013, Act 759). Thus, that the existence of permissible takaful interest is essential at the inception of contract.

Permissible Takaful Interest Lost in the Midst of Takaful Contract. In the event that a *takaful* contract is void because of lack of permissible *takaful* interest as required. such as through the resignation of the employee or divorce. Then, sub-paragraphs (4) and (5) of Paragraph 3, Schedule 8 read together, states that the lack of permissible *takaful* interest would not render the contract void where after the takaful contract entered into and the licensed *takaful* operator becomes aware that a *takaful* participant no longer has a permissible *takaful* interest in the person covered, the licensed family *takaful* operator shall (a) pay to the *takaful* participant such moneys payable under the contract of family *takaful* as may be specified by the Bank; and (b) upon such payment to the *takaful* participant, the contract of family *takaful* shall be deemed to be terminated.

It is submitted that in the event sub-paragraph (4) and (5) occurred, the licensed family *takaful* operator shall refer to Schedule 10, Section 142, (Paragraph 3(1)) of the Islamic Financial Services Act 2013, (Act 759) where it is stated that a nominee shall receive the benefits payable under a *takaful* certificate either as an executor or a beneficiary under a conditional *hibah* (gift) as long as this is stated in the nomination form by the *takaful* participant. The term conditional *hibah* (gift) had been clarified by the *Shariah* Advisory Council to mean that the family *takaful certificate* had mature before the death of the *takaful* participant and benefits thereunder falls to the *takaful* participant, whereas if the *takaful* participant had passed on then *hibah* (gift) will be distributed. (Abubakar, Zaid & Markom, 2014, p. 71). Nevertheless this issue is still subjected to disagreement amongst the scholars as firstly, it is not permissible in Islam to collect benefit from insuring the lives of others where you have no permissible *takaful* interest (Billah, 2013). Secondly, even if collection of benefit is possible, Islamic scholars have divided opinions on whether the benefits payment should be treated as *hibah* or *wasiyah* (bequest) and *mirath* (inheritance). The argument against *hibah* (gift) stems from the fact that the benefits under the family *takaful* certificate is conditional in the sense that the rights to the benefit will be that of the *takaful* participant if the *takaful* certificate matures before his death and only become distributable as a gift if his or her death occurs before the maturity of the *takaful* certificate (Abubakar, Zaid & Markom, 2014 p. 76). However, *Shariah* Advisory Council opines that as this is the right of the *takaful* participant, he or she will then be given the right to determine the gift based on conditional *hibah* (gift) as long as it is not against *Shariah* law. (Shariah Advisory Council, 2010, p. 85).

6.2. The Appointment of Nominee: Mandatory or Automatic?

The above discussion revealed that status of nominee is important in determining the distribution of takaful benefit in any situation either the permissible takaful interest is applicable or otherwise (Zaid, 2009). It is submitted that the better approach to take is to treat the nominee as a trustee and then determining role of the nominee to act as a trustee is derived from the doctrine of *al-amanah* (trust). Furthermore it is provided for in the Holy Qu'ran where it states that a nominee is a trustee as the role of the nominee is to "...faithfully observe their trust and covenants" (Su'rah AlMu'minun, 23:8) and to "Make a trial of orphans until they reach the age of marriage; if then you find sound judgement in them; release their property to them; but consume it not wastefully" (Su'rah al-Nisa, 4:6). This would have ensured greater clarity to sub-paragraph (4) and (5) on the treatment of payment of benefits upon the death of the person covered under the family *takaful* certificate.

On the other hand, the power to make nomination is not mandatory nor is it automatic. In Schedule 10, Section 142, (Paragraph 2(1)) of the Islamic Financial Services Act 2013 (Act 759), anyone who has attained the age of sixteen years may nominate an individual to receive *takaful* benefits. The key word 'may' nominate which means that nomination is a choice and is not mandated by law. This would mean that in absence of nomination, the *takaful* operator is subjected to the provision in sub-paragraphs (4) and (5) to make payment to the *takaful* participant who may not be the person whose life is covered under the family *takaful* contract and may have at that point in time loss permissible *takaful* interest on the life of the person covered due to divorce or the person covered no longer fulfilling the dependency requirements. What is interesting is the provision in sub-paragraph (5), is that once the *takaful* operator is aware of the lack of permissible *takaful* interest on the part of the participant, they may still pay the benefit under the *takaful* contract and then thereafter the contract is to be terminated.

6.3. Categories of Persons for Whom the Policyholder will have Permissible Takaful Interest

a. Employee

Sub-paragraph (6) subjected to the detailed provisions in subparagraph (8), basically provides for the categories of person for whom the policyholder will have permissible *takaful* interest in to form a *takaful* contract. The concern lies with certain category of people listed in sub-paragraph (8) which states that a person shall be deemed to have a permissible *takaful* interest in the person covered if that other person (b) his ward under the age of majority at the time the person entered into the contract of *takaful and* (c) his employee. It would appear that from the list, employees now ranked as being equal for permissible *takaful* interest as with family members. This should be an area of major concern as certainly there are no family ties in many of such cases and the opportunity to insured for an unlimited amount for ties of tenuous nature may be exploited for financial gains.

The question is whether there is a limit to the amount of permissible *takaful* interest? An example of an issue that may fester in future is that the Islamic Financial Services Act 2013 is silent on the limit of permissible *takaful* interest that an employer has on his employee. Similar observation is made for the conventional insurable interest where employee too is considered in the same provisions as that for family members. This is not the case with English common law, where the employer interest on the life of employees is limited to the extent of the value of his work to the employer (Simcock v. Scottish Imperial Insurance Co. (10 SLT 286). Having a limit is important in ensuring that there is no financial motivation to benefit from the death of a former employee, particularly one who may have left the former employment in a bad disagreement.

The provision under sub-paragraph (6) of Paragraph 3, Schedule 8, Section 140 of the Islamic Financial Services Act 2013, may be differentiated from sub-paragraph (6) where employees are insured under a group *takaful* certificate as compared to sub-paragraph (6) which is related to family *takaful* certificate. This means that the employee in sub-paragraph (6) is more likely to be a domestic employee. However, the absence of limit to permissible *takaful* interest is a serious concern as it may lend itself to manipulation in absence of appointment of a nominee.

b. Minor

In paragraph (8), provides that a person entering into a contract of family *takaful* on a person covered pursuant to this paragraph shall, unless the person covered is a minor, obtain the prior written consent of that person. This paragraph requires that the policyholder if covering the life of another shall obtain their consent before taking out a cover under the *takaful* contract unless the person is of minority age. Furthermore, in paragraph (9), the person covered may revoke his consent by informing the licensed family *takaful* operator in writing and in paragraph (10) where the person covered revokes his consent under subparagraph (9), the person entering into the contract of *takaful* no longer has a permissible *takaful* interest on that person covered.

c. Spouse

As for spouses, a divorce may not annul permissible *takaful* interest as provided for in paragraph (11) where it provides that a family *takaful* certificate issued in respect of a contract of *takaful* entered into by a person where the person covered is his spouse shall not be void only on the ground of dissolution of marriage between the person and his spouse. Sub-paragraph (11) has justified the reasoning to sub-paragraph (4) and (5), that is, the protection of the next-of-kin upon the demise of the party covered and any annulment of marriage still protects the interest of the former spouse as divorce will not end the existence of permissible *takaful* interest (Abdullah et al, 2015).

6.4. Lack of Compulsory Nomination Procedure

One of the pertinent issue is the distribution of *takaful* benefit in the situation where the spouse are divorced is the lack of compulsory nomination procedure. The current situation is there is no compulsory nomination procedure with direct payment to a nominee who is a trustee to ensure the well-being of the children.

Since takaful policyholders involved both Muslims and Non- Muslims, the matters will be discussed both according to the right of maintenance according to Law Reform (Marriage and Divorce) Act 1976, Act 164 and the Islamic Family Laws Enactments.

a. Non-Muslim Marriage

As for the Non-Muslims, Malaysian law governing the duration for maintenance upon divorce, spouses may upon divorce be granted alimony and this duty to pay for maintenance of one's spouse only ends upon the other spouse's death (Section 81 (a) and (a) Law Reform (Marriage and Divorce) Act 1976, Act 164). This is an important point to consider when determining the extend of time insurable interest should exist upon the termination of marriage and it is submitted that there is a strong case to answer when it comes to consideration of spouses that has received the order for payment of alimony that they have insurable interest on the life of the former spouse.

As such it is recommended that in cases of civil divorce, the former spouse will still have insurable interest upon the life of the other former spouse to the extent of the financial interest of the alimony payment. Upon the death of the former spouse, the spouse who has arranged for the life assurance or family *takaful* cover will then be entitle to payment of the life assurance or family *takaful* benefits (section 82 of the Law Reform (Marriage and Divorce) Act 1976, Act 164. Section 82 provides for the entitlement of a former spouse to alimony payment until death of the former spouse or if former spouse remarries).

This issue is an area of key concern in legislating for insurance laws surrounding payments to beneficiaries of divorced couple with children. The concern is once divorced, the mother who had the burden of looking after the children is left without financial means upon the demised of the former husband if she is not entitled to the payment of benefits under the life assurance and family *takaful* contracts. By extending insurable interest of the former spouse to the extent of the financial interest of alimony payment will mean that there will be a form of security in the event of the former husband's death and when there is no continuation to the alimony payment, insurance benefits will step-in to cover the financial deficit faced by the family (Salleh 2013). Upon death of the former husband, permissible *takaful* interest ends (Parid, 2010, p. 6).

b. Muslim marriages

In contrast, for the Muslim in Malaysia with matters regarding financial support during marriage and after divorce, Malaysia follows the Shafi'i Islamic School, which means that the scale of financial support is considered from the perspective of the husband financial standing (Abdullah, Monsoor Johari & Radzi, 2015, p 366). The basis for this approach in Malaysia is drawn from *Surah Al Baqarah* (2): 241, translated as: -

> "... for divorced women financial support should be provided on a reasonable (scale). This is a duty on the righteous".

For matters concerning divorce, the Muslim in Malaysia is subjected to the Islamic Family Law Enactments and there are fourteen different enactments to apply to the thirteen states while three Federal Territories shares one enactment. The enactment that applies to the Federal Territories is titled as Islamic Family Law (Federal Territory) Act 1984 (Act 303) and one that apply to one of the states would be Islamic Family Law (State Of Selangor) (Enactment 2 of 2003).The authority to award financial support are in the hands of the *Shariah* Court and they consider various factors in accordance to *Shariah* principles (Raihanah Abdullah, Taslima Monsoor, Fuadah Johari & Wirdati Mohd Radzi, 2015, p 366), such as whether the dissolution of the marriage is through dissolve the marriage through *taali, faskh* (judicial divorce) or *talaq*. For the Muslim in Malaysia, the distributions of payments of benefits under the family *takaful* contracts are governed by the provisions in the Islamic Financial Services Act 2013 (Schedule 10, Section 142, Paragraphs (2) to (11)).

In cases where the *takaful* participant may lose permissible *takaful* interest in future through the non-fulfilment of dependency requirements, this includes especially former employees or children who may be affected as a result of divorce of parents, it is proposed that the current statutory provision be amended to make it mandatory for the appointment of a nominee who acts as a trustee at inception of contract of family *takaful.* The family *takaful* benefit payments should be considered as a gift to non-heirs and as part of wasiyah or *mirath* for heirs and will not form as part of the estate of the *takaful* participants and other creditors will have no claim upon it (Billah 2000, 2003, 2013).

7. CONCLUSION

The provision of law with regards to insurance for life is that insurable interest needs only to exist at the time of inception of the cover afforded by the policy of life assurance and not thereafter. The

position is similarly catered for in Malaysia through section 128 Financial Services Act 2013, which provides in Schedule 8 of the Act. Accordingly, at Paragraph 3 (1) of Schedule 8, states that a life policy insuring the life of anyone other than the person effecting the insurance or a person mentioned in subparagraph (3) shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected. It is recommended that there should not be additional requirements for insurable interest in life assurance at the time of death of the life assured as requiring it may make it more difficult for the beneficiaries to receive the benefits under the contract of life assurance and having such a requirement will not deter the intention to commit murder. This however leaves open the possible abuse to law because the lacuna will act as financial opportunity to the insured to commit murder of the life assured and gained from the payment of life assurance contracts. By requiring insurable interest for life assurance to exist at the time of death reduces such inclination for the unhealthy practise and of course illegal act of murder by removing the financial motivation. This may be further enhance by requiring person who insured others' lives under such circumstances that they may lose insurable interest in future (such as wards and former employees) to mandatorily appoint a nominee consisting of such as the family members of the ward or former employees to ensure that there is to financial motivation to be gained from insuring the lives of others. Law should be seen to promote ethical practices and not leave uncertainty to be exploited, however few that may actually abuse it to benefit themselves. As discussed, and if the major concern is basically payment of benefits to beneficiaries who are minors and recently divorced mothers, then there is a basis to extend insurable interest to cover for the financial interest in alimony payments. Based on the findings from the study which included support from legal academics, it is proposed that in order to improve the consistency and clarity of laws concerning the timing for the requirements of insurable interest for life assurance contract, the requirements for insurable interest should also exist at the time of death.

As for family *takaful* contract the provision of IFSA 2013, section 142, Schedule 10, Paragraphs 2 (1) for appointment of nominee must be made mandatory rather than a choice. This is to address the situation where the *takaful* participant may lose permissible *takaful* interest at a future date. Family *takaful* contracts are required to have permissible *takaful* interest at inception with Paragraphs 3 (1) clearly stating this. The provisions contained in Paragraphs 3(4) and 3 (5), where payment will still be made by the *takaful* operators even if permissible *takaful* interest is lost after contract is made will now not cause as payment of benefit is made to the nominee and as recommended the nominee plays the role of the trustee to ensure distribution in accordance to the doctrines of *wasiyah* and *mirath.*

It is recommended that the current provision on the payment and distribution of the *takaful* benefit in the event the permissible *takaful* interest is lost specifically in cases of divorced, be reviewed to include a compulsory nomination procedure with direct payment to a nominee who is a trustee to ensure the well –being of the children are protected.

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