

Gift *Inter vivos* for Charged Property

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Abstract: With the improving economic status of Malaysia, especially, in terms of personal property and wealth acquisition, problems and issues relating to devolution of properties have risen. In this regard, the law of gifts is recommended as an effective instrument to be applied by the people in Malaysia. Nevertheless in the case where the property is charged to the bank, one has no absolute right over it and consequently is unable to make any devolution without the bank's consent. The bank would disallow the transfer to be executed with regard to charged property until and unless discharge has been made in satisfaction of the full amount of the loan or debt. This procedure gives the writer the impression that the present policy exercised by the bank declines to uphold the distribution of property through gift and thus, necessitates revision and amendment. Since, this study is a qualitative study, the approach applied is a content analysis methodology. A flexible method of interviewing is useful as the writer has as yet little understanding of the problem or situation due to the exploratory nature of this study. The interview was conducted with bankers, practitioners and some other relevant people in order to complete the study. Thus, this study is mainly done to identify the applicability of the concept of gift *inter vivos* in the Malaysian banking system as regards charged property. The outcome of literature reviews demonstrates that under the Malaysian banking system, a chargor is not allow to transfer his charged property. Additionally, under the National Land Code, 1965, the Land Registry has a power upon request by the bank to enter a caveat in order to put off the transfer. The concept of gift is extremely needed to be introduced into the banking system in order to avoid economic loss due to problems in estates distribution of Malaysian.

Key words: Gift *inter vivos*, estate planning, charged property, economic loss, Malaysian banking, Malaysia

INTRODUCTION

The main objective of this study is to examine the applicability of the concept of gift *inter vivos* relating to charged property in the Malaysian banking system. It is a preliminary idea that has not been used before and needs to be studied in order to contribute an improvement to the structure of estates planning in Malaysia. According to statistics in 2006, an estimate of >1 million cases in Malaysian estate claims worth RM38 billion are still outstanding for not being managed by the beneficiaries. Most of the cases involve nearly 90% of

Muslim-owned property. However, this amount has increased to a value of RM40 billion in early 2007 involving >1 million cases. Of this amount, RM38 billion is in real estate property, RM1.5 billion in cash and RM70 million in Employees Provident Fund (EPF) savings. Recent statistics in 2011 also show the estimated amount of RM42 billion of assets owned by >500,000 beneficiaries of the Muslim community has not been distributed. Thus, the aim of this study is to propose a way to provide an alternative method of distribution of charged property to avoid problems in inheritance which in many cases is cumbersome, costly, complicated and time-consuming.

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The emergence of well-off Malaysians leads to the idea that property management is becoming more important. Statistic reveals that there is a serious delay or backlog in processing applications for estate distribution. The total of about RM42 billion of inheritance estates in terms of immovable properties and money remain unresolved. Thus, the law of gifts is recommended as an effective tool to be applied by the people in Malaysia. For a Muslim, the law of gift *inter vivos* or known as hibah is one of the means to distribute one's assets in Islamic financial planning. Even though, it is not specifically codified in a special act, it may be derived from Islamic Enactment in each state in this country. Hibah is a transfer of legal and beneficial ownership of the assets from the donor to the donee (Beneficiary).

It has to be made voluntarily without valuable consideration and during the lifetime of both the donor and beneficiary. Under hibah, the proportion of distribution to heirs and non-heirs can be determined by the donor. As compared to a non-Muslim where there is also no explicit law in Malaysia regarding this matter (unlike under the English law), Section 26 (a) of Malaysian Contracts Act, 1950 would sufficiently be used and become accommodative enough to permit this matter. On this basis, the transfer of one's property during one's lifetime is not only permissible but does not contravene any personal law.

As part of the requisites in the process of transfer, it is important to ensure that the said property belongs to the donor. However, in the case where the property is charged to the bank, one has no absolute right over it and is consequently unable to make any devolution unless the chargee (the bank) has consented to it. On top of this, the bank would normally disallow transfer of the property charged until and unless the discharge has been made by paying the full amount of the loan or debt. As a result, it gives the perception that the current policy employed by the bank does not promote the distribution of property by this way and therefore calls for revision and amendment. The refusal to allow the transfer of charged property which is largely related to the debt or loan security by the bank will definitely cause the denial of a person's rights under the law of gifts. This will ultimately increase the number of unsolved problems in distributing assets through the law of succession, thus causing economic loss to Malaysians. Therefore, this currently practised policy need to be reformed and a new policy should properly be introduced. The new proposed policy will resolve difficulties in property distribution after one's death in respect of charged property. This is because the transfer of property by way of gifts can be done at one's own freewill during his lifetime, thus disallowing

any possibility of disputes amongst heirs which frequently occur after one's death. A gift, in the law of property is the voluntary transfer of property from one person (the donor) to another (the donee) without full valuable consideration. In order for a gift to be legally effective, the donor must have intended to give the gift to the donee and the gift must actually be delivered to and accepted by the donee. In Islam, a gift (hibah) is the immediate and unqualified transfer of corpus of the property during the donor's lifetime without any return. The concept of hibah consisting of proposal (offer) on the part of the donor to give a thing and the acceptance of the thing by the donee. Research done by Bin Lembut (2003) among the notable jurists in Islam defined hibah as a contract of transfer of property voluntarily without any return.

The devolution of property through a gift is very common in Malaysia, especially from parents to their children. There were some studies done to indicate the practice of gift amongst the Muslims and non-Muslims. Research done by Krippendorff (1980) examines the practice and response from the Malay community pertaining to gifts particularly in Klang valley. The research indicates that the respondents who have distributed their property through this mode is 32 and 32% people have received the property by this way. *Inter vivos* financial transfers from older parents to their adult children are also widespread in the US (Hurd, 2008; Buang, 2008). Similar to countries such as the United States, the improving economic status in Malaysia leads to higher likelihood of transfers of property through this way. In the United States, a study shows that the more resources parents have the higher the tendency to make gifts (Nordblom and Ohlsson, 2010). In line with the prevalent transfer of property by this method, the present that examines the concept of the law of gift for property charged to the bank. It is hypothesized that the bank policy in Malaysia does not allow the charged property to be transferred until the property is discharged.

A charge involves no transfer of possession or ownership of the property (Weber, 1990; Razman and Shukor, 2001). Under the National Land Code 1965, a charge may be created over the whole but not a part only of any alienated land so as to secure the repayment of any debt or the payment of any sum other than a debt or of any annuity or other periodic sum. It will take effect as a security transaction so as to render the land in question liable as security for the loan or sums of money advanced. In the event of any default or breach committed by the chargor under the charge, the chargee may exercise the remedy of sale of the land (Teo and Khaw, 1988). By looking at this point, it can be concluded that there is a restriction to the chargor which prevents the property

from being registered in a new name until the chargor (the bank) lifts the charge or consents to the transfer. The chargor cannot dispose of the property free of the charge without the chargee's consent unless the debt secured by the charged is paid up (Razman and Shukor, 2001). The rationale of the restriction made to the chargor is to avoid the possibility that it could reduce the value of the property while the main purpose of the property is to secure the debt (Rashid, 2008). Relating to the issue, Islam allows anyone (including the chargor) who has a right in order to use and manage his property as he likes but if the property is connected with another party's rights (such as charged) then the owner is prohibited to manage his wealth independently. It requires the approval by the party who has an interest to it (Rashid, 2008). In *Awang Bin Abdul Rahman lwn Shamsuddin Bin Awang* and another in 1998, 6 MLJ 231, a court has ruled that the property that was charged to the bank can not be transferred as gift *inter vivos* because it is not an absolute title of the chargor but treated as liability.

The same situation applies in the case of gifts which are made under Section 26 (a) of the Contracts Act, 1950. It has similar requirements to provisions of law relating to gift *inter vivos* under the Islamic law as the property must be an absolute right of the owner before he can give away to any other person through gifts. Failure of this will render the contract invalid. Accordingly in the case of *Kannamah vs. Narayanan* (1993) 3 MLJ 730, the appellant and his family were occupying the premise which is located on government land under Temporary Occupation License (TOL).

This premise was originally given by the appellant's father by a deed of gift for the benefit of his daughter (respondent). In his appeal, the judge has ruled that the trial judge at the court before had failed to consider that the claims of respondents were against the law for that premise is located on government land and a deed of gift was not possible without proper approval of the government. Although, abuse of the law was not argued by the appellant, the court will not enforce the deed of gift as the occupation of government land is illegal. Although, the father of the respondents held a temporary occupation license on government land, the license is temporary and is not transferable upon the death of the respondent's father (even by way of gift).

CONCLUSION

The result of this review shows that under Islamic law and sub-section (a) of Section 26 of the Contracts Act, 1950, a property cannot be transferred if it is not considered as an absolute right of the owner, thus making

it impossible to be given away by gift. Under the National Land Code 1965, a chargor is not allow to transfer his charged property and the Registrar at the Land Registry has a right to enter a restriction by way of caveat in order to prevent the transfer. In view of the urgent need to devolve property through gifts in order to avoid economic loss due to problems in managing and distributing the estates of Malaysians, it is thus important to propose the application of the gifts concept to the Malaysian banking system. As a solution for this issue, the writers strongly propose that the chargor who wants to transfer his charged property may apply consent from the bank or the lender (chargee) by giving a letter in writing stating his intent to do so. The chargee may give the approval for the application of consent with the condition that his rights remain intact. This is in line with provisions in the National Land Code, 1965. Section 216 states where by virtue of sub-section of Section 215 any land is transferred subject to any lease, charge or tenancy exempt from registration:

- Every provision, express or implied of the lease, charge or tenancy shall so long as the land continues vested in the transferee be enforceable by or against him as if he were a party there to
- Unless the instrument of transfer otherwise provides, there shall be implied on the part of the transferee and in favour of the transferor, an agreement with respect to those provisions in the terms set out in sub-section

The term of the said agreement shall be as follows:

- That the transferee will so long as the land continues vested in him duly perform and observe the said provisions
- That the transferee will indemnify the transferor against all claims arising in respect thereof after the transfer takes effect and all expenses properly incurred by the transferor in connection with any such claim

Thus, a chargee will not in the absence of any express provision to the contrary contained in the charge, withhold his consent without reasonable cause, to the granting by the chargor of any transfer by gift of charged land. It is hoped that this study will give some idea on how Malaysians could devolve the charged property which is largely related to the debt or loan security to the bank in estate management in order to curb the increasing number of problems in distribution of estates.

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