

# **“A FAVOR FILLI” ENSURING THE BEST INTEREST OF THE CHILD IN DETERMINATION/DIVISION OF MATRIMONIAL PROPERTY: A SPECIAL REFERENCE TO FAMILY BUSINESSES**

**Zuhairah Ariff Abd Ghadas<sup>1</sup>  
Norliah Ibrahim<sup>2</sup>**

---

## **Abstract**

A family business is an interesting business structure as it connotes a structure in which the interests in ownerships, managements and business overlapped upon one another. There is also a confinement of ownerships on family members to ensure business legacy of the family name. This confinement would be prejudiced in the case of divorce as the family structure shall be affected or broken by separation of the parent. In many cases, interest in the business shall be divided between the spouses according to their interest or contribution to the business. The case law shows that, the issue of the best interest of the child is seldom applied in determination and division of interest/shares in business as a matrimonial property; albeit the family business structure was initially meant for the children and for the continuation of the family name. This paper intends to look into case law pertaining to matrimonial property which involved family business and to identify the Malaysian court approaches in determining or dividing the interest in business as matrimonial property. The main objective of this paper is to highlight that “the doctrine of favor filli” (best interest of the child) should be applied by the court in cases involving family business as a matrimonial property. Research methodology which is adopted in this research is statutory and case law analysis.

**Key Words** : Family Business, Matrimonial law, Malaysia

## **Introduction**

The doctrine of “favor filli” generally refers to judicial decision is based on what is in the child's best interest. In the case of a divorce, the common method adopted by the court to ascertain and divide the property of the divorced parties is by identifying the amount or level of participation of the parties in the properties which existed during the marriage or brought into the marriage by either or both parties. If is observed that no contentious issues arise if the property are personal property but when the property claimed are interest in business or property owned by the parties under a company's name, they might be issues which arise such as locus-standi of the parties to claim the

---

<sup>1</sup> Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia

<sup>2</sup> Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia

property as matrimonial property and what type of contribution is actually required to entitle the parties to have a claim in the business interest.

Such issues shall further be inflated in a family business, whereby the business was initially formed for the family and meant to be passed to the children and the next generation. However, it is observed from the case law that the main method of distribution of interest in business including in family business, is that the parties' interest are valued and they have the right either to sell or to redeem their interest from the business. Such approach is seen to terminate the succession of the business to the children and to the next generation as initially planned. It is viewed that the succession issue could be resolved if the court take into consideration the element of participation in business rather than the quantum of interest in the business in determining and dividing the matrimonial property. The participation right ensures the continuity of the family ownership in the business despite that a divorce took place between the parent and such right could be delegated or transferred by the divorced parties to the children in due course or in the future. This approach would be able to ensure continuity of the business, achieved the initial/main purpose of establishment of the business and bestow a long term benefits to the children.

### **Family Business**

There are various approaches which are used by writers to define family business. Ibrahim and Samad (2010) highlighted that among the basis which are used to define family business are; on the structure of ownership and/or management and family members, for example Barry (1975), Barnes and Hershon, (1976), Alcorn (1982), Dyer (1986), Stern (1986) and Lansberg et al. (1988); or on the degree of family involvement for example, Davis (1983), Beckhard and Dyer (1983) or on the potential for generation transfer, for example Ward (1987) and Churchill and Hattertn (1987). Ibrahim and Samad (2010) also highlighted that according to empirical studies conducted by writers such as Sraer and Thesmar (2006); Mishra and McConaughy (1999); McConaughy et al. (1998), family business refers to firms which have either the founder or a descendent of the founder as the CEO. Amran and Ahmad (2010) highlighted that according to stewardship theory, ownership and control concentration is one of the factors that influence the effects of family relationships in family firms. Indeed, this variable helps explain the motivation for members to act as stewards of the firm versus their propensity to act destructively (Corbetta & Salvato, 2004).

Family ownership is claimed to be efficient in minimizing agency problems because shares are in the hands of agents who have special relations with other decision agents that allow agency problems to be controlled without separation of the management and control decisions (Amran and Ahmad, 2010). Further, family members have many dimensions of exchange with one another over a long horizon, and therefore, have advantages in monitoring and disciplining the agents (Fama & Jensen, 1983). In addition, as the ownership in

family firms, concentrated in the hands of family firms, the risk of free riding is likely to diminish (Shleifer & Vishny, 1997). Jensen and Meckling (1976) and Fama and Jensen (1983) supported that a family's involvement in ownership and management could shun the problem of possible exploitative behaviour of the agent towards the principal, and minimize the supervision costs. While Gorriz and Fumas (1996) evidenced that agency costs are minimized when shares are concentrated in a few owners and these owners do all the decision process.

In short, family business requires the concentration of ownership and management rights to the family members and with such characteristics it is deemed to be one of the most efficient business structure.

### **Family Business in Malaysia.**

The report of a national survey covering 225 companies conducted by Grant Thornton and Malaysian Institute of Management (Shamsir Jasani, 2002), stated that majority of family businesses in Malaysia is small scale enterprises and generally managed by the founder. Manufacturing, retailing or constructions are the notable sectors in which family business ventured most. It is also found that most of the family businesses were initiated by people having six years or more of work experience. This indicates that in Malaysia, people with appropriate experience commenced family businesses.

The report also underlines the characteristics of family business in Malaysia, which can be summarized as:

- 59% of the business is still run by the founder and 30% are run by the second generation, the majority of whom are children of the founder.
- 65% of small scale enterprises are managed by the founders
- 55% of family businesses in the small scale enterprises employ less than 51 persons
- 35% of family businesses in the medium scale enterprises employ between 51 - 250 persons.
- 10% of family businesses from large scale enterprises employ more than 250 persons.
- Main activity of family business lies in manufacturing (35%), followed by retailing (12.9%) and construction (10%).

### **The concerns in Family Business**

Report of the survey highlighted two main concerns in a family business structure:

1. Means to finance the business
2. Involvement /Participation of family member

Although this two factors are seen to be distinct, in practice they are actually interrelated with one another. In starting up, carrying out and expanding the business, often family business faced not only the challenge of getting sufficient financing but also the appropriate source of finance.

The survey also highlighted that it is in the small scale business that members are most concerned about losing control if they obtain external finance. For the large scale business, the concern on external participation is not much on the financing aspect but rather on the possibility of change in the management system. 52% of the respondents from the large scale business express their concern on the possibility of changes in the way the business is run if outsiders come into the picture.

### **Family Relationship**

As regards to family involvement, the survey's report stated that 48% of the large scale enterprises seemed to be less concerned about bringing family members into business as compared to the small scale (31%) and the medium scale enterprises (29%). Nevertheless, some of the aspects which majority of the respondents, regardless sizes of business, strongly agree are:

- Children should be introduced to the business at an early age
- Children's education should be geared towards the business needs.
- The business is stronger with family members involved
- Founder and subsequent generations should always have a formal role in the business

Pertaining to children's participation, the report highlighted that 21% of the respondents wanted their children to be involved in the business. The survey also seeks responses on outsiders' participation in the family business. It was found that only 39% of the respondents from the large scale business were concerned about outsiders coming into the business and take control of the business whilst in the medium scale businesses, 43% of the respondents expressed their concern about external participation in the family business. On top of that, 44% of the respondents in the medium scale business expressed their worry over losing control if outsiders are allowed to be in the family business.

### **Ownership v Control**

In business, the dichotomy of control and ownership lies upon the separation of control and ownership. In a company structure, the shareholders who own shares in the companies are known as the owners whilst the directors who manage the companies are said to have control over the entities. Berle and Means (1933) contended that a greater dispersion of share ownership would cause a decrease of the shareholders' power and interest in the company. This is known as a separation of ownership from control. Saleem Sheikh and SK Chatterjee (1995) argued that as a result of the separation of ownership from

control, shareholders would no longer have charge of the direction of the company and the directors are vested with wider power in developing the company. According to the writers within the corporation, shareholders had only interests in the enterprise while the directors had power over it. The position of the shareholders had been reduced to that of having a set of legal and factual interests in the enterprise.

Saleem Sheikh and SK Chatterjee (1995) also contended that there is a separation between the owners and the controllers in a company, there is a possibility that the interests of the shareholders would not be carried out since they have no control over the running of the company. The separation of ownership from control also resulted to owners to being satisfiers instead of maximizers as the shareholders will be satisfied with the dividend received without participating in the management of the company for the purpose of obtaining maximum profit. The writers emphasized that when the owners lack control of the company, they become unfamiliar with the policies engaged by it. As a result, the managers may aim at achieving steady growth of earnings instead of maximizing profits for the owners. This situation is also known as shareholders passivity.

Cohen Committee Report (1945) also acknowledged that the lack of active participation from the shareholders was due to the separation of ownership from control. The Report further highlighted that dispersion of capital among an increasing number of small shareholders made them pay less attention to their investments and they are content with the dividends which are forthcoming

### **Management power**

Generally, companies would adopt article 73 of Table A of Fourth Schedule in its articles of association. The article speaks about on whom lays the power to manage the company. The article provides:

The business of the company shall be managed by the directors who may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting...

The main issues highlighted in Article 73 of Table A of Fourth Schedule is that the management of a company is vested with the directors and the members may not give instruction to the directors or override their decision (Walter Woon, 1997). Harman J. in *Breckland Group Holdings Ltd v London Suffolk Properties Ltd & Ors* [1989] confirmed that the powers of the board are independent of the shareholders.

## Observation

The discussion on ownership and control structure is important to highlight that in sustaining the succession of family business to the children, it is important for the children to not only own shares in the business but also become members of the board of directors. By being mere shareholders, they will not have decision making power in the business but merely waits for their ascertainment of profit via dividend of the business. Nonetheless, the recommendation for declaration for the dividend is also a right vested to directors (Article 98, Table A of Fourth Schedule). As such, it is clear that to assure the children's rights in the family business, the interest which they should have is both the ownership and control rights. The best way to sustain interest of children in family business is by making sure that the children have certain amount of shares and also sit in the board of directors.

The above understanding is important for the court in distributing interest in a family business to ensure that their interest in the business continue despite divorce of the parent. The distribution of interest in family business should not be divided directly to the parent in accordance to their proportion as this may result to discontinuance of the children's interest when one of the parents decided to sell their interest in the business. It is viewed that by applying the doctrine of "a favor filli", i.e. for the best interest of the children, the court could ensure that the children get a fair share in the family business and the ownership of the family business is retain in the family despite the business.

It is proposed that the analogy to the matrimonial home to be applied by the court in determining and dividing interest in family business as a matrimonial property.

## Matrimonial Property

The statutes in Malaysia are silent as regards to the definition of the matrimonial property. Even though the Married Women Act (Revised 1990) is the main statute, which deals with the married women's property, no reference is made to the term matrimonial property. The LRA also leaves the term undefined and this failure has led to uncertainty in deciding what should and should not be included in the division. However, generally matrimonial property has been refers to any property, which is acquired during the marriage either by the joint effort or the sole effort of the party. It also includes property, which is owned before the marriage provided that it has been substantially improved by the other parties or by both parties during the marriage (section 76(5) of LRA). In the case of *Ching Seng Woah v. Lim Shook Lin* [1997] 1 MLJ 109. Shankar J said that:

“...the expressions refer to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses

and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.”

The above definition clearly indicates that matrimonial property should cover everything that is acquired during the marriage. The definition is wide enough so as to cover the earning power of the spouse even though the quantification of the amount may lead to another dispute. The above finding corresponds to the decision of Lord Denning in the case of *Wachtel v. Wachtel* [1973] Fam. 72, at p.90 where matrimonial assets should refer to those things, which are acquired by one or the other or both of the parties. This must be coupled with the intention that it should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The judge in this case also divides the matrimonial assets into two parts; assets “of a capital nature” such as the matrimonial home and its furniture and “revenue producing nature” which include the earning power of husband and wife. The finding of Lord Denning conforms with the decision of Lord Diplock in the case of *Pettit v. Pettit* [1970] AC 777. where matrimonial property or family assets means “property whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children”. The above cases show that the English courts by using the word “family assets”, describe matrimonial property as property in which both spouses should have some interest either because of the way in which it was acquired or because of the manner in which it was used.

### **Matrimonial property laws in Malaysia**

In Malaysia, the law that governs the division of matrimonial property is the Law Reform (Marriage and Divorce) Act 1976. As its long title provides that it is an Act to provide for monogamous marriages and the solemnization and registration of such marriages and to amend and consolidate the law relating to divorce and to provide for matters incidental thereto, the division of matrimonial property is specifically dealt with in section 76 of the Act. The Act which generally applies not only to all persons in Malaysia but also to those residents outside Malaysia whose domicile is in Malaysia (section 3 of the LRA ) was enforced throughout Malaysia since the date of the enforcement of the LRA i.e first March 1982 (PU (B) 73/1982). For the Muslims, applications for division of matrimonial property (*harta sepencarian*) are made to the Shariah Court under the respective state’s Islamic Family Law Acts or Enactment. For the purpose of this paper, the discussion is only based on the LRA as the issues for the Shariah perspectives are viewed to be dealt separately in another forum.

## Law Reform (Marriage and Divorce) Act 1976

Section 76 reads:

- “(1) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties any proceeds of sale.
- (2) In exercising the power conferred by sub-section (1) the court shall have regard to-
- (a) The extent of contributions made by each party in money, property or work towards the acquiring the assets;
  - (b) Any debts owing by either party which were contracted for their joint benefit and
  - (c) The needs of the minor children (if any) of the marriage, and subject to those considerations, the court shall incline towards equality of division.
- (3) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by the sole efforts of one part to the marriage or the sale of any such assets and the division between the parties any proceeds of sale.
- (4) In exercising the power conferred by sub-section (1) the court shall have regard to-
- (a) The extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
  - (b) The needs of the minor children, if any, of the marriage; and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the courts think reasonable ; but in any case the party by whose effort the assets were acquired will get a greater proportion.
- (5) For the purposes of this section, references to assets acquired during marriage include assets owned before the marriage by one party, which have been substantially improved during the marriage by the other party or by their joint efforts.”



Referring to the above provision, it is clear that section 76 of the LRA is dealing with the power of the court, upon granting a decree of divorce or judicial separation to order the division of matrimonial assets acquired during the marriage. It requires the Court to differentiate between those assets acquired by joint efforts from those acquired by sole effort. In the case of assets acquired by joint effort, the Court is directed to incline towards equality of division while in the case of assets acquired by sole effort the Court is directed to ensure that the 'acquirer' shall get a greater proportion. However, in dividing such property, there are certain factors that the court has to take into consideration. For the joint effort property the factors include the extent of the contribution made by each party in money, property or work towards the acquiring of the assets (Section 76(2) (a) of the LRA). Besides, any debts owing by either party which were contracted for their joint benefit will also be considered without undermining the needs of the minor children, if any, of the marriage (Section 76(2) (b) and (c) of the LRA).

Similarly, for assets acquired by the sole effort of one party to the marriage, the court also has to look at several factors namely the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family (Section 76(4) (a) of the LRA). If there are minor children from the marriage, their needs shall be taken into account too, as provided for in section 76(4) (b) of the LRA.

Section 76(5) of the LRA further elaborates that for the purpose of this section, assets acquired during a marriage includes assets owned before the marriage by one party as well. Nevertheless, it is subject to the condition that the claimed property must be substantially improved during the marriage by the other party or by their joint effort.

### **Best interest of children**

Referring to the provision governing the division of the matrimonial property as provided for in the LRA and the IFLA, it is noted that needs of the minor children is one of the factors that the court has to consider in dividing the property regardless whether the property is joint effort or sole effort property (Sections 76 (2) (c), 76(4) (b) of the LRA). The reason is mainly because besides the parties themselves, the children are directly affected by the divorce and may suffer considerable emotional trauma when their parents break up (K. Stanley, 1993). To minimize the effect of divorce on children, the law emphasizes that the children rights or interest should be protected or at least their needs are adequately considered in dividing the property. In pursuant to this, it is obviously noted that the court has been very cautious in dealing with division of matrimonial property especially in relation to the matrimonial home. The term matrimonial home generally refers to a dwelling house or other accommodation, which is occupied by spouses jointly as their home (Miller JG, 1983). Normally the parent who is awarded custody of the children is allowed to keep the matrimonial home so that the children can continue to live

in the house with minimal disruption to their daily routine after the divorce (Leong Wai Kum, 1997).

### **Division of matrimonial home as a matrimonial property**

There are few decisions made by the court in relation to the matrimonial home as a matrimonial property including the order to postpone the sale until some specified time in the future, such as until the a child attained the age of majority, to transfer the matrimonial home to one spouse absolutely and to order the matrimonial home to be sold and to divide the proceeds of sale between them. The order to postpone the sale is fundamentally to solve an immediate problem of accommodation for the wife and children without affecting both spouses' interest in the matrimonial home (N.V. Lowe and G. Douglas, 1998). With the intention to give a protection to a child at least until they complete their full time education, the order to sell the house is postponed until the child reach the age of majority with a presumption that after the age of majority the child will be more self- reliant.

This is best illustrated in the case of *Lim Tian Hock Vincent v. Lee Siew Kim Virginia* [1991] 1 MLJ 274. The Court of Appeal, in considering the needs of the two children, who were under the custody of the mother, affirmed the decision made by the learned judge that the matrimonial home was not to be sold until the younger daughter; Charlene Lim Yu-Shan reached the age of majority. The father's application to sell the house was therefore rejected. By such order, it means that the respondent and the children would have exclusive possession and enjoyment of the matrimonial home until the year 2003.

By referring to the English case of *Chambelain v. Chambelain* [1974] 1 ALL ER 33 the court in the case of *B Ravindran v Maliga d/o Mani Pillai* [1996] 2 MLJ 150 also decided that the sale of the matrimonial home to be postponed until the four children who are in the custody of the mother attain the age of majority whence the proceeds will be divided equally. Similarly, without denying the fact that both parties entitle to the share of the house, the court in the case of *Yeoh Kum Chin v Tan Gook Eng* [1996] 2 CLJ 65 decided that the order of sale to be postponed until the child age reach the age of 18 years, which is about four more years to go. The court emphasized that;

“To order a sale would in effect amount to ordering a change of environment for the child where so far the close proximity of the house to the school has contributed positively to her being able to cope with her parents being away all day at work without getting into unhealthy activities. Having given this aspect much anxious [11] consideration I find that since the house plays an integral role for the child, I would refuse an order for disposal of the house until the child shall have reached the age of 18 years, at which time the parties may dispose of the house and share the proceeds after outgoings on an equal basis.”

The above quotation obviously shows how the court is very concern with the interest of the children's which might be affected if they were to find other house to live in. The needs of the children have been equally emphasized by the court in ordering the matrimonial home to be transferred to one spouse absolutely. In *Tham Khai Meng v. Nam Wen Jet Bernadette* [1977] 2 SLR 27, the judge of Appeal Court, L.P Thean, said (at pg 38):

“...the needs of children are also an important consideration. The children are still young, aged 10 and 8 only. Although the wife and the children are living with the wife's parents, they will eventually need a home of their own, a roof over their heads. We therefore should consider retaining [the property]. Its location is ideal. Not only it is an independent house for the wife and the children to live in but also it has the benefit of adjoining the house of the wife's parents. The children will continue to require the support and care of the grandparents, while their mother has to go out to work to support herself. We are firmly of the view that the house should not be sold but should be transferred to the wife so that she and the children would have a roof over their heads...”

Thus, the court in the above case decided not to order the matrimonial home to be sold but to be transferred to the wife absolutely upon her payment of certain amount of money as a consideration of such transfer.

In the earlier case of *Tan Poh Soon V Phua Sin Yin*[1995] 3 SLR 368, the court has also demonstrated their deepest concern for preserving the interest of the retarded son who needed a house to stay in. Even though the court did not specifically mentioned about considering the child's needs, yet it is undeniable fact that his needs must have played an important role in the judgment of the court in ordering the husband to transfer his declared half interest on the matrimonial home to the plaintiff subject to plaintiff payment of certain amount of money See also the case of *Ong Chin Ngoh v. Lim Chin Kian*1992] 2 SLR 414; *Fan Po Kie v. Tan Boon v Son* [1982] 2 MLJ 137 and the case of *Chia Gek Yong v. Cheng Hiang Keow @ Yeow Hwee Ming* [1987] 1 MLJ 93. Similarly, in *Shirley Koo v. Kenneth Mok Kong Chua* [1989] 2 MLJ 264 , the court decided that the wife should get the matrimonial home so that she and the children could have a roof over their heads, which would afford them permanent security. In return, the court ordered that the wife to forego all her claims on the other assets.

Thus, it is found that the parent who is awarded custody of the children will generally be allowed to keep the matrimonial home so that the children can continue to live there with minimal disruption to their daily routine after the divorce (*Leong Wai Kum* at p 948). It is also important to note that the needs of the minor children actually cover both present and future needs. The award of the matrimonial home extends to children who have been staying in their

grandparents' house since birth until the divorce is granted. In such a case, it is foreseeable that the children eventually need a home of their own.

This is what actually happened in the case of *Tham Khai Meng v. Nam Wen Jet Bernadette* [1977] 2 SLR 27, where the court ordered the wife to retain the house at No. 2, Brightney Crescent, Singapore despite the fact that all this while the children together with their parents have been staying with the wife's parents. However, in consideration of such transfer the wife should pay to the husband a lump sum of \$1 million as his share and to take over the entire liability to the OCBC Finance Singapore Limited. The wife thus obtained 80% of the value of the matrimonial property. By this, it shows that the Court of Appeal has demonstrated the deepest concern for preserving the living environment of the children not only at that particular time but also their future needs (*Leong Wai Kum*, at p. 949).

In other circumstances, the needs of the minor children have also become a major concern of the court even though the matrimonial home has to be sold and divided. The court will only order the matrimonial home to be sold and divided in case both the husband and wife are still young and there are no children from the marriage or the child is already a major (*M. Hayes and C. Williams*, 1999). This is best illustrated in the case of *Lim Bee Cheng v. Christopher Lee Joo Peng* [1996] 1 AMR 1096, where the marriage only lasted for three years with one child who has already reached the age of majority. Thus the court decided that the matrimonial home has to be sold and the proceeds are to be divided accordingly

### **Interest in business as a matrimonial property**

In the English case of *Wachtel vs Wachtel*, Lord Denning M.R held that "the phrase 'family assets' is a convenient short way of expressing an important concept of matrimonial property. It refers to those things which are acquired by one or other or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The judge divides the matrimonial assets into two parts; assets "of a capital nature" such as the matrimonial home and its furniture and "revenue producing nature" which include the earning power of husband and wife.

If the definition in *Wachtel* case is used as the judicial guideline of what is matrimonial property, then, there is no reason to exempt divorced couple to claim their interest in family business. As long as it can be proved that the business was established/acquired before or during marriage with the intention that it is for continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole, divorced parties should be entitled to claim some proportion in the business.

The principle which the court applied in division of interest in business as matrimonial property is the "participation / contribution test". The case law

highlighted that if the parties did not contribute to the business, direct or indirect or was never involved in the management of the business, direct or indirect, he/she would not be entitled to the business as part of matrimonial property. Some degree of participation is required to indicate interest of the parties in the business.

In *Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam* [2002] 3 MLJ 273, whereby the Court of Appeal upheld the decision of the High Court that upon the divorce, the wife was entitled to a share of the clinic as matrimonial property because the court found that the wife had contributed to the setting up of the clinic by among others:

- (i) Standing as guarantor for banking facilities
- (ii) Selling the family car to tide over the difficult period and
- (iii) Utilizing joint savings in the opening of the clinic

In *Koay Cheng Eng v. Linda Herawati Santoso* [2005] 1 CLJ 247, the petitioner contended that the respondent is not entitled to any maintenance payments as she is a professionally qualified architect, licensed to practice in the UK and, hence, capable of earning a living in the UK, free from the responsibility of raising any children. The petitioner declared his monthly income at RM10 000. The respondent disputed this and submitted that the petitioner had failed to make a full and frank disclosure of his income. The petitioner also contended that the respondent is ineligible to a share of the matrimonial assets because she did not contribute towards the purchases of the properties. The respondent, on the other hand, submitted that she is entitled, under s. 76(1) and (2) of LRA, to half of all the matrimonial assets, including the properties and motor vehicles owned by the petitioner, a share in the petitioner's ENT clinic, and an equal share in the petitioner's provident fund contributed during the subsistence of the marriage.

The court held that the petitioner's contention that the respondent should not be paid any maintenance was unsustainable. The parties had been married for 17 years and the respondent had hoped for the marriage to survive. The respondent had sacrificed a career as an architect to follow the petitioner in his various postings before they moved to Malaysia 11 years ago. It would be a grave injustice to not order maintenance in favor of the respondent.

The court also held that properties acquired by the parties in Malaysia were paid for mostly with the moneys repatriated from the UK. Some of such properties were subsequently disposed of and the proceeds were used to purchase other properties. The respondent was able to show a direct contribution in relation to the purchase of the properties in the UK and consequently, she would be entitled to an equal share in the properties purchased in Malaysia. However, from the evidence, it is found that the respondent was never involved in the setting up or management of the petitioner's clinic and as such, she was unable to prove her claim of having contributed to the clinic.

From the case law, it is evident that interest in business as matrimonial property is subjected to the court discretion whether there was sufficient contribution made by the spouses to the business. The division is always made according to the value of the shares rather than shareholding or rights of ownership/ participating rights in the business. The right of participation in business and ownership are more extensive and long lasting compared to the monetary compensation of the value of the interest in the business as it involves the management right and most importantly the decision making power.

In the high profile divorce case of Datuk Seri Mohd Effendi Norwawi and Zariah Hashim @ Farida Effendi, instead of valuing the wife's interest in the business, the divorce settlements settled with transfer of the ex-husband's shares in Encorp Utility Sdn. Bhd. to the ex-wife and Madam Zariah retains the position as the non-independent Executive director in company (M. Mageswari, October 19, 2006). This means, Madam Zariah obtained ownership and participation rights in the business. The effect of this settlement seems to give a more pertinent and long term benefits to the ex-wife.

Applying this approach in family business, it is observed that in dividing interest in family business, it is more important for the court to look into the possibility of transferring the right of ownership/shareholding to the divorced parties as such interest could be transferred to or inherited by the children. The value of interest could still be justified/determined by using the contribution test and/or the sole and joint effort test but once the interest had been determined, it should not be quantified in monetary value but rather retained in its shareholding form so that the rights of ownership and participation in business could be transferred by the parents to the children when the time comes. The divorced parents could also benefit from their interest in the business and enjoy the benefits accrued from it before transferring the interest to the children, for example in the form of dividend and perks. If the interest in family business is divided in accordance of its monetary value, for example, the ex-wife got her proportion of RMXXX thousands, she will only get that amount of money once and the ex-husband who continued the business on his own shall get more and long term benefits from the business. Not only the ex-wife will succumb to a short term and limited benefits from such division of matrimonial property, the children who are under her custody shall not be able to enjoy the long term benefits which are due to them as planned by the earlier generation who set up the business for their grandchildren. The negative impact is not only on the ex-wife but more to the children who supposedly benefitted from the business if the divorced did not occur. The family business structure may also collapse as the succession plan is disrupted due to break up of the family continuation.

### **Analogy of the matrimonial home to family business**

Similar to matrimonial home, a family business is established and meant to continue for the children/family benefits. Despite the divorce, the interest of the children should be a prime consideration to represent continuous interest of the family and a long term benefit to the children. This scenario would not be

possible with the existing court approach, whereby the division of matrimonial property in the business is divided according to pecuniary valuation rather than ownership rights in the business. In short, when the divorced parties' interest in the family business are divided according to the quantum of their contribution to the business, the issue of succession planning shall depart from the initial idea of setting up the family business, i.e. for the business to be passed from the father/mother to the children. The divorced parties will be taking their portion accordingly without realizing that the division shall break the ties between their children and the business.

To ensure the continuation of the ownership, the court may consider similar approach which they applied for matrimonial home, i.e. giving supplementary orders to restrict the parents from selling or affecting the interest in business until the children are ready or capable to inherit them. These proposal shall be able to sustain the succession issue in family business albeit a divorce between the parents and provide a long term benefits to the children in line with the initial and noble idea of setting the family business, i.e, for the family name and business legacy to be continued by the next generation.

## **Conclusion**

In deciding the divorce settlement and matrimonial property cases, the court normally refers to the statutory and judicial guideline. This is indeed commendable as the main method to justify the judgment. Nonetheless, it is perceived that there are other aspects which need to be highlighted in determining the composition of matrimonial property, in particular when it comes to interest in business.

It is clear from the discussion that interest of the children is one of the prime factors which the court look into when it comes to division of matrimonial home as matrimonial property. It is noted that that in almost all cases the matrimonial home is awarded to the wife who has the custody of the children or to order the sale of the matrimonial home to be postponed until the child attain the age of majority. The purpose is fundamentally to protect the children as much as possible from the consequences of divorce as well as a desire to protect and relieve the party (usually the wife) who is left with the financial, mental and physical burden of the divorce. This aspect has been highlighted by Michael L. Rakusen et al (1989) in his book.

As such in dividing interest of divorced parties in a family business, it is also important to take into consideration "best interest of the children" as the future owner of the business. This factor may not only provide a long term benefit to the children but may also ensure sustainability of the family business despite divorces. It is proposed that the Malaysian court could expand its approach in deciding interest in family business as matrimonial property by taking into consideration the long term interest of the children and the sustainability of the family business and not merely confine the distribution by

reference to the amount of shares or value of the divorced parties' interest (money worth) in the business.

## **References**

### **Statute**

Companies Act 1965

Law Reform (Marriage and Divorce) Act 1976

### **Book**

Adolf A. Berle and Gardiner C.Means. 1933. The Modern Corporation and Private Property. Macmillan. New York.

Edward S. Herman. 1981. Corporate Control, Corporate Power. Cambridge University Press. London.

Hayes M and Williams C. 1999. Family Law, principles, policy and practice. Butterworth. London.

Leong Wai Kum. 1997. Principles of Family Law In Singapore. Butterworth. Singapore.

Lowe N.V and G. Douglas. 1998. Bronley's family Law .9<sup>th</sup> Ed. Butterworth, London.

M. Hayes and C. Williams. 1999. Family Law, principles, policy and practice. Butterworth. London.

Michael L. Rakusen, D. Peter Hunt, A. Jane Bridge. 1989. Distribution of matrimonial assets on divorce, 3rd. Ed., Butterworth. London

Miller, JG, Family Property and Financial Provision. 1983. 2<sup>nd</sup> ed. Sweet & Maxwell. London.

Saleem Sheikh and SK Chatterjee, Perspectives on Corporate Governance, in Dr Saleem Sheikh and Prof William Rees(eds), Corporate Governance & Corporate Control, (Cavendish Publishing Limited, London, 1995).

Stanley K. 1993. Family Law. MacMillan Press Ltd. London.

Walter Woon. 1997. Company Law, Second Edition, FT Law & Tax Asia Pacific.



## Article

Amran, Noor Afza and Ahmad, Che Ahmad. 2010. Family Succession and Firm Performance among Malaysian Companies. *International Journal of Business and Social Science* Vol. 1 No.2; November 2010.

Ibrahim, Haslindar and Samad A. Fazilah. 2010. Family business in emerging markets: The case of Malaysia. *African Journal of Business Management* Vol.4 (13), pp. 2586-2595, 4 October, 2010.

## Report

Board of Trade, Report of the Company Law Committee .1945. Cmnd 6659 (Cohen Committee)

English Law Commission (Family Property Law). The Law Commission Published Working Paper, No. 42, para 0.24 at p. 15.

Report on Malaysia's Family Business. Shamsir Jasani. 2002. The Family & The Business International Survey, Grant Thornton & Malaysian Institute of Management .

## Internet

Johnben Loy. 2010. Lessons from successful family businesses. Management@work, the monthly management pullout of The Edge Malaysia, Issue 830, Nov 1-7, 2010. Retrieved from <http://www.theedgemaalaysia.com/management/177494-lessons-from-successful-family-businesses.html> on 8 December 2011.

M.Mageswari. 2006. Effendi case settled. The Star, Thursday October 19, 2006. Retrieved from <http://www.thestar.com.my/news/story.asp?file=/2006/10/19/courts/15767577&sec=courts> on 5 Jan 2007.