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INTRODUCTION

The objective of this paper is to examine the nature of trust that arises under s 23 of the Civil Law Act 1956 ('the CLA'), s 130 and para 5 Schedule 10 of the Financial Services Act 2013 ('the FSA'), which is applicable only to non-Muslims.

It has been said that:

It is still uncertain whether a trust policy created under s 23 or a trust of policies moneys under s 166 of the repealed Insurance Act and now the Financial Services Act 2013, is a trust inter vivos or a testamentary disposition.1

This paper proposes that the trust policy created is an inter vivos trust for the reasons discussed and advanced herein.

The above quoted statement is a result of much academic debate criticising the application of the s 23 of the CLA in cases like Re Man bin Mihat, decd2 and Re Bahadun bin Haji Hassan decd3 to Muslims. In course of contentions the arguments raised therein included the argument that the trust created is a testamentary trust and hence is not applicable to Muslims.

The FSA and its predecessor Insurance Act 1996 (since repealed) had as a result, legislated that Muslims are not subjected to the applications of the provisions of the statutory trust. Nonetheless, the after effect of this argument still haunts us today and has left a state of uncertainty in its wake.4

The basis of the contention to exclude application of the common law statutory trust under s 23 of the CLA to Muslims has its justification which stems from the provisions under the Ninth Schedule State List item 1, wherein the jurisdiction of personal and family law for Muslims is under the state and syariah courts' jurisdiction.5

The argument maybe reinforced by the provision of s 25 of the CLA 1956 that provides that nothing in PT VII (ss 17–25) of the CLA 1956 may affect the disposal of property according to Muslim Law. These arguments best support the contention for the exclusion of the provisions on statutory trust to Muslims.

It may be academic but noteworthy that in the cases of Re Man bin Mihat, decd and Re Bahadun bin Haji Hassan decd, the learned judges ratio in deciding the case when considering a Muslim person entitlement to proceeds under a s 23 of the CLA policy hinges on the fact the trust created is an inter vivos trust or gift.6 The contention of this paper is that the trust created is an inter vivos trust as opposed to a testamentary trust. It also follows then that should a non-Muslim person create such a trust, the mere fact of a subsequent conversion of the said person shall
not affect the validity of the trust so created. Hence the interest of the protected class beneficiaries (as will be defined shortly) will be safeguarded.

An inter vivos trust it is submitted, would entail the divesting of interest in the trust property to the trustee (legal title) and beneficiary (beneficial title) by the insured during his lifetime. The subsequent conversion of the insured does not impair the trust created. However once an insured converts to being a Muslim, the statutory trust provisions under the FSA and the CLA would not apply to the Muslim convert for subsequent but not previously created inter vivos trust of the insurance policy or monies.

SCOPE OF THE FSA STATUTORY TRUST AND ITS RELATIONSHIP WITH CLA

With the repeal of the Insurance Act 1966 by the FSA 2013, the position and application of s 23(1) of the CLA is uncertain. It is likely not to apply to the extent that it is not compatible. This is the effect of the provision of s 13 and para 5 Schedule 10 of the FSA 2013. However s 23 of the CLA has not been repealed unlike the Insurance Act 1996 so the provisions and case law in relation to the same still has significance.

In this regard, reference is made to the case of Shunmuga Vadevu S Athimulam & Ors v The Malaysian Co-operative Insurance Society Ltd & Anor. Here, the High Court decision of Abdul Hamid Mohammad J (as he then was) dealing with the issue of the conflicting provisions of who is to be the trustee of the statutory trust policy wherein s 23(4) of the CLA provides it is the insured in default of nomination by the insured and s 166(3) of the repealed Insurance Act 1996 wherein it provides for the nominee who is competent to contract to be the trustee. It was decided that the provision of the since repealed Insurance Act 1996 will prevail over the CLA as to who is the trustee of the policy. The deceased legally married wife was named as nominee under the policy and was the trustee given s 166(3) of the said 1996 Act. The second purported nomination of another by the deceased insured without the consent of the nominee was not valid.

The Civil Law Act 1956 is an earlier Act general in nature, whereas the Insurance Act 1996 is a later Act and is specific in nature ie, insurance. Therefore, where the provisions of that two Acts conflict, then latter and the specific Act should prevail.

Hence, given that the judicial interpretation has placed the Insurance Act 1996 over the CLA, it follows that the FSA 2013 will likewise be argued to prevail over the CLA in the event of a conflict even without the express provision of para 1 Schedule 10 of the FSA.

Nonetheless it has been statutorily provided that s 23(1) of the CLA 1956 life policy is subject to s 10 of the FSA. The relevant provisions of FSA Schedule 10 para 1 and 13(1) are reproduced herein:

Para 1 Application of Schedule 10 FSA

In this Schedule, a reference to a policy is a reference to a life policy, including a life policy under section 23 of the Civil Law Act 1956, and a personal accident policy, effected by a policy owner upon his own life providing for payment of policy moneys upon his death.

Para 13(1)

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

It is to be noted then that the creation of trust policies under s 23 of the CLA is only possible for non-Muslims. This is because this is a limitation imposed under para 5 Schedule 10 of the FSA to exclude application to Muslims and s 23 of the CLA is subjected to this overriding provision.
It is also to be noted that the creation of trust over insurance policies otherwise than by statute has not been excluded by the provisions of the FSA under Schedule 10 para 13(2). The said provision provides for the exclusion of written law, practice or customs in relation probate administration and distribution of the estates of deceased persons which in fact relates to a testamentary trust.

There is also no exclusion of the creation of an inter vivos trust under an express trust aside from statutory trust. It is to be noted that inter vivos trust of insurance policy can arise not just out of statutory trust but can be created by a trust instrument. Further that equitable assignment of the policy is also not expressly excluded under the Schedule 10 para 13(2) which reads:

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

STATUTORY PROVISIONS RELATING TO LIFE INSURANCE TRUST POLICIES IN MALAYSIA AND THE PROTECTED CLASS

The current relevant provisions on statutory insurance trust over life policy and policy moneys respectively are the s 23 of the CLA and s 130 and para 5 Schedule 10 of the FSA which are applicable only to non-Muslims. Section 23 of the CLA deals with the creation of trust in an insured own life policies expressed for the benefit of a wife, husband or child, or a combination of any of them. The statutes create a statutory trust to give effect to the legislative intent where the primary rationale was to exclude from the clutches of the creditor this security over the policy owner and insured own life that a man or wife provides for the benefit of the family and by creation of such a trust, the property to the policy and policy money is divested from the estate of the insured in a form of a trust to a trustee to hold for the beneficiary. The question of when this trust takes effect will be examined in the discussion that follows.

The protected class under a statutory trust over the insured own life policy by virtue of the provisions of the CLA and FSA are possibly the spouse, child and if there is no spouse or child at the time of nomination the insured’s parent.

EFFECTIVE TIMING OF VESTING UNDER STATUTORY TRUST — UPON NOMINATION OF PROTECTED BENEFICIARIES AND NOT DEATH OF INSURED

Houseman and Davies (2001) with reference to s 11 of the Married Women Protection Act 1882 which is in para materia with s 23(1) of the CLA, the provision is said to have the following effect:

- the creation of a trust of life policies without the formalities otherwise required; and
- the appointment of trustees and the vesting of the policy in those trustees from the outset. (Emphasis added.)

There is a distinction between s 23 of the CLA and para 5 Schedule 10 of the FSA with regards to the timing of the creation of trust and over what property. The s 23 of the CLA trust is over trust policies and is created at the inception of the policy; whereas under para 5 Schedule 10 of the FSA, the trust is over policy moneys and can be created at any time during the term of the policy. Given the overriding effect of the FSA, it is suggested likewise that the naming of the protected class nominee under s 23 can occur at the inception or during the term of policy.

It will be seen that the policy vests in the trustee once the nominated nominee falls within the protected class aforementioned. Hence it would be arguable that if there is no insured appointed trustee the courts would apply the default list under para 5 Schedule 10 of the FSA, which now specifically excludes the insured. The ability of the insured to revoke the nomination of the protected class under para 3(1) Schedule 10 of the FSA of the insured as regards to the protected class has been read or construed restrictively as will be seen later in this paper. Notwithstanding the liberal wording of para 3 Schedule 10 of the FSA as regards to revocation of nomination, the
courts have required that the consent of the trustee be obtained to affect a revocation of the statutory trust. The point to be highlighted here is the fact that an inter vivos and not a testamentary trust have been accepted as created by the courts. The need for consent of the trustee during the insured lifetime to deal with the trust policy or to revoke the same is a recognition of the existence of an inter vivos trust. The fact the trustee cannot be the insured under the provision of the FSA para 5(3) Schedule 10 further lends to the contention that the beneficial interest is created and belongs to the protected class upon creation by nomination of the protected beneficiaries of the trust policy or policy monies. The statutory intent to exclude the insured as trustee is to ensure that the beneficiary interest is being safeguarded by an insured nominated third party trustee acting to serve the beneficiary interest or in default of appointment, the trustee is the nominee who is competent to contract. The possibility of the beneficiary being the trustee but not the insured is reflective of the fact that the beneficial interest resides with the beneficiary and not the insured upon nomination of the protected beneficiary. This occurs during the lifetime of the insured when the protected class is nominated whereupon an inter vivos trust is created. An incidental point is where the protected class beneficiary is a sole beneficiary and who either by nomination or default becomes the sole trustee. Here it would be submitted that the trust dissolves as no trust can exist where the entire estate both legal and equitable is vested in one person. The beneficiary cum trustee holds title in the beneficiary own right and is akin to an assignee to whom the chose of action in the policy has been transferred.

The mere fact that are provisions within the statute that regulate the vesting and demarcation of the trust property from assets of the insured, the appointment of trustees and the control over the trust property speaks to the existence of an inter vivos trust.

**REBUTTING THE ARGUMENT AVERRING TESTAMENTARY TRUST**

One of the arguments raised so as to exclude the application of the statutory trust to Muslims is the averment that a testamentary trust is created by virtue of s 23 of the Civil Law Act 1956.

The argument that was advanced doubting the correctness of Suffian J’s (as he then was) judgment in *Re Man bin Mihat decd* is the argument that the trust policy under s 23 come into existence upon the death of the insured. Hence it takes effect upon the death of the settlor. The disposal is upon death. Hence it was argued that the trust is testamentary. As such it should be subjected to the Islamic law of inheritance unlike the divesting of property during the settlor’s (insured) lifetime wherein he is not so constrained.

The case of *Re Ismail bin Rentah deceased Haji Hussain bin Singah v Liah binti Lerong & 3 others* was cited to support the contention that the s 23 trust is a testamentary trust. However this case fact is not in pari materia with the case of *Re Man bin Mihat, decd* that invokes the application of a statutory trust in the form of s 23 of the CLA. The case of *Re Ismail Rentah* did not involve the creation of trust by virtue of a statute. The case involved a nomination of a gift that was to take effect upon the death of the donor. The case of *Re Ismail Rentah* concerned a nomination as opposed to a trust under s 21 of the Cooperative Societies Rules for a daughter to receive the share of her father, Ismail Rentah in the event of his death. The primary differences are that there is no statutory trust created inter vivos, the nomination is revocable at will of the member, and the disposition of share is only upon death of the father, hence post mortem (after death) in nature. The court found that the gift form part of his estate and the nominee is not to take it beneficially. A similar outcome is also seen in the cases where in absence of trust where policy money is expressed to be payable to a third party upon his death, the third party is then prima facie an agent for the time being of the legal owner.

The facts of the case here also fall within the classification of testamentary trust as illustrated by Ford (1996). ‘But if x were to execute a deed providing for the transfer of property on his death to T … the deed would be in nature of a will or as it sometimes described as testamentary’. The primary point is that the transfer is upon death and is only effective upon death of the benefactor.

However as will be seen, statutory trust cases do not fall within this category of a mere nomination to receive upon death but because of the provisions within the statute for statutory trust, particularly under s 23 of the CLA, it gives rise to the creation of *trust at the outset* defining trust property, the objects of trust, trustees and beneficiaries (whether vested or contingent) and insured roles respectively. The similar though not identical provision existed under the repealed s 166 of the Insurance Act is re-enacted with minor changes under para 5 of Schedule 10 of the FSA which supports the contention that there is a trust inter vivos intended by statute. This is further reinforced by
judicial interpretation in cases that will be discussed shortly.

**TRUST: INTER VIVOS TRUST**

**Meaning of inter vivos trust**

The trust created under s 23 of the CLA and para 5 Schedule 10 of the FSA are statutory trust created by the Parliament.

HA J Ford and WA Lee *Principles on the Law of Trusts* (1996) has this to say on the nature of inter vivos trust.

The expression ‘inter vivos’ meaning ‘between living persons’ is used to describe a trust which is created with the intention that it should operate in the lifetime of the creator of the trust.

The expression ‘post mortem’, meaning ‘after death’ when applied to a trust which the creator does not intend to operate before death. Post mortem trusts are sometimes referred to as testamentary trusts meaning a trust which to be validly created should be contained in a valid last will and testament. However as we shall see it is possible to have a trust coming into operation after the death of a person who dies intestate and the expression ‘post mortem’ is more accurate. The distinction turns on the intention of the creator to the trust as to when the person who is to be the trustee is to become subject to equitable obligations under the trust. A trust will be inter vivos if that person is to become subject to those obligation under the settlors lifetime. It would still be a trust inter vivos even if the settlor reserves a power of revocation.

The statutory intention to create a trust for the protected class during the lifetime of the insured (inter vivos) is evident by the provision and framework of the statute and the case law interpretation of the same. Further that, the contingent nature of the interest of the beneficiary, any benefits or right reserved to the insured or the existence of a revocation clause are not a bar to the creation of the statutory inter vivos trust as will be seen in this paper.

It follows then that the divesting of the property occurs in an inter vivos trust during the settlor’s (insured) lifetime. It is unlike a testamentary trust or gift which operates upon the death and forms part of the estate of the deceased settlor or donor. A testamentary gift occurred in cases like *In re Ismail bin Rentah* discussed previously and in the case below.

In the case of *Lee Ing Chin @Lee Teck Seng & Ors v Gan Yook Chin & Anor* where the testator left shares in envelopes marked with the names of the beneficiaries, the issue that arose was whether a gift was intended to be a gift inter vivos or a testamentary gift. Gopal Sri Ram CJA (as he then was) delivering the judgment of the court said on the facts that the intention was that the gift was to take effect upon the death of the testator and not during his lifetime. It was hence a testamentary gift and formed part of the estate of the deceased.

**PROVISION OF S 23(1) OF THE CLA AND SCHEDULE 10 PARA 5 OF THE FSA — DIVESTING OF PROPERTY INTER VIVOS**

It will be seen from the provisions here and the cases that interpret the same that the nomination of protected beneficiary triggers the creation of an inter vivos trust. This occurs during the insured cum settlor’s lifetime. The trust arises upon the said nomination wherein the legal title vests in the trustee and the beneficial title vests in the beneficiary. The trust property is divested from the insured and does not form part of the estate of the insured. The appointment of trustee and the control by the trustee over the trust property is for the benefit of the beneficiary. The consent of the trustee is required by the insured who wishes to revoke nomination or otherwise deal with the policy. The duration of trust remains as long as the objects of the trust remain unperformed. All of the above are characteristics of an inter vivos and not a testamentary trust.

Section 23 of the Civil Law Act 1956 reads:

1. A policy of insurance effected by any man on his own life and expressed to be for the benefit of his wife and children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in
favour of the objects therein named, and the money payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts.

(2) If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.

(3) The insured may by the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

(4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

(5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee, or trustees or a new trustee or new trustees may be appointed by the High Court.

(6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

Para 5 Schedule 10 of the FSA reads:

Para 5 (1) A nomination by a policy owner, other than a Muslim policy owner shall create a trust in favour of the nominee if:

(a) the nominee is his spouse or child; or

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

Para 5(2) Notwithstanding any written law to the contrary that a payment made under subsection 5(1) shall not part of the estate of the deceased policy owner or subject to his debts.

Para 5(3) The policy owner may by the policy or a notice in writing to the licensed insurer appoint any person other than himself to be the trustee of the policy money and where there is no trustee appointed —

(a) The nominee who is competent to contract or

(b) Where the nominee is incompetent to contract, the parent of the incompetent nominee other than the policy owner and where there is no surviving parent, the Public Trustee or a trust company nominated by the policy owner

Para 5(4) (new provision) If there is more than one nominee who is competent to contract, the nominees shall be joint trustees and the consent for the purpose of this paragraph shall be given by all such trustees.

Para 5(5) A policy owner shall not deal with a policy to which subpara (1) applies to a revocation of a nomination or adding a nominee other than his spouse, child or parent under the policy, by varying or surrendering the policy, or by assigning or pledging the policy as security without the written consent of trustee.

The power of the insured to revoke a nomination or to add a nominee (with the exception of a parent, child or spouse) or to deal with the policy is curtailed. The consent of the trustee is required. The trustee is duty bound to act in the interest of the beneficiary when making decisions and may be liable to a beneficiary if he breaches this duty.

The insurance policy being a chose in action is capable to be transacted upon either by assigning, pledging as a
security or otherwise. The terms within the policy also may be subject to variation and the policy may be subjected to surrender. There may be dividends and bonus payable under the policy which require management during the lifetime of the insured. This power exists during the lifetime of the insured and is exercisable before and not after his death. However we note that power to deal with the policy for the protected class is limited in that the written consent of the trustee (other than insured) is required under para 5 (except for adding of additional trustees within the protected class by the insured) Schedule 10 of the FSA. Hence it is apparent here that the trust obligations arise during the course of the policy during the lifetime of the insured for it to be an inter vivos within the definition set out above.\textsuperscript{38} Under s 23 of the CLA, it is said that the trust is created as soon as the policy owner names or refers to his wife or husband or child as a class in the proposal form whereas it happens upon compliance with para 2 of Schedule 10 of the FSA where specific naming is required at any point of time during the duration of the policy.\textsuperscript{39} Further, the nature of the interest held by the nominee beneficiary of the protected class whether contingent or vested does not prevent the statutory trust from arising.\textsuperscript{40} This is further supported by the statute provisions and case law interpretation of the same.

The Federal Court decision of \textit{Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased)}\textsuperscript{41} had cited with approval the decision of \textit{Re Man bin Mihat, decd}\textsuperscript{42} as discussed below as good law.

In the case of \textit{Malaysian Assurance Alliance} the insurers were held not to be bare trustee of policy monies. The provisions before the court were s 23 of the CLA and the now repealed s 166 of the Insurance Act which is substantially the same with para 5 Schedule 10 of the FSA. Hence the remarks made and cases cited therein as regards to the nature of trust that arises therefrom is relevant. The inter vivos nature of the statutory trust is demonstrated in the facts of \textit{Re Man bin Mihat decd}, where the case concerned an insured who took out a policy on his life for RM40,000 which provided that should he die during the term of 25 years, the policy moneys would be payable to the beneficiary named in the policy.\textsuperscript{43} The insured named his wife as beneficiary and he died within the term period. The interest of the beneficiary was contingent under the terms of the policy in that she does not predecease the insured and that the insured does not survive the term period.\textsuperscript{44} Here under s 23 the court found that notwithstanding the contingent nature of the interest of the wife, there was an inter vivos statutory trust created during the lifetime of the insured in favour of his wife by virtue of s 23, and that the trust was not effective upon the death of the testator but as in accordance with para 23(4), immediately on it being effected, it vested. Suffian J (as he then was) said:

\begin{quote}
Therefore I am of the opinion that here too this policy would have \textit{created a trust in favour of the wife if non-Muslim and immediately on it being effected it vested}, as provided for by sub-s (4) of s 23 in the insured or his legal representatives for the purposes of the trust.

\end{quote}

\textit{...}

\begin{quote}
In my judgment the statutory trust created in favour of the wife in the instant case \textit{also retains is character as a trust after his death}, and for so long as any object of the trust remains unperformed the trust cannot be defeated and may if necessary, be enforced by the widow. \textit{The beneficial interest in the policy belonged to the wife since the date of the taking out of the policy and no beneficial interest in it accrued or arose on the death of the husband.} (Emphasis added.)

\end{quote}

It is to be noted that the on the facts of the case there was also an assignment to the wife. Further, that the court held the gift being inter vivos was not in conflict of the right of a Muslim to dispose his assets during his lifetime.\textsuperscript{45}

The fact that the gift was contingent or a gift in futuro did not invalidate the trust created.

In this regard, we also refer to the case of \textit{Re Choong Chak Choon}\textsuperscript{46} wherein the wife and son were named as beneficiaries provided that they survived him before the maturity of the policy. Terell CJ stated that:

\begin{quote}
\textit{The fact that the gift being contingent upon the beneficiaries surviving the insured does not prevent the Ordinance from applying.}

\end{quote}
Likewise in the case of *Re Bahadun bin Haji Hassan decd* where the court used the term gift. Abdul Hamid J (as he then was) said: ‘On the authority, *Re Man bin Mihat, decd,* … There was a complete gift even though the gift was contingent upon the life insured pre-deceasing the respondent before the maturity of the life policy.⁴⁷

Reference is also made to Abdul Hamid J (as he then was) in *Re Kathiravelu Decd: Sundari v Pemungut Duti Harta Pesaka Tanah Melayu⁴⁸* wherein it is said:

… that by its terms the benefit would be derived in a certain event only and such benefit is of a limited or contingent character it does not in my mind prevent the policy from being a policy effected under s 23 of the Act.

In the case on deciding whether estate duty was payable (as it then was) on policies of insurance, the court also cause to remark on when the policy was created under s 23 of the CLA:

The assured or his personal representatives are trustees of the policy and unless until some other trustee is appointed. The trusts operate from the inception of the policy.

A statutory trust is one where as a result of legislative intervention, a trust is created on the terms of the statute. The creation of a trust will result in the transfer of beneficial interest to the beneficiary (contingent or otherwise) whereas the legal title is held by the trustees over policy or policy moneys as the case may be.⁴⁹

Section 23(3) allows the insured to appoint a trustee failing which s 23(4) provides that in default of appointment, the policy shall *immediately vest* in the insured or personal representatives.⁵⁰

Section 23(5) is a saving provision to appoint new trustees in the event there is none at the time of death of the insured. This would be the required situation where the insured is the deceased trustee. Hence is it very evident that the trustee role arises during the lifetime of the testator.

Under para 5(1) Schedule 10 of the FSA, a statutory trust is created by naming nomination of a person within a defined class (spouse, children or parent when there was no spouse or child at time of nomination) of a non-Muslim policy owner over policy money payable upon his death, the trustee shall be appointed by the policy owner (other than himself) and in default there is a descending list of trustees the statute nominates as trustees. Further, under para 5(2) the policy money does not form part of the estate of the insured.

The trustees are subjected to an obligation towards the beneficiaries⁵¹ and trustee written consent is required when any dealings are to be made as regards to the policy moneys under para 5(5) Schedule 10 of the FSA.

Hence it is not a case like a nomination for others outside the class mentioned here where the policy or the policy money in question forms part of the estate of the deceased and subject to the payment of his debts and distribution as per the law of testacy or intestacy applicable to the insured when he dies.⁵²

As stated previously, the learned judgment of Suffian J (as he then was) in the case of *Re Man bin Mihat* that recognised the existence of inter vivos trust resulting from the creation of statutory trust under s 23 of the CLA despite the interest of the beneficiary being contingent, received affirmation in the Federal Court judgment of Ariffin Zakaria CJ in the case of *Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased):*

By sub-s (1) of s 23 of the CLA, a statutory trust is created in favour of the objects named in the policy and the *moneys payable under the policy shall not so long as any object of the trust remained unperformed become part of the estate of the insured or be subject to the debt of the insured.* To achieve this purpose, the insured may under sub-section (3) appoint a trustee or trustees in respect of the moneys payable. And sub-section (4) provides that in default of such appointment the policy shall immediately vest in the insured … The above view was confirmed by Suffian J (as he then was) in *Re Man bin
EFFECT OF CREATION OF TRUST: IDENTIFICATION AND SEPARATION OF TRUST PROPERTY

As seen in the above cases of *Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased)* and *Re Man Mihat, decd* cited therein, the trust property (policy moneys) is identified for the benefit of the protected class beneficiary and does not form the estate of the deceased insured.

Under s 23(2) of the CLA, the repealed s 166(2) and Schedule 10 para 5(2) of the FSA, the effect of the trust created is that the policy moneys shall not form part of the estate of the deceased policy owner or subject to his debts.

The case of *Manomani v Great Eastern Life Assurance Co Ltd*,53 construed a life policy that named the deceased wife and son as beneficiaries in a trust policy under s 23 of the CLA wherein the same was held not to form part of the estate of the deceased. It was held that the insurer defendant was erroneous in releasing the monies to the official administrator. Dato Hj Mohd Eusoff bin Chin J (as he then was) said at p 145:

As far as the wife and child of deceased are concerned, it is crystal clear that by virtue of s 23 of the Civil Law Ordinance 1956 as the policy of assurance was effected by the assured on his own life and expressed to be for the benefit of his wife and child, the moneys payable under the policy does not form part of the estate of the deceased. The Official Administrator committed an error when he requested for this money to be paid to him for his distribution under s 83 of the Probate and Administration Act. (Emphasis added.)

It is the contention that the inter vivos trust property being policy or policy moneys are divested from and do not form part of the estate of the insured from the time it is created. This is effected during the lifetime of the settlor which is a point of time prior to the death of insured, hence the inter vivos nature of the trust.

TRUSTEE APPOINTED TO ACT IN INTEREST OF BENEFICIARY

It is trite trust concept that the trustee is to act in the best interest of the beneficiary.54

The FSA changes the previous provision under the repealed provision of s 166 of the Insurance Act where the insured is not precluded from being a trustee. Hence it is arguable that the provisions under s 23 of the CLA that provides for the insured to be the trustee (if none nominated) will not be applicable as it is in conflict with the FSA which precludes the insured to act as trustee.55

It is also said previously that the trustee has duties and obligations to the protected class during the course of the policy within the lifetime of the insured. This duty will be invoked when the trustee’s written consent is sought when the insured seeks to act in the terms of para (5)(5) Schedule 10 of the FSA save for adding additional nominees within the protected class.

In *Re Equitable Life Assurance Society of United States v Mitchell*,56 Swinfen Eady J stated that:

So long as any objects of the trusts remained unperformed the trusts could not be defeated, and the options must be exercised in the best manner for the benefit of those entitled.

The trustee under paras 5(3) and 5(5) Schedule 10 of the FSA is authorised to deal on behalf of the beneficiaries with the insurer or insured or third parties and to give a valid receipt. The trustee has a duty under trust law to act in
the interest of the beneficiary as long as the object of the trust remained unperformed. This is so notwithstanding that the interest of the beneficiary may be a vested interest or a contingent interest as seen in the case below.

In the case of *In re Fleetwood Policy*, the wife of the assured was sole beneficiary contingent on her surviving the insured. The insured exercised an option in the policy of receiving the entire cash value and discontinuing the policy. The company paid the proceeds into court. It was held that by exercising the option, the assured could not defeat the beneficial interest of the wife and the proceeds would remain in court and accumulated to await the determining event that would decide who would be entitled to the money.

The court also rejected the argument that the policy was not one under the Married Women Property Act 1882 (similar to s 23 of the CLA) since the benefit conferred upon the wife was expressed to be contingent on her surviving the assured. Tomlin J said that:

> It is true it (that is the policy) is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of the Act. I think, therefore, that the policy creates a trust in favour of the wife, but only in the terms of the trust.

**DURATION OF TRUST: TRUST EFFECTIVE UNTIL OBJECT IS PERFORMED OR BEING UNABLE OF PERFORMANCE RESULTS BACK TO THE ESTATE OF THE INSURED**

Returning back to the words of Suffian J in *Re Man bin Mihat* (as he then was), it is evident that the legislative intent is for the creation of trust during the lifetime of the settlor wherein title to property is divested from the insured and obligations of the trustee are assumed towards the beneficiary. This is evident by the provision of the statute that creates an inter vivos statutory trust, provides for a trustee to act for beneficiaries and provides for separation of the estate or interest from the estate of the policy owner or insured:

> In my judgment the statutory trust created in favour of the wife in the instant case also retains its character as a trust after his death, and for so long as any object of the trust remains unperformed the trust cannot be defeated and may, if necessary, be enforced by the widow. The beneficial interest in the policy belonged to the wife since the date of taking out of the policy and no beneficial interest in it accrued or arose on the death of the husband …

Section 23 clearly states that as an own life insurance policy taken by a man or wife for their respective wife or husband or/and children or any of them:

> shall create a trust in favour of the objects therein named and monies payable under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts. (Emphasis added.)

The above provision however is a reflection of the duration of the trust and divesting of property under the life policy from the estate of the insured as long as the objects of trusts remain unperformed. It is not in conflict with the FSA Schedule 10. Hence it is submitted the position is still valid under the FSA.

The Court of Appeal in *Cousins v Sun Life Assurance Society* dealt with a policy under the Married Women Property Act 1882 (similar to s 23 of the CLA) where a wife was named under the policy effected by her husband on his life as beneficiary and she predeceased her husband. Here since the trust in favour of the wife was not dependent on her surviving her husband, the wife took immediate vested interest in the policy. The court held the vested interest passed to her personal representatives and that the vested interest would mature upon the death of her husband. The death of the beneficiary did not put to an end the trust it subsists until the death of the insured for the benefit of her personal representatives. The case demonstrates the possibility of the beneficiary interest being construed as vested as opposed to contingent.
In this case of interest is the meaning of the words any objects remains unperformed above as construed by the court. The court disapproved the decision of Ross J in *Robb v Watson* wherein the court construed the word object remaining unperformed as not referring to the beneficiary as in *Robb v Watson* but to the purpose of the trust.

Hanworth LJ stated (at pp 133–134): ‘The difference, it will be noticed at once is in the use of the word *unperformed*. It seems difficult to apply that word unless it relates to impersonal objects that is not to beneficiaries but to *purposes of the trust* … On the plain terms of the policy there remains the trust to pay over the moneys due under the policy to the executor of Lilian Cousins with the result that the trust in her favour is not ended by her death. There is still a trust which is unperformed and in those circumstances the terms of the Act negative any interest passing to the husband in the events which have happened.

The point made here is that the interest remains not with the husband since the interest is an interest vested in the named wife. The object to be performed is the payment of the policy moneys to her trustee and her death does not defeat the trust.

Protected nominations under Schedule 2 para 2 are when a husband, wife, child or parent is or are nominated as beneficiary/beneficiaries. As a result of the provision under para 3(1)(a) that requires a nominee to survive the insured, failing which, the nominee’s share reverts to the insured and failing his nomination to another nominee, the remaining nominee takes the deceased nominee’s share in proportion to their remaining share.

If so, then unlike the outcome of the case of *Cousins v Sun Life Assurance Society* above, the named wife in a life policy may be argued to be required to satisfy the condition of not predeceasing the insured under the FSA Schedule 10 para 3(1)(a) to be entitled to the policy moneys. It may be argued that the beneficiary interest is contingent on the beneficiary surviving the insured failing which it results back to the insured upon the terms provided under para 3 Schedule 10 of the FSA.

The concept of a resulting trust occurring when the objects of the trust remains unperformed is seen in the case of *Cleaver and Others v Mutual Reserve Fund Life Association* where on the ground of public policy, the court held the objects as being impossible to perform and reverted the property divested by the creation of the trust back to the insured (settlor). The ground here was that a wife beneficiary under a life policy of her husband murdered him and assigned her interest in the policy to an assignee. In considering whether the assignee or executor of the murdered insured could claim the policy moneys, the court held that the trust created under the Married Women Property Act 1882 (UK) was defeated by the crime and the money was payable to the insured’s estate.

These cases are consonant with the fact that in an inter vivos trust irrespective of whether it is contingent or vested as the case may be the trust property is no longer in the hands of the insured. It is in the hands of the trustee to act for the benefit of the trustee. Further to that when the objects being payment to the beneficiary of policy monies is unable to be performed as in the case of *Cleaver and Others v Mutual Reserve Fund Life Association* on the ground of public policy, there is a resulting trust back to the estate of the insured.

**Revocable trust and reservation of right by the insured**

It is recognised that notwithstanding that there is trust policies the insured policy owner may retain certain rights over the policy including the right to revoke the beneficiaries.

The provision of a revocation clause in the policy or trust instrument will not render the trust invalid. It is possible to have a revocable trust where an express trust is completely constituted. The power to revoke must be expressly provided as in the immediate case below and such a power must be exercised in the manner expressly directed.

In the case of *Re Kishabai v Jaikishan*, the court recognised the possibility of a trust being revoked though on the facts of the case, the court held that there was no power to revoke as the same was reserved or provided for in the trust instrument.
To be able to revoke the trust created, the deceased must have reserved for himself an express power of revocation — *Snell's Principles of Equity*, 27th Ed, p 126.

Likewise in the case of *Re Chong Chak Choon* where the insured named his wife and two sons as nominee of the policy. There was an express power of revocation and substitution reserved. On the facts, the court held that the power was not exercised and hence the beneficiaries were entitled to the monies notwithstanding provisions under the will. Terrell AG CJ said:

> It is true that the interest of the beneficiaries was liable to be defeated but this would only result in an interest otherwise vested, becoming divested and in fact such interest has not become divested and prima facie subsists.

Hence the existence of a power to revoke does not invalidate the inter vivos trust. It will only do so if it is exercised in accordance with the terms of revocation.

The insured or insurers may add grounds for revocation in the trust policy that does not contradict or conflict with para 3(1) but nevertheless for the protected classes, it is still subjected to the provision of para 5(5) given the case law interpretation to be discussed below.

To consider the effect and application of revocation of nomination clause under the FSA schedule 10 para 3 and 5 of Schedule 10, it is set out as follows:

Para 3(1) A nomination, including a nomination to which paragraph 5 applies, shall be revoked:

(a) upon the death of the nominee, or where there is more than one nominee upon the death of all the nominees, during the lifetime of the policy owner;

(b) by a notice in writing given by the policy owner to the licensed insured; or

(c) by any subsequent nomination

(d) Subject to subparagraph (1), a nomination shall not be revoked by a will or by any other act, event or means.

(e) Where there is more than one nominee and one of the nominees predeceases the policy owner, in the absence of any subsequent nomination by the policy owner disposing of the share of the deceased nominee, the licensed insurer shall pay the share to the remaining nominees in proportion to their respective shares.

Para 5(5) reads:

A policy owner shall not deal with a policy to which subpara (1) applies by revoking a nomination nor adding a nominee other than his spouse, child or parent under the policy by varying or surrendering the policy, or by assigning or pledging the policy as security without the written consent of the trustee. (Emphasis added.)

The effect of Schedule 10 para 3 in seeming to conflict with para 5(5) has been read to construe para 3 as being subject to para 5(5) despite the literal wording of the clause in para 3 that seem to put cl 5(5) subject to cl 3. An interpretation otherwise would nullify the need for the provision of para 5(5) and run contrary to the trust concept.

Reference is made to the case of *Shunmuga Vadevu S Athimulam & Ors v The Malaysian Co-operative Insurance Society Ltd & Anor*, where the court construed the repealed s 164(1) (similar to para 3 Schedule 10) and s 164(4) (similar to para 5(5) Schedule 10). Notwithstanding the provision under s 164(1) allowing for the revocation of nomination including a nomination under s 166, the court read the application of s 164(1) subject to s 164(4) where consent of trustee is required. This is so notwithstanding the wording of s 164(1) that places s 166 subject to s 164.
Likewise, the provision of para 3 Schedule 10 of the FSA (on revocation) places para 5(1) Schedule 10 of the FSA (on statutory trust) subject to para 3 Schedule 10 of the FSA.

If the intent was to change the law given the case law interpretation of the now repealed ss 164 and 166 of the Insurance Act 1996, it is submitted that a revised provision would have been legislated for clarity and a change in the judicial interpretation of the law.

Hence it follows that reading of the revocation clause in para 3 Schedule 10 of the FSA for the protected class by virtue of the case law below is that the revocation of nomination by a subsequent nomination and by extension to any unilateral act of a policy owner cannot be made without the consent of the trustee.

The case facts of Shunmuga Vadevu S Athimulam & Ors v The Malaysian Co-operative Insurance Society Ltd & Anor is restated here. The deceased nominated his wife (plaintiff) as a nominee in a life assurance policy. Subsequently, he purported to nominate the second defendant as the nominee untruly describing her as his wife. The deceased did not obtain the consent of the first plaintiff when he nominated the second defendant. The court held that notwithstanding the wording of the provision of s 164(1) (in pari materia to the current para 3(1)(c) of the FSA 2013) which revoked a prior nomination by a subsequent nomination was inapplicable to section 166 where a trust policy was in effect. The consent of trustee (being the plaintiff) must be obtained which it was not so obtained in the case for the second nomination. Hence it was held to be invalid. Abdul Hamid J (as he then was) held as follows:

I am on the view that the purported nomination of the second defendant is void because by virtue of sub-s(3) of s166 of the Insurance Act 1996 the first plaintiff is a trustee and her written consent was not obtained as required by sub-s (4) of the same section and Act.

The point made earlier that the fact that the courts require the consent of a trustee to enable the insured to effect a revocation is testimony to the fact that the trust exists during the insured's lifetime is an inter vivos and not a testamentary trust.

CONCLUSION

A trust under s 23 of the CLA and para 5 Schedule 10 of the FSA is an inter vivos statutory trust for non-Muslims. It is not a testamentary trust. The statutory trust would exist as long as the protected nominee survives the insured as the inter vivos trust created is based on a contingent interest. The conversion of the insured subsequently to Islam does not affect the created statutory trust in favour of said protected nominee who survives the insured.

1 Santhana Dass (2013) Law of Life Insurance in Malaysia at p 435 referring to footnote 73. See article by Chan Wai Meng, Trust Under Section 166: Revocation Upon Conversion? [2006] 5 MLJ clv; Rafiah Salim, Part XII of the Insurance Act 1996: Payment of Policy Money Under a Life Insurance Policy or a Personal Accident Policy [1997] JMCL55; Nik Ramlah Mahmood, Insurance Law in Malaysia (1992 Ed) at pp 220–222. Much of the early debate has been made on the soundness of the case of the case of Re Man bin Mihat, decd [1965] 2 MLJ 1 in arguing that a testamentary as opposed to inter vivos trust exists under statutory insurance trust. This controversy in part led to the amendment whereby the Insurance Act was amended in 1996 to exclude application to Muslims giving rise to the comment in Halsbury Laws of Malaysia Vol 20 Insurance, 2006 reissue where it was viewed that at para 490.284, this seems to indicate that the Malaysian legislature is of the view that such a statutory trust of insurance policy would amount to testamentary disposition and consider the earlier judicial decision (Re Man bin Mihat, decd) [1965] 2 MLJ 1 as wrong. Note however that the case has cited and referred with approval in recent Federal Court decision MAA Bhd v Anthony Kulanthai Marie Joseph [2010] MLJU 508.

2 Re Man bin Mihat, decd [1965] 2 MLJ 1.


4 See footnote 1.
By virtue of the Federal Constitution Ninth Schedule State List Item 1 the jurisdiction over personal and family law including intestate and testate gift, partitions and non-charitable trusts is conferred to the State. This would be a better argument to justify the exclusion of the application of statutory trust to Muslims under para 5 Schedule 10 of the FSA (previously s 166 of the Insurance Act) is this Constitutional provision.

Refer to footnote 2 and 3. Further that it did not offend s 25 of the CLA as being not in accordance with Muslim law as to disposition of property.

Chan Wai Meng, Trust under s 166: Revocation upon conversion? [2006] 5 MLJ cliv. It will also be demonstrated that the case of Re Man bin Mihat has been accepted as valid and good law as evident in current Federal court decision. Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased) [2010] 4 MLJ 749. See also Santhana Dass (2013) Law of Life Insurance in Malaysia (2nd Ed) p 435 which noted that the decision in Re Man bin Mihat and Re Bahadun have not been overruled to date and is good law.


Para 5(1) Schedule 10 FSA provides that statutory insurance trust does not apply to a Muslim.


Section 23 is in pari materia to s 73 of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed.) [SG], s 11 of the Married Women Property Act 1882 [UK] and s 94 of the Life Assurance Act 1945 [AUS].

Man has been read to include unmarried men providing for the benefit of children since children under s 2 of the FSA 2013 extends to illegitimate children.


See the Federal Court decision in Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased) [2010] 4 MLJ 749 wherein the Arifin Zakaria CJ cited with approval the judgment of BTH Lee J in Kishabai v Jaikishan [1981] 2 MLJ 289 in other words the Legislature viewing with sympathy any effort of a man to provide to provide for his wife and family after his death has provided that a man might insure his life at any time for their benefit and any moneys payable under the policy shall not go pay his debts but shall be held in trust for his family.

Section 1 of Schedule 10 of the FSA 2013 also includes personal accident policy. Also treated to apply to endowment policy in cases like Re Bahadun bin Haji Hassan, decd [1974] 1 MLJ 14 and Re Man bin Mihat decd [1940] MLJ 77.

For definition of child see s 2 of the FSA 2013.


Para 1 Schedule 10 of the FSA.

The FSA 2013 included the restriction to exclude an insured from nominating himself as a trustee. Such restriction was not present under the Insurance 1996 Act. The timing of the default list to apply in default of nomination by insured is uncertain. Presumably the default list would kick into effect in event there is dealing with the trust policy that require the consent of the
trustee in absence of nomination of trustee by the insured. The best practice is to ensure the nomination by the insured of the trustee in cases of protected classes as soon as the policy is effected.

22 Which is in para materia with the repealed s 164 of the Insurance Act 1996.

23 Refer to para 5 Schedule 10 FSA for full list of default nominees.

24 Re Cook [1948] Ch 212. See also Pettit (2012) Equity and the Law of Trusts 12th Ed, Oxford University Press, United Kingdom at p 48. It remains to be seen if the statute can arguably preclude the operation of this principle.


26 Nik Ramlah Mahmood (1992) Insurance Law in Malaysia at pp 220–222: ‘A s 23 policy however comes into existence upon the death of the insured, thus resulting in a disposal of property effectively taking place after the insured’s death. Such disposal should therefore, unlike a gift intervivos be subject to the Islamic law of inheritance … The case of Re Man and Re Bahadun have also failed to take into account the decision in Re Ismail Rentah’.

27 Re Ismail bin Rentah deceased Haji Hussain bin Singah v Liah binti Lerong & 3 others [1940] 1 MLJ 77.

28 Re Man bin Mihat, decd [1965] 2 MLJ 1 see also Suffian J’s judgment in regard to the same wherein he stated: ‘I do not think that re Ismail bin Rentah [1940] MLJ 98, the case relied on by the guardian ad litem, can have any effect on my view because first, that case was a decision on the Co-operative Societies Federated Malay States Enactment No 7 of 1922 and, secondly, because in the Federated Malay States then there appeared to be nothing corresponding to s 23 of the Civil Law Ordinance, 1956, or at least there was no reference to such a provision in the judgment’.

29 Rule 21 of the Societies Rules reads: ‘Any member of a registered society may in writing … nominate any person or persons to whom his share or interest and all other monies referred to in section 22 of the Enactment that may be due to him on the death of such member be paid or transferred under the provisions of the said section and may in similar manner from time to time revoke or vary such nomination …’.

30 In re A Policy No 6402 of Scottish Equitable Life Assurance Society [1902] 1 CH 282. This is similar to the current position of non-protected nominees under an insurance policy under para 2(4) of Schedule 10 of the FSA where the nominee do not take the gift beneficially.


32 Pawancheek bin Marican, The Legal Effect of Nomination by Muslims [1997] 2 MLJ cxxxviii with due respect focuses on the premise of the case of Re Ismail bin Rentah as having a testamentary effect and s 25 of the CLA with issues of jurisdiction over property of Muslims and not on the nature of trust created.


35 Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 at p 146.

36 As discussed this provision is to be read subject to para 5(3) of the FSA.

37 The exclusion of the statutory trust to Muslims under the repealed s 166 Insurance Act is similarly carried under para 5 (1) of the FSA.

38 Re Man bin Mihat, decd [1965] 2 MLJ 1 wherein it was noted that the assignment created after nomination the assignee takes subject to the interest of the nominee, I am further of the opinion that the subsequent assignment has made no difference because even if the policy had been assigned to a third person (here it was assigned to the wife herself) that person could only receive the policy money subject to the statutory trust in favour of the wife, In re Fleetwood’s Policy [1926] Ch 48.

40 *Halsbury Laws of Malaysia* (2006) Reissue Vol 20 Insurance para 490.283. It is clear that a statutory trust policy may arise as a result of the creation of an immediate vested interest or may arise because contingent interest (trust) have been created.

41 *Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (Suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased)* [2010] 4 MLJ 749. See also Santhana Dass, *Law of Life Insurance in Malaysia* (2nd Ed, 2013) at p 435 which noted that the decision in *Re Man bin Mihat* and *Re Bahadun* have not been overruled to date and is good law.

42 *Re Man bin Mihat, decd* [1965] 2 MLJ 1.

43 The fact the policy was an endowment policy wherein the monies are payable to the insured policy owner should he survive the term of 25 years with dutiful payment of premium and the wife interest was contingent upon his death within the term did not exclude it as a statutory trust that covered upon her a beneficial contingent interest enforceable against the trustee upon occurrence of the contingent event.

44 Reference to support validity of contingent or future gifts were made to the cases of *In re Ioakimidis’ Policy Trusts* [1925] Ch 403 and *Sadiq Ali And Others v Zahida Begam* AIR 1939 All 744.

45 This is with regard to the consideration of the application of s 25 of the Civil Law Act 1956 where it is provided that disposal of the property of a Muslim is not to be affected by s 23. The editorial note *Sadiq Ali And Others v Zahida Begam* AIR 1939 All 744 which is mentioned in the judgment also suggests that the disposal of the property within the lifetime of the testator is also Muslim law compliant.

46 *Re Choong Chak Choon, deceased; Fong Choong Cheng & Wong San v Chung Yok Lam (W) and others* [1937] 1 MLJ 258. See also *Halsbury’s Laws of Malaysia*, Insurance Vol 20 2006 Reissue para 490.283 where s 23 of the CLA was construed to provide an immediate vesting in the named beneficiary unless there is a power of revocation reserved.


48 *Re Kathiravelu decd, Sundari v Pemungut Duti Harta Pesaka Tanah Melayu* [1973] 2 MLJ 165.

49 Section 23 (1) where moneys payable are not part of the estate of the insured as long as any object of the trust remains unperformed. Section 23(2) and (3) provide for an appointment of a trustee in default of which the trustee is the insured. See para 5(2) and (3) Schedule 10 of the FSA however the word immediate is not used as in s 23(4). There seems to be no specific time requirement as to when insured should appoint a trustee or when a default appointment would be effective. The constraints under para 5(5) will make any dealing by the insured with the policy difficult if there is no trustee. It is suggested that it is prudent for the policy to provide for the insured to make a trustee nomination failing which it is stated clearly that the default provisions of relating to trustee shall apply forthwith.

50 Note para 5(3) FSA which modifies the application of s 2(3) and (5), where insured cannot be the trustee and provides a default list in the event of non-appointment by insured. However it emphasises the fact that the trustee is appointed not upon death but during the lifetime of the insured.

51 *In re Fleetwood Policy* [1926] Ch 48. See also *In re a Policy of the Equitable Life Assurance Society of United States and Mitchell* (1911) 27 TLR at p 213.

52 The FSA Schedule 10 paras 2(4)(a), 6(1) and 6(3) requires nominees outside the statutory class to be assigned the policy moneys before they can receive beneficially and not as an executor. As an executor under para 6(2), the distribution is as per the will or law of distribution applicable to the policy owner in case of intestacy. In event there is an assignment to the nominee then the nominee receives the policy moneys beneficially per para 6(3) Schedule 10.


54 Restatement (Third) of Trusts 2 (2003) (defining trust) provides that it is a fiduciary relationship with respect to property ... subjecting the person who holds title to the property to duties to deal with it for the benefit of ... one or more persons. See also Pettit P (2012) *Equity and the Law of Trusts* (12th Ed Oxford University Press) at p 397 wherein it is stated that it is the
paramount duty of trustees to exercise their powers in the best interest of the present and future beneficiary of the trust. Also Mary George (1999) *Malaysian Trust Law* (Pelanduk Publications) at p 314 wherein it is stated the main duty of the trustee is to look after the welfare of the beneficiary according to the decision in *Yap Tai Che v Yap Tai Cheong & Ors* (1910) 2 FMSLR 35; MD 4th Ed para 2085. Refer also to *Shunmuga Vadevu S Athimulam & Ors v The Malaysian Co-operative Insurance Society Ltd & Anor* [1999] 1 CLJ 231 p 237.

55 Refer also to *Shunmuga Vadevu S Athimulam & Ors v The Malaysian Co-operative Insurance Society Ltd & Anor* [1999] 1 CLJ 231 at p 237.

56 In *re Equitable Life Assurance Society of United States v Mitchell* cited in the case of *Re Man bin Mihat, Decd* [1965] 2 MLJ 1 in the interpretation of s 23 of the CLA.

57 In *re Fleetwood Policy* [1926] Ch 48. See also *In re a Policy of the Equitable Life Assurance Society of United States and Mitchell* (1911) 27 TLR at p 213.

58 Refer to s 23(2) and (4) of the CLA and Schedule 10 paras 5(1)–(5) of the FSA 2013.

59 *Cousin v Sun Life Assurance Society* [1933] 1 Ch 126 overruling *Robb v Watson* [1910] 1 Ir 243 held that interpretation that the objects of the trust remaining unperformed referred to not the beneficiary but purpose of the trust.

60 The Federal Court decision in *Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/Anthony Selvaraj, deceased)* [2010] 4 MLJ 749 applied the provision of s 23 in this regard and notwithstanding the such provision did not exist under the repealed s 166 of the Insurance Act 1996 (now repealed) as it is submitted the same did not conflict with the repealed Act. A similar situation is apparent now under Schedule 10 of the FSA 2013 where it is submitted that the same construction should follow.

61 *Cousins v Sun Life Assurance Society* [1933] Ch 126.


63 See also *Houseman’s Law of Life Assurance*: A policy expressed to be for the benefit of or to be payable to a named wife without further words will give her a vested interest in the whole policy.


65 *Cleaver and Others v Mutual Reserve Fund Life Association* [1892] 1 QB 147.


68 *Lane v Debenham* (1853) 11 Hare 188 at p 192.

69 *Kishabai v Jaikishan* [1891] 2 MLJ 289.

70 *Re Choong Chak Choon* [1937] 1 MLJ 258. Note the case of *In re Yeo Hock Hoe’s Policy* [1938] 1 MLJ 33 was distinguished in on facts (since insured never parted with right to dispose of policy monies) was decided before cases interpreting effect statutory trust on like provisions of the CLA and hence was not followed. Instead the court applied the concept of trust in *Re Ioakimidis’ Policy Trusts* [1925] Ch 403 recognising that contingent interest of the beneficiary under statutory trust does not defeat a trust.

71 By virtue of para 3(2) Schedule 10 of the FSA provides that a revocation by will is not possible unless it is done in accordance with the provision of the FSA para 3(1).