Matrimonial Property Division through Philanthropic Settlement

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ABSTRACT

This study aims to examine the practice of *sulh* (mutual agreement) in dividing matrimonial asset after divorce, upon the death of a spouse and polygamous marriage. The study adopted qualitative method where analysis is conducted on a purposive sampling of unreported cases collected within the period of 2000-2012. The samples are collected from six zones representing Shariah Courts in Malaysia. Analysis on the sampling is made based on several variables such as the types of matrimonial property, factors for consideration and proportion of distribution of the assets. This study discovers that philanthropic element of kindness, gift and generosity has been implemented in the majority of cases involving claims of a matrimonial property when they are practically settled by way of *sulh* (amicable settlement). In determining the division through *sulh*, the parties is in fact more generous when dealing with the interest of children to the level that the husband is willing to transfer the whole interest in the asset to the existing wife who is rarely achieved in other litigation processes. The parties also voluntarily waive each party right by granting the matrimonial asset as a gift to the children. This study suggests that the mutual consent on proportion of asset by way of *sulh* to be widely practised when dealing with the division of matrimonial assets to promote harmonious settlement and to prevent a costly and lengthy litigation process. This study suggests for specific governing mechanism in ensuring the establishment of justice among the disputing parties.

Keywords: Division, Matrimonial Property, Philanthropic Settlement

1. Introduction

Matrimonial asset or commonly known in Malay as *harta sepencarian* is defined in Section 2 of Islamic Family Law Enactment (Selangor) as property jointly acquired either directly or indirectly by a husband and wife and its acquisition was made by both parties during the course of their marriage. A judicial decision in most cases elaborates the definition of *harta sepencarian* in Sec. 2 of the IFLA whereby the provision should be read together with Section 122 of the Enactment. Section 122(1), (3) and (5) has highlighted the term 'assets of joint effort', 'assets of sole effort' and 'assets acquired before marriage and improved by joint effort after marriage'. Although, Section 122 has not specifically stated the word *harta sepencarian*, by virtue of Sub-sections (1), (3) and (5) of Section 122 of the Enactment, the definition of *harta sepencarian* can be understood in three situations. Firstly, it is the assets jointly acquired by the effort of the husband and wife during marriages. Secondly, the assets are jointly acquired by the husband and wife during the subsistence of their marriage through the effort of one of the parties to the marriage and finally, assets owned by one party before marriage which has substantially been improved by joint effort from both parties during their marriage. Thus, assets which are liable to be divided are the assets which are acquired through the direct effort of both parties, the direct effort of one party but the indirect effort of the other and sole or joint efforts to improve the value of the assets which are owned by one party before marriage. Thus, the effort of both parties is pertinent to constitute the legal right to claim *harta sepencarian*. The effort also determines the right for the proportion of division of the assets. This is property jointly acquired by husband and wife during their subsistence of marriage according to *hukum syarak* (Section 2, Islamic Family Law Act). The division is subjected to the principle embodied in Section 122 of Islamic Family Law Act which requires the court to consider several factors including a contribution, interest of minor children and debt in determining the portion of share. Distribution of matrimonial asset between spouses is always associated with unfairness to one of the parties especially to the non-working wife due to the fact that the current provision on the distribution of matrimonial asset emphasises on the contribution of the parties as a sole criteria in determining the proportion of the share. Though the law has not been amended to address the issue, it is observed that a transfer of ownership through *hibah* for the benefits of family member during marriage provides an alternative to a fairer

distribution of matrimonial assets. Thus, this paper identifies the method used in solving the dispute and hence, examines the effectiveness of the law through the court practice. It highlights the use of *sulh* as an effective method in determining the proportion of the share of matrimonial assets between existing spouses. Due to this reason, philanthropic settlement in division of matrimonial is a mechanism that could serve effectively to the parties especially to non-working wife who during the subsistence of the marriage has not made significant impact in contributing to the acquisition of the asset.

2. Development of Law relating to the Division of Matrimonial Property

The law regulating matrimonial property is not discussed in a systematic manner in the Islamic law. However, several Muslim scholars have addressed the division of matrimonial assets in their texts. Al-Imam as-Syafie in his famous book of *al-Umm* describes that when dispute arising between husband and wife on the matter of dividing the household utensil, the property is divided based on the evidence adduced by the parties where the contribution of each party in acquiring the asset is part of the determining factors to be taken into account (As-Syafie, 1996). In *al-Bughyah al-Mustarsyidin*, Sayyed Abdul Rahman Bin Muhammad describes that in dispute to determine share of matrimonial property between spouse, when the assets are mixed property and in the absence of any evidence or spousal agreement in order to differentiate the property's ownership and division of the asset, the jurists would resort to an equitable principle where both parties are equally awarded half share of the assets (Sayyed Abdul Rahman, n.d). Thus, an equitable principle should be applied in the case of division of matrimonial asset when there is no evidence or agreement among spouse in the distribution of mixed property. Each party would, therefore, be awarded a half share of the assets.

The jurists have propounded that the legal basis of the spouse's rights to the property is based on their specified rights and duties as mentioned in the text of the Quran and the Sunnah. The jurists emphasised on the prescribed nature of work or *fitrah* in marriage life as husband or wife determinant factor and act as guidance for the jurist to determine the duty of husband and wife and consequently to determine the rights of both parties (Sayed al-Sabiq,1981). The jurists highlighted the distinct duty of both husband and wife where providing the

maintenance to the wife was the obligations of the husband which require the husband to carry more physical work. This responsibility is related to a man who is granted by Allah SWT physical strength and ability to work as compared to a wife who naturally bears responsibility to take care of family and home (Sayed al-Sabiq, 1981). Similarly, in *I'anah al-Talibin* the writer emphasizes on the share of a wife to a matrimonial asset was related to her role in managing the household and taking care of the family. This practice recognised contribution as criteria to determine the wife's shares in the division of *harta sepencarian.* According to Islamic law, the share to matrimonial asset is in conjunction with part of the wages the wife is entitled to after conducting all household work since such works are not considered as wife's obligation (Fathul Muin, n.d*)*. Thus, Islamic law's recognition on the contribution indicates the acceptance to the existence and principle of *harta sepencarian* in Malay practice. This highlights that the concept, the origin and characteristics of *harta sepencarian* are considered by as-Syafie and al-Sayyed Abdul Rahman as not contrary to Islamic law although they originated from the *Malay Adat* (Ibnu Qayyim, n.d.).

The concept of equal partnership in a marriage where the spouse is entitled to a proportion of matrimonial asset earned during marriage is consistent with the quranic verses (al-Nisa' 5: 32) and *hadith*. In the hadith of the Prophet PBUH relating to Ali bin Abi Talib and his wife Fatimah, it was decided that she had to manage the household chores while Ali went out to earn income (narrated by Tarmizi, Syaikhani, Ibn Majah & Ibn Abbas). The Malay custom in the division of *harta sepencarian* has a basis in Islam and its characteristics are accepted and recognised by Islamic law since Islam has been practised in Malay society hundred years before Independence (*Ramah Binti Taat v. Laton Bin Malim Sutan* [1927] 6 F.M.S.L.R. 128). Hence, it does not pose an issue because the practice of distributing the asset acquired during a marriage is not contrary to Islamic principle and is justifiable via primary sources of Islamic law. Thus, this practice of dividing the joint earning property of husband and wife after a divorce is not contrary to Islam and has been accepted as customary practiced (*urf)* among the Malays. This is because the characteristics and elements of contribution as criteria in determining the share of matrimonial asset are consistent with that of Islamic principles where the shares of matrimonial asset are determined by contributions made by the husband and wife.

The current provision is at *verbatim* with Section 58 of Islamic Family Law Enactment 1984 (Selangor) indicating the retention of the

same law although there is a substitution to the number of the section. By virtue of this section, the law pertaining to the division of *harta sepencarian* is accepted in the Muslim society as part of the Islamic law and that has been codified as an authoritative law.

Section 122 of Islamic Family Law Enactments/Act which embodies the principle of division provides that:

> (1) The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during their marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
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> (2) In exercising the power conferred by subsection (1), the Court shall have regard to:
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> (a) The extent of the contributions made by each party by money, property, or labour toward acquiring the assets;
>
> (b) any debts owing by either party that were contracted for their joint benefit;
>
> (c) the needs of minor children of the marriage and, subject to those considerations, the Court shall incline towards equality of division.
>
> (3) The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
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> (4) In exercising the power conferred by sub-section (3) the Court shall have regard to:
>
> (a) the extent of contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family:
>
> (b) the needs of minor children of the marriage, if any,
>
> and, subject to those considerations, the Court may divide the assets or the proceeds of sale in such proportions as the Court deems reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.
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> (5) For the purpose of the section, references to assets acquired during a marriage by one party include assets owned before the

marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.

The above provisions clearly embodied the rules to the power of the court to order the division of matrimonial assets acquired during marriage upon granting a pronouncement of *talaq*. The section particularly highlights two subsections. Firstly, sub-section (1) where the court orders the division between the parties of any assets acquired by them during their marriage by their joint efforts and secondly, sub-section (3) where the courts order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage. For division of the first category, the court shall incline towards equality of division. The division, however, is subject to certain factors which the court has to take into account such as the extent of the contribution made by each party in the form of money, property or work towards acquiring the assets. Besides, any debts owing by either party which were contracted for their joint benefit will also be considered. The needs of minor children, if any of the marriage will not be ignored too.

With reference to the second category of assets or assets acquired by the sole effort of one party to the marriage, the court may divide the assets in proportion as it deems reasonable, subject to certain factors. Besides the extent of contribution made by those who did not acquire the assets to the welfare of the family by looking after the home or caring the family, the court will also consider the need of minor children from the marriage, if any. In any case, the party by whose effort was acquired the asset shall receive a greater proportion.

Sub-section (5) is the extension to the scope of *harta sepencarian* to include asset acquired before the marriage by one party where the asset must be substantially improved during the marriage by the other party or by their joint effort. Furthermore, section 122 describes the term assets as assets of joint and sole effort. The statutory and judicial definition of *harta sepencarian* has made clear the concept of matrimonial assets as practiced in Muslim Marriages in Malaysia and was founded on the basis of effort and contribution of parties during their marriage. For example, in *Ahmad Fikri Bin Mahmud* v. *Habibah Binti Muhamad* (2007) (23 JH, part 1, 23), the court refused to consider the disputed asset as *harta sepencarian* and to order the division of *harta sepencarian* to the plaintiff, in the absence of contribution of the plaintiff in acquisition of the assets. Thus, the contribution to the acquisition of asset acts as a significant proof of the existence of joint and sole effort of parties which made possible the rights for entitlement to the share of assets. This

certainly clarifies that the existence of marriage and living together as husband and wife do not by itself constitute the asset as matrimonial assets and, therefore, liable to be divided after divorce (Suwaid, 2001).

By virtue of this provision, the law of division is more extensive and clear when the law differentiating the assets into joint and sole effort. By including the homemaker's contribution in a household job as a factor to determine the share of sole effort enables the homemaker to get her share out of the assets which she has not acquired. Thus, this shows that the law has given recognition to the homemaker's role in taking care of the family (*Tengku Anum Zaharah v. Dato Dr Hussein* (Selangor Civil Case no 10/79). In addition, the law also guided the court in determining the proportion of share by providing the specific quantum of ½, 1/3 or greater proportion thus, implying that the law is not too rigid as rigidity may lead to injustice. The court, however, has the power to exercise its discretion in allocating the correct proportion of share either ½, 1/3 or 1/6, according to the circumstances of a case. However, the court is very much inclined to the contribution in the acquisition of the asset as sole criteria in determining the proportion.

There are a number of cases highlighting the practice of division of matrimonial asset. One example is in the case of *Tengku Anum Zaharah v. Dato Dr Hussein* (Selangor Civil Case no 10/79). The court found that the appellant had provided the contribution, not in monetary form but by way of moral support, resulting in the respondent's business flourishing due to public confidence in him and the award of the title Dato' in such a short time was possible to the respondent's marriage with a member of the royal household. Under the circumstances, the respondent could not deny that the appellant had made her contribution. In the opinion of the court, the appellant ought to be given her share in *harta sepencarian* as provision for her future. The court found that the appellant should be given a small portion of the *harta sepencarian* and so the court ordered that the respondent to transfer 3 acres of the property in Kelang to the appellant. This proves that *harta sepencarian* continued to be in practice.

In the case of *Roberts alias Kamarul zaman v. Ummi Kalthom* ([1966] 1 M.L.J.163) where the facts of the case was the plaintiff was a government servant presently carrying on a private business as a chartered accountant in Kuala Lumpur. He has held various government posts as an accountant, rising to the appointment of accountant general in Malaya. In 1951, he embraced Islam and married the defendant. He decided to remain in Malaya and consequently purchased a property at Setapak for RM50 000. The plaintiff raised RM40 000 while the

defendant RM10 000 towards the purchase price and it was registered in the defendant's name. In 1962, they divorced. The plaintiff contended that at the time of purchasing the property he never intended to make it a gift to the defendant. The court held that the said property was acquired by the joint resources of both parties and therefore be regarded as *harta sepencarian*. The court was also satisfied that the evidence failed to fully establish the unequivocal manifestation of the plaintiff of an intention to make a gift of the said property to the defendant.

3. Philanthropic Element in Dividing Matrimonial Property

Philanthropy is defined as altruistic concern for human welfare and advancement, usually manifested by donations of money, property, or work to needy persons, by endowment of institutions of learning and hospitals, and by generosity to other socially useful purposes. It is also identified as an activity of donating to such persons or purposes in this way: to devote one's later years to philanthropy (http//Dictionary.reference.com/browse/philanthropy/ thesaurus assessed on 22 Jan 2015). Though the current provision relating to the division of matrimonial asset provides the basic guideline for the court to decide on the division, the parties have the option to divide the asset on the philanthropic settlement basis. The basic guideline of philanthropic settlement is when the husband and wife though not working may agree on dividing equal proportion.

In division of matrimonial property the element of philanthropy appears when the parties allowed to forgo each party's rights to wholly or partially of the asset in determining the proportion of share either through the execution of gift or mutual agreement of parties. The law provides that in dividing the matrimonial asset, the court shall look into the contribution of the parties in the acquisition of the asset (Sec. 122 Islamic Family Law Enactment Selangor). Contribution in the form of money, capital and labour is required to claim for division of joint effort asset and contribution in the form of taking care of family and children for division of sole effort asset is no longer the focus. Although parties' contribution in acquisition of asset is the sole criteria in determining the proportion of share of matrimonial property, by virtue of *sulh*, the parties in some cases were reluctant to consider the contribution as factor of consideration in the division.

4. *Sulh* and Division of Matrimonial Property

The concept of settlement outside the court through *sulh* is an essential method used in dispute settlement involving family matters. *Sulh* is described as the result or finding from a conciliation or mutual consent of disputed parties achieved through the mediation process (Siti Noraini, 2008). *Sulh* is executed depending on the claim and application enunciated by the disputed parties (*Majallah al Ahkam al Adliyyah*). In the Malaysian Syariah Court, *sulh* has been implemented since 2002 when the court gives primary attention to the dispute settlement instrument through conciliation (Siti Noraini, 2008). *Sulh* or spousal agreement is an amicable settlement commonly used in dividing the matrimonial property out of the normal litigation proceeding. In the agreement, the data highlights that each party agreed to accept proportion, waive each parties rights and in some occasion the parties agreed to transfer whole interest of the property to the other spouse and to some extent both parties husband and wife allow the asset to be considered as their gift to their children.

Observation on some cases signifies that *sulh* is a preferred method for settlement in the division of matrimonial property and it is used in settlement of matrimonial property dispute in other ancillary matters such as *mut'ah* (*Abd Ghani Abdullah v. Norhanita Abd Hamid*; 10200-017-19-2001 (Selangor), arrears of maintenance and maintenance. The cases showed that the court was in favour to invoke *sulh* as an amicable settlement to guarantee the fair division of *harta sepencarian* to both parties. In *sulh* the meeting involved the parties and a *sulh* officer should be held within 21 days after registration of case where the agreement achieved will be endorsed and enforced by the court (*Sulh* Work Manual Jabatan Kehakiman Syariah Malaysia, Circular of Chief Judge MSS 1/2002, *Sulh* Work Manual, Pekeliling Ketua Hakim MSS 9/2002, Jabatan Kehakiman Syariah Malaysia Practice Direction 3/2002; (Nora, 2007). Failure to reach the agreement leads the case to be litigated in normal proceeding. In the case of division involving polygamous marriage, the division of property during existing marriage objectively to safeguard the interest of existing wife and to protect the existing wife's interest from being dissipated by third parties after the practice of polygamy (Roslina, 2007).

In the case of *sulh* for division of matrimonial property during existing marriage, the data also displays that the flexible time is given to the spouse to make the claim either at the time application for polygamy

is made to the court or after the application (*Khadijah Bt Ahmad v. Khairuddin Bin Ghazali* (03100-017-0046-2010 (Kelantan); *Rosmaliza Binti Ismail v. Muhamad Zarin Bin Mohd Nor* (01100-017-1187-2010 (Johor). However, in some cases the division is made after permission for polygamy was granted due to the silence of the law as regards to the time the claim of *harta sepencarian* could be made. With regards to the duration of time taken to divide the matrimonial assets upon polygamy of a husband, although no specific duration is determined in the provision, it has been noted that the order of division is made in two occasions either at the time the permission is granted or after the execution of polygamy where the division of matrimonial property is made after the court has granted the permission in a separate application. Thus, it signifies that the law is flexible in allowing the division at the time of application for polygamy or after the permission to polygamy is granted.

4. Methodology of Study

This study examines the practice of mutual consent of parties in dividing the matrimonial property. For that purpose, data from 117 unreported cases have been collected and analysed. The data consist of cases involving the division of matrimonial property where it is made based on the mutual agreement of spouse either the reason of the division is due to the divorce of spouse, death or upon the application of the husband for polygamous marriage. The case law analysis seeks to examine the methods used and the effectiveness of the law through examining the approach and practice of the court. The data represent the settlement of cases through *sulh* methods whereby it highlights *sulh* as an appropriate method to settle the dispute in division of matrimonial asset between existing spouses when the husband requested for polygamous marriage in the Shariah court.

The statutory analysis examines the significant development of the codified law and significant improvement in the existing law as well as strengths and weaknesses for further improvement of the law. The main focus of this research was on several variables including the element of contribution, proportion determination and type of matrimonial assets. On that note, the study also adopts field work research by exploiting case studies of unreported cases which are collected at random from six Shariah Courts to represent all the states in Malaysia. The states are Selangor which has a high density of population representing the Western Region; Penang also with higher population representing the northern

region. Johor represents the Southern Region; Kelantan represents the population of the Eastern Region, and lastly, Sarawak representing the population of East Malaysia. Cases from Perak are included since Perak has a similar law despite having the proportion of assets being equal.

5. Result and Discussion

In order to explain the divisional practices of matrimonial property, elaboration and commentary of some unreported cases have to be relied upon so as to see the court's approach in dividing asset in the existing marriage as well as factors used to determine the division and whether any expansion on the law has been done. The sub-section below elaborated the matters.

5.1 *Sulh* as an Amicable Settlement for Division of Matrimonial Property

The studies made on 117 cases display the well practice of division of matrimonial property in the Shariah Court in Malaysia like Selangor, Johor Bharu, Perak, Sarawak, Kelantan, and Penang. Thus, the data display that *sulh* was an amicable settlement where it was frequently adopted to determine the division of matrimonial property. Despite the method was frequently used for division after divorce and upon the death of a spouse, the finding also highlights that the method has been prettily used in dividing the matrimonial property upon polygamous marriage. The spouse was coorperative in arriving at the agreement on the important element which has hardly been achieved during litigation process especially on matter relating to declaration of asset to be divisible as matrimonial asset as well as the determination of proportion awarded to the spouse. Thus, this agreement might shorten the litigation period after the parties should no longer need to undergo the litigation process especially in presenting the evidence related to contribution of parties (*Aminah Binti Abdullah v. Noriah Bt Ahmad, Zulkifli Bin Daud and 19 others* (03100-017-11-2003 (Kelantan).

The study explains that the litigation process of the claim in the division of assets upon death is shortened by spousal agreement during the lifetime of the parties. Proving the extent of contribution and involvement of many parties, some particular cases that cause delay, may prolong the process. Through *sulh,* it appears to be a practical method and a form of amicable settlement for the division of matrimonial assets of a

deceased's estate. Thus, mutual agreement on the proportion of share promoting a peaceful solution between the deceased's spouse and heirs after both parties have been granted with an agreed proportion with regards to matrimonial and inheritance property. In addition, *sulh* is effective to resolve the issue of proving cases especially on elements of contribution which were hardly to be conducted after death in a litigation process. In the Kelantan case of *Aminah Binti Abdullah v. Noriah Bt Ahmad, Zulkifli Bin Daud and 19 others* (03100-017-11-2003 (Kelantan) the court held that upon parties' agreement, a land lot situated at Bachok be declared as *harta sepencarian* where half share of the land was granted to the plaintiff while the other half was to be divided among the defendants according to the law of inheritance. The plaintiff claimed an equal share due to her direct and indirect contributions. Her contribution to the acquisition of the estate was made by assisting the deceased husband in a food business where she claimed that from the deceased's savings out of the business, he managed to acquire some assets.

In the case of *sulh* for division of matrimonial property during existing marriage, the data also display that the flexible time is given to the spouse to make the claim either at the time of application for polygamy is made to the court or after the application. However, in number of cases the division is made after permission for polygamy was granted due to the silence of the law. With regards to the duration of time taken to divide the matrimonial assets upon polygamy of a husband, although no specific duration is determined in the provision, it has been noted that the order of division is made in two occasions either at the time the permission is granted or after the execution of polygamy where the division of matrimonial property is made after the court has granted the permission in a separate application (*Khadijah Bt Ahmad v. Khairuddin Bin Ghazali* (03100-017-0046-2010 (Kelantan); *Rosmaliza Binti Ismail v. Muhamad Zarin Bin Mohd Nor* (01100-017-1187-2010 (Johor). Thus, it signifies that the law is flexible in allowing the division at the time of application for polygamy or after the permission to polygamy is granted. This is illustrated in the case of *Aminah Bt Berkatal v. Mohd Shakdan B. Kamsah* (10100-017-0120-2009 (Selangor) where the Syariah Court of Shah Alam ordered a matrimonial home be transferred to the plaintiff and the defendant agreed to forego his interest in the home. The fact shows that the defendant obtained the permission to polygamy in the Syariah court of Perlis. However, no order of the division of matrimonial property is granted by the court. This proves that the rights of the existing wife to the share of matrimonial assets is not barred due to the failure of any

party to apply for the division of matrimonial assets at the time when permission is granted. It was best illustrated in the case of *Rosmaliza Binti Ismail v. Muhamad Zarin Bin Mohd Nor* (01100-017-1187-2010 (Johor) where the court allowed the plaintiff, to divide the existing matrimonial assets after the husband committed polygamy. The court awarded her share based on the agreement in *sulh*.

5.2 Parties' Contribution Is Not Considered in Philanthropic Settlement

Generally, in a few cases the proportion of share reflects the parties' contribution. It was illustrated in *Zaidi b. Mohd Supiah v. Masiah Bt Ibrahim* (10100-011-0210-2009 (Selangor), where the court ordered 1/3 portion of the solely acquired assets consisting of a matrimonial home and paddy farms share to be granted to the full-time housewife based on her indirect contribution in taking care of the family. However in a majority of cases, it has been observed that the agreement to waive rights of a party, and being awarded greater or equal proportion to a homemaker in sole effort assets was evident. No references were made to the contribution of the parties. For example, mutual agreement was achieved where the transfer of matrimonial home to a homemaker wife who has indirectly contributed to the acquisition of asset (*Abdullah Bin Shikh Mohamed v. Ruhaidah Binti Ismail* (01100-011-0040-2012 (Johor). However in some cases, the share of a non-working wife is only limited to ½ or 1/3 of any acquired sole effort asset (*Zaidi b. Mohd Supiah v. Masiah Bt. Ibrahim* 10100-011-0210-2009 (Selangor). This shows that the court is willing to accept the agreement of parties conclusively, irrespective of the direct or indirect contribution acquisition of the said asset. Basically, contribution remains the main factor in determining the proportion of share of the parties. However when the division involved spousal agreement, the court no longer subjected to the provided statutory law as the court bound to order the division as specified in the agreement. Thus, in spousal agreement other factors other than contribution are taken into consideration and the factors are the need of parties and children. This indicates that the parties' desire is obsolete and the division is effective after being endorsed by the court. For example in the case of *Zulkifli Bin Hj Saedun v. Zaimatun Bt. Hj Suradi* (10100-011-0045-2008 (Selangor) the court based on the agreement of both parties ordered the house to be divided equally to the plaintiff and the defendant.

5.3 Types of Philanthropic Settlement

The finding highlights that the division of matrimonial property through philanthropic element represents the voluntary dispute resolution, peace and pleasure with the division created by the agreement. The agreement made in the division could be emphasised as follows:

5.3.1 Waived Spouse Right to Matrimonial Property

Similarly, the rule was applied in the case of *Khadijah Bt Ahmad v. Khairuddin Bin Ghazali* (03100-017-0046-2010 (Kelantan). Here, the claim for division of matrimonial property was made after the court granted the permission to polygamy. The court ordered the transfer of a house situated in Temerloh, Pahang to the plaintiff and his children. Moreover, the defendant also agreed not to transfer the ownership to others except the plaintiff and their children. Due to the transfer, the plaintiff agreed to forgo all her interest in the defendant's other assets. The plaintiff in a separate application obtained an interim order against immovable and movable assets to abstain the respondent from disposing and transferring the assets owned by the respondent to a third party on the reason that the respondent's application for permission of polygamy in the Pasir Mas Shariah Lower Court was still in progress and the applicant had filed the application for matrimonial property. In this case, the respondent had done several transactions on the asset with the intention to dispose the asset to his second wife without the plaintiff's permission before an official order was issued by the court which subsequently could prejudice the plaintiff's rights. Similarly, in Johor, the court ordered the division of assets held in her husband's name where the claim for the division was made in a separate application only after the husband obtained permission for polygamy. This was illustrated in case of *Rosmaliza Binti Ismail v. Muhamad Zarin Bin Mohd Nor* (01100-017-1187-2010 (Johor) where the court ordered a matrimonial home and the rest of matrimonial assets held under the husband's name be declared as matrimonial property. Thus, the discussion proves that the division of matrimonial assets during an existing marriage is practiced throughout Malaysia except in Kelantan. The duration to claim for the division is unlimited where the application is not merely confined at the time where permission is granted, but is extended after the husband has contracted in a subsequent marriage.

In the division of matrimonial home it was illustrated in some cases that the party agreed to transfer the whole ownership of the home to an existing wife which highlights the extension to the original rule in practices of division of matrimonial assets. In *Aminah Bt. Berkatal v. Mohd Shakdan B. Kamsah* (10100-017-0120-2009 (Selangor) the court held that based on the agreement of parties, a terrace house situated in Shah Alam to be transferred to the plaintiff and the defendant waived his right to claim the asset. Similarly, in the case of *Mohd Isa B. Hashim v. Rusnah Ahmad*(10300-011-0051-2006 (Selangor) the court ordered the parties to adhere to the agreement endorsed regarding the division of *harta sepencarian* that on an apartment situated in Puchong. Similarly in *Mohd Mohsi Bin Arsam v. Noraesah Bt Aman* (10100-011-0009-2009 (Selangor) where the court held that the permission of polygamy has been allowed and the court order the division agreed through *sulh* that a terrace house situated at Johore Bharu and grant no. HSD 95452 situated at Johor Bahru, the plaintiff has to surrender to the defendant, a Naza Ria car with registration number BJS 8983, the plaintiff should surrender to defendant as to be used as transportation by defendant and their children and a car of Wira TAD 983 was ordered that be surrendered to the defendant.

In division after divorce, it has been observed that the parties may agree to transfer a joint effort asset registered in joint names to one of the parties. It is depicted in the Selangor case of *Norma Mokhtaram v. Kamaruddin B. Murat* (12200-17-17-2000 (Selangor) where the court ordered that the defendant agreed to transfer his right to the plaintiff as the settlement of matrimonial property and agreed to cooperate in the transferring process. However, a house situated at Subang Jaya, Selangor registered under the defendant's sole name was ordered to be transferred to the plaintiff. The defendant agreed to pay the mortgage instalments of the house until completion (*Nordalilati Hashim v. Erwan Zafry* 10200-017-0303-2009 (Selangor). In the case of *Alami Bt. A. Latif v. Mohd Yusof Bin Shamsuddin*(10200-017-013-2001(Selangor) the plaintiff, the former wife claimed her rights against a bungalow situated at Subang Jaya valued at RM1 million. The home was registered in the defendant's name and it was purchased during marriage. The plaintiff worked as dentist and she also did household chores and took care of the family. The plaintiff claimed that during her studies in the UK, the defendant started his study in law and she assisted the defendant in settling the study fees and bore some living costs and daily expenses from 1978-1983. The court decided that on the agreement, the respondent agrees to the claim of the applicant against 70% of the net value of the matrimonial home. In

another case, it has been noted that the court ordered that RM20,000 be refunded to the plaintiff and in return, the plaintiff agrees to transfer a matrimonial home situated at Batu Feringgi to the defendant. The plaintiff contributed about RM17,000 for the construction and renovation of the home (*Minah Binti Kassim v. Anuar Bin Abu Bakar* 07100-017-0149-2003(Penang).

5.3.2 Waived Spouse's Rights to Other Claims

It has been observed that in some cases, *mut'ah* has been considered as a factor when both claims have been tried concurrently where the proportion is decided by spouses' agreement. For example, by mutual agreement the rights for the matrimonial property are waived for getting a *mut'ah* or *vice versa*. In some cases, the proportion of a homemaker in matrimonial property is smaller than 1/3 when her homemaking contribution is lesser after taking into consideration the husband's efforts to provide assistance or maid and hence, the wife is allocated a huge amount of the *mut'ah* (Personal communication with Y.A. Tuan Hj Awang Suhaili Bin Ledi, the Kuching Syariah Court judge that was conducted on 14th December 2012 at 12 p.m at The Syariah Court Kuching, Sarawak). This signifies that the amount of *mut'ah* could be taken into account as a factor in determining the proportion of the share of a matrimonial property since *mut'ah* involves payment as well. It has been observed that *sulh* acts as a mediator for the wife to forgo her interest in the right of a party against other ancillary claim such as *mut'ah, 'iddah* and child maintenance (*Norhasliza Bt. Hassan v. Shamsul Ikram B. Bahrom* 10200-017-136-2000 (Selangor). This has been illustrated in the case of *Nurihan Bt. Abd. Hamid v. Mohd Yatim B. Awang* (01100-017-0786-2008 (Johor) that the court ordered the defendant to transfer the ownership of a house situated at Ulu Tiram, Johor to the applicant. The applicant agreed to forgo her interest in *mut'ah,* arrears of maintenance, medical costs and debts against the defendant.

5.3.3 *Hibah* and Interest of Minor Children

The law regulates that in dividing the matrimonial asset, the court is required to take into consideration the interest of minor children to the marriage. However, by agreement of the parties who are responsible for children's care became the focus of interest in the division of matrimonial

property although the practice is quite rare. The finding presents that *hibah* or gift of the asset previously used to be matrimonial property awarded to either party or to children of the marriage though rarely occurred are among the settlement made through *sulh*. For example, it was noted that sole effort assets registered in the sole name of a party which was acquired during marriage were also transferred to children. This is apparently found in the settlement of division upon polygamy, for example, in the case of *Che Aminah Bt. Mohammed Saad v. Ibrahim B. Kassim* (1220-17-17-2000 (Johor) where both parties agreed to transfer their interest of a double-storey terrace house situated in Subang Jaya, Selangor which was registered under the sole name of the defendant and his four children. All expenses related to maintenance and renovation of the said house, have been borne solely by the defendant.

The transfer of the interest of matrimonial home to children also takes effect when stipulated by agreement of parties. In the case of *Roslinah Che Wan v. Azlan B Sabtu* (10200-017-0009-2008 (Selangor) the court ordered a double-storey terrace house be considered as matrimonial property and the said house to be transferred wholly to the plaintiff with the mortgage installments of the house to be continued to be paid by the defendant until 2029. A condition is imposed that if the plaintiff wants to get married to another man, the plaintiff has to transfer the assets to the children as *hibah.* The data shows that six out of fourteen cases attended to the welfare of children taking into account the division of the matrimonial asset through the spousal agreement. This is to protect the parties' welfare and well-being and also to ensure the children's security and stability. In the division of assets it has been observed that the greater portion of share is granted to children of a spouse as *hibah* and the division involved a variation of assets such as share, matrimonial home, shop houses, vehicles and cash monies. However, the allocation of a share to children does not prejudice the right of an existing wife to *harta sepencarian* and when the division to a minor is only made available if multiple assets are involved. In Johor Bharu, in the case of *Abdullah Shik Mohammad v. Ruhaidah Binti Ismail* (01100-011-0040-2012 (Johor) wherein allowing the respondent husband's application for polygamy, despite the appropriate proportion allocated to the homemaker wife, the court ordered the plaintiff to transfer four units of houses to their two sons and two daughters including one minor daughter and to deposit in Tabung Haji account cash monies amounting to RM 1 million. The applicant also agreed to divide business shares owned by the applicant to the respondent that is 15% of the total share. However, the

remaining 25% of shares were to be given to their two sons and 10% share each to the other two daughters.

5.4 Expansion in Proportion of Share

The data show that in a majority of cases involving polygamous marriage, an exclusive transfer of matrimonial home is common, and to some extent is considered as the protection to wife which connotes her rights to matrimonial home (*Borhan Bin Ahmad v. Khadijah Binti Muslimin* 07100-011-0280-2007 (Penang); *Yusni B. Mohd Yusof v. Narizan Bt Che Namat* 08100-011-0007-2009 (Perak); *Johan B. Nasser v. Roziana Bt Rajali* 08100-011-0170-2010 (Perak); *Mohd Isa B. Hashim v. Rusnah Ahmad* 10300-011-0051-2006; *Mohd Mohsi Bin Arsam v. Noraesah Bt Aman* 10100-011-0009-2009 (Selangor). This type of division in the context of a matrimonial home is a practical and fair to ensure stability and security of a wife and children after the husband practices polygamy. In addition, equal proportion is another common variation of proportion in *sulh* upon polygamy(*Mustafa Bin Ismail v. Saadiah Binti Din* 07200-011-0363-2006 (Penang); *Ibrahim Bin Zen v. Hamdiah Binti Zen* 13100-011-0209-2008(Sarawak); *En Samri Bin Suhaili v. Puan Habsah Binti Deni* 13100-011-0210-2008 (Sarawak) and in rare cases 1/3 proportion of asset is determined (*Zaidi b Mohd Supiah v. Masiah Bt. Ibrahim* 10100-011-0210-2009(Selangor). It has been observed that the agreed proportion does not reflect the extent of contribution of parties. For example, in a few cases sole effort assets are divided equally to a homemaker who has indirectly contributed to the acquisition of assets (*Abdullah Bin Shikh Mohamed v. Ruhaidah Binti Ismail* 01100-011-0040-2012 (Johor). Nevertheless, the greater proportion for the homemaker wife is part of an agreed proportion in *sulh* (*Mohd Mohsi Bin Arsam v. Noraesah Bt. Aman* 10100-011-0009-2009 (Selangor). In some situations, greater proportion is associated with the wife's permission for the husband to practice polygamy where it is considered significant in ensuring a fair practice of polygamy among wives (*Abdullah Bin Shik Mohamad v. Ruhaidah Ismail* 01100-011-0040-2012 (Johor).

It is also clear that when a matrimonial home is involved in division, the division may vary in proportion and be subjected to the parties' mutual agreement. The transfer of the matrimonial home to a deceased spouse was illustrated in Perak case of *Amienadzariza Jamali v. Abu Bakar Mohd Yusof* (10200-017-0315-2005 (Selangor). The court

ordered by agreement of the defendants, to transfer a double-storey terrace house situated at Shah Alam to the plaintiff. The court also ordered to omit the sole name of the deceased in the title. The plaintiff also agreed to bear the bank's mortgage installments and expenses of the house. Thus, the *sulh* mechanism in the division of matrimonial asset is deemed to be more practical. More consideration is given to the welfare of family especially so when the division involves a transfer of assets to the children and wife. The interests of a child are paramount and significant in the division in order to safeguard the child's interest after the husband's commits polygamy although this is still not widely practiced. It can be concluded that *sulh* of parties is an amicable settlement and its distribution is practical as parties' need and children's interest become vital in ensuring the fair and just division of assets.

6. Conclusion

Though the law provides a basic guideline for the court to decide on the division of matrimonial property, a philanthropic settlement could serve adequate security to the wife or children. The parties agreed to transfer whole or partial ownership of the asset for the benefits of family member during marriage provides an alternative to a fairer distribution of matrimonial assets where the contribution of parties is no longer the factors in determining the share of the asset. *Sulh* is a potential mode of an amicable settlement which is a strong mechanism to be used in the division of the matrimonial assets especially in promoting the element of philanthropic to be established when making the division of the asset. In fact, by the nature of *sulh*, the proportion based on the spousal agreement promotes fair division among the parties and the fact that it could shorten the process of application to *harta sepencarian.* By taking this approach, it is suggested that the use of *sulh* as a mode of dividing the matrimonial asset be expanded not only in the division upon polygamy but it can be extended widely to the division upon the death of a spouse and after a divorce.

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