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Inheritance Right of Illegitimate Child in Malaysia: Dawn or Storm after *Tan Kah Fatt v Tan Ying*

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ABSTRACT

Before the Federal Court's decision in *Tan Kah Fatt v Tan Ying* (2023), a distinction had always been drawn between the inheritance right of a legitimate child and an illegitimate child in Malaysia. While a legitimate child has an automatic right to inherit the parents' intestate estate, such a right was not available to an illegitimate child. An illegitimate child may only inherit the intestate estate if he has been legitimised. Without legitimisation, an illegitimate child would be ineligible to succeed to his father's intestate estate. The illegitimate child's entitlement to succeed on his mother's intestacy is conditioned on the absence of any legitimate issue surviving the mother. However, *Tan Kah Fatt* has altered this legal position. This article seeks to examine the change in the law of the inheritance rights of illegitimate non-Muslim children in Malaysia, the effects of this Federal Court's decision, and some concerns about this case. Doctrinal research is employed, and the discussion is confined to the law of intestacy for non-Muslims in Malaysia only. This article suggests that



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amendments to relevant statutes are needed if Malaysia truly intends to equalise the illegitimate child's inheritance right to the intestate estate as that of the legitimate child.

Keywords: Illegitimate child; Inheritance right; Intestacy; Intestate estate; Malaysia

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1. Introduction

At common law, a child is legitimate if the parents were married to each other when he was conceived or born. A child of unmarried parents is illegitimate and referred to as a *filius nullius* which means 'a son of nobody'. The status of an illegitimate child is inferior since he does not have a recognised legal relationship with his parents. It follows that under the common law, an illegitimate child is not entitled to succeed to the estate of his parents who die intestate.

This strict rule of common law had been slightly modified by the Legitimacy Act 1961 in Malaysia. Nevertheless, a distinction had always been drawn between the inheritance right of a child born into a lawful marital union and a child born out of wedlock. A child born in wedlock¹ has an automatic right to succeed to the estate of his or her parents who die intestate. However, an out-of-wedlock child does not have an automatic right to an intestate share of the deceased parent's estate, unless he or she has been legitimised through the subsequent marriage of the parents.²

Legitimated children are deemed to have been born legitimate and are entitled to succeed to the intestate parents' estate as any legitimate children.³ Therefore, if the statutory requirement of legitimation is not met, an illegitimate child is ineligible to inherit from the father. Although an illegitimate child has the right to succeed on his mother's intestacy, this is subject to the condition that the mother does not leave any surviving legitimate issue.⁴ In fact, the earlier cases⁵ and previous literature⁶ had taken the position that illegitimate non-Muslim children are not included as issues who had the right of succession on intestacy.

¹ A child is considered legitimate if he or she was born during the subsistence of a valid marriage or within 280 days after the dissolution of a marriage provided that the mother has not remarried during that period of time: Evidence Act 1950, s 112.

² If the parents of an illegitimate child marry each other, and the father is domiciled in Malaysia at the time of the marriage, such child will be rendered legitimate from the prescribed date or from the date of marriage, whichever is later: Legitimacy Act 1961, s 4.

³ Legitimacy Act 1961, s 6(1).

⁴ *ibid* s 11(1).

⁵ *Shamugam s/o Kanapathy v Pappah d/o Chinniah Nadar* [1994] 2 Current Law Journal 265 (HC); *Kausalya a/p M Pathmanathan v The Legal Representatives of Jamuna a/p Narayanan, deceased* [2014] 2 Malayan Law Journal 836 (CA); *Tan Ying v Tan Kah Fatt* [2018] Malayan Law Journal Unreported 1070 (HC).

⁶ *Halsbury's Laws of Malaysia: Wills, Probate, Administration and Succession*, vol 11(2) (LexisNexis 2019) [330.647]; Rasamani Kandiah, *Child Handbook* (Malayan Law Journal Sdn Bhd 2004) pt I [23] and [28]; Ainur Nadhrah Roslan, Nik Sarah Adilah Abdul Aziz and Fathin Izzati Mohd Shaharudin, 'Discrimination Against an Illegitimate Child According to Law and Society' [2021] 3 Current Legal Issues 16.

However, the legal position has been reversed following the landmark decision by the Federal Court in *Tan Kah Fatt v Tan Ying*.⁷ This article seeks to examine the change in the legal position of the inheritance right of illegitimate non-Muslim children in Malaysia, the effects of the Federal Court's decision in *Tan Kah Fatt*, and some concerns about this case. Doctrinal research is adopted in this article and the law of intestacy discussed will be confined to the law applicable to non-Muslims in Malaysia only.

2. The inheritance right of illegitimate children before *Tan Kah Fatt v Tan Ying*

When a non-Muslim dies intestate in Malaysia, the persons entitled to the deceased's estate are determined by the Distribution Act 1958. Similarly, if a person dies leaving a valid will but only disposes of part of his properties, what is not disposed of by the will shall be distributed under the provisions in the Distribution Act 1958.⁸ Generally, the categories of persons who will inherit from the intestate under the Distribution Act 1958 are the spouse, the parents, and the issue. In the absence of these three categories of persons, other relatives are entitled to intestate succession according to the order. They are the intestates' siblings, grandparents, uncles and aunts, great grandparents, great grand uncles, and great grand aunts.⁹ The phrase 'issue' is defined as including 'children and the descendants of deceased children', while the word 'child' refers to a legitimate child and a child adopted under the Adoption Act 1952.¹⁰ The earlier cases often read the definition of 'issue' and 'child' in the Distribution Act 1958 together, which led to the conclusion that an illegitimate child has no right to inherit the estate of his biological father on intestacy, and *vice versa*.

In *Shanmugam s/o S Kanapathy v Pappah d/o Chinniah Nadar*,¹¹ it was held that the plaintiff must prove that he was the deceased's legitimate son in order to establish his right to succeed the estate of the deceased who died intestate. The same position was taken in *Kausalya a/p M Pathmanathan v The Legal Representatives of Jamuna a/p Narayanan, deceased*.¹² In this case, the Court of Appeal found that there was a favourable presumption that the marriage between the deceased and the plaintiff's witness was valid. Therefore, the plaintiffs who were born from such a marriage were held to be the deceased's legitimate children and beneficiaries of the deceased's estate.

3. The landmark decision of *Tan Kah Fatt v Tan Ying*

In 2012, Tan Kah Yong (the deceased) died intestate in a motor vehicle accident. He left behind his two parents, his lawful wife Tan Ying (the respondent), and a daughter by the name of Tan Sin Lin from this marriage (the legitimate daughter). The deceased also had an

⁷ *Tan Kah Fatt v Tan Ying* [2023] 2 Malayan Law Journal 583 (FC).

⁸ Distribution Act 1958, s 8.

⁹ *ibid* s 6(1).

¹⁰ *ibid* s 3.

¹¹ *Shanmugam s/o S Kanapathy* (n 5).

¹² *Kausalya a/p M Pathmanathan* (n 5).

illegitimate daughter named Tan Sin Yee (the second appellant), who was born on 8 October 2002 from his relationship with Lu Yan Liu, a Chinese national. The deceased and Lu Yan Liu only underwent a Chinese customary marriage at the end of 2002 and had never registered under the Law Reform (Marriage and Divorce) Act 1976.¹³

The respondent and the deceased's brother, Tan Kah Fatt (the first appellant) were granted the letters of administration to administer the deceased's estate. Initially, five beneficiaries were identified, namely the respondent, the legitimate daughter, the second appellant, and the two parents of the deceased. After the distribution of the deceased's assets to these beneficiaries, the respondent appointed her solicitor and was advised that an illegitimate child is not entitled to inherit her father's estate. The respondent then filed a suit to declare that the second appellant, as an illegitimate child, was not entitled to claim any interest in the deceased's estate, and the respondent further demanded the second appellant return the assets received to the deceased's estate.

Referring to the definitions of 'child' and 'issue', and section 6 of the Distribution Act 1958 which provides for the succession to intestate estate, the High Court held that an illegitimate child does not have the right to succeed intestate estate under the Distribution Act 1958. It was insufficient to prove that the second appellant was the deceased's daughter. She must be a legitimate child to be entitled to the deceased's estate. The High Court declared that the second appellant was an illegitimate child who had no claim against the interest of the deceased's estate. As a result, the grant of letters of administration was set aside.¹⁴ This decision was upheld by the Court of Appeal.

When the matter was appealed to the Federal Court, the main issue was whether a child born to parents who underwent a Chinese customary marriage not registered under the Law Reform (Marriage and Divorce) Act 1976 was entitled to claim the estate of the late father. The Federal Court made several decisions. Firstly, the Federal Court held that the Distribution Act 1958 is intended solely to deal with the distribution of an intestate estate and not the legitimacy of a child or the validity of marriage. Section 5 of the Distribution Act 1958 recognises a person with 'some lineal blood connection with the deceased' as a potential beneficiary as no distinction should be made whether he is related to the deceased through his father or mother. The Federal Court then pointed out that section 6(1) of the Distribution Act 1958 which sets out the order of statutory succession uses the term 'issue' and not the word 'child'. There was no express or implied provision that only allowed legitimate children to succeed the intestate estate. According to the Federal Court, the definition of 'child' should not be ascribed to 'issue' under the Distribution Act 1958. The definition of 'issue' is more expansive since 'issue' includes children and the deceased

¹³ Law Reform (Marriage and Divorce) Act 1976, s 4 provides that any customary marriage solemnised before 1 March 1982 shall be deemed to be registered under the Law Reform (Marriage and Divorce) Act 1976 and valid. Section 27 of the same Act requires any marriage on or after 1 March 1982 involving a person who ordinarily resident in Malaysia or a Malaysian resident abroad or domiciled in Malaysia shall be registered under this Act.

¹⁴ *Tan Ying* (n 5).

children's descendants. This is opposed to the definition of 'child' which means a legitimate child, including a child adopted under the Adoption Act 1952. The Federal Court also referred to the dictionary meaning of 'issue', which includes the children, lineal descendants, or legitimate offspring with the direct bloodline of a person. It then concluded that the term 'issue' does not depend on the descendant's legitimacy but relates to the descendant's blood lineage. In other words, a person has the right of succession if he can establish some 'genetic or blood lineage connection' with the deceased. It was held that the second appellant was the deceased's issue because of the lineage and therefore, she was entitled to inherit the deceased's intestate estate under section 6 of the Distribution Act 1958. The Federal Court felt that the rational interpretation of 'issue' includes an illegitimate child. Such construction was said to accord with the purpose of the Distribution Act 1958 and was consistent with the right to equality as guaranteed in Article 8 of the Federal Constitution.

The Federal Court also referred to section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 in which a child of a void marriage shall be treated as a legitimate child if both or either of the parents reasonably believed that at the time of their solemnisation of marriage, the marriage was valid. There was a Chinese customary marriage between Lu Yan Liu and the deceased but the marriage was not registered. However, the Federal Court found that the evidence by Lu Yan Liu and the deceased's parents showed that Lu Yan Liu had reasonable belief that her marriage with the deceased was valid. Applying section 75(2) of the Law Reform (Marriage and Divorce) Act 1976, the Federal Court held that the second appellant was actually a legitimate child who was eligible to succeed the intestate estate of her late father. Nevertheless, it should be noted that section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 was not raised and addressed in the High Court as well as the Court of Appeal.

There were four related questions posed for the Federal Court's determination which focused on 'child' and not 'issue'. Therefore, the Federal Court declined to answer them. The Federal Court allowed the appeal with costs and set aside the decisions of the High Court and the Court of Appeal.

4. The Effects and Implications of *Tan Kah Fatt v Tan Ying*

The most important and significant effect of *Tan Kah Fatt* is that the Federal Court removed the distinction between the inheritance right of an illegitimate non-Muslim child and a legitimate non-Muslim child whose parent died intestate. An illegitimate child is now placed on the same footing as a legitimate child and can take an interest in the intestacy of his parent, regardless of the marital status of his parents at the time of his birth and the absence of subsequent legitimisation. This means that illegitimacy is no longer relevant for inheritance rights on intestacy. The legitimate and illegitimate children will share the inheritance of their intestate parent. The elimination of the legal discrimination or disadvantage on an illegitimate child in intestate succession matters has indeed promoted the welfare of the child. It also extended the group of beneficiaries of the intestate estate.

However, it is not clear if the illegitimate child can also inherit if his grandparent, half-blood sibling, uncle, or aunt dies intestate.

Following the expansion of the potential beneficiaries of a deceased who dies intestate, there may be claims made by persons whose identity or even existence is not known to the administrator or the deceased's family members through the legitimate link.¹⁵ The administrator may find it difficult to ascertain if there is any illegitimate child left by the deceased who can take on an intestacy. It would also be embarrassing to inquire about the possible existence of an illegitimate child. There is a risk that the administrator may distribute the deceased's estate without notice of the existence of such an illegitimate child. To protect himself, it appears that the administrator may need to advertise in newspapers or gazette for any claim on the deceased's estate.¹⁶ This will increase the costs incurred in the administration of the estate. Furthermore, whoever claims to be the illegitimate child of the deceased may need to resort to DNA tests to establish paternity. If there is a dispute on the identity of the illegitimate child, this may cause some delay in the administration of the deceased's estate. The administrator has a greater burden to ensure that the deceased's estate will not be distributed to the wrong party. Even if the existence of the illegitimate child is known, a prospective administrator such as the wife or the legitimate child of the intestate may be in a hostile relationship with the illegitimate child, to the extent that she or he will refuse to include the illegitimate child in the list of beneficiaries. This may result in a legal suit being brought by the illegitimate child against the administrator and the beneficiaries of the intestate.

According to a report by the Child Rights Coalition Malaysia in 2013, there were 234,000 illegitimate children whose birth certificates did not bear the father's name. Out of this number, 85,000 were Muslims¹⁷ which means that the non-Muslim illegitimate children constituted 149,000. In 2019, it was reported that only about 28% of the Malaysian working population made a will.¹⁸ Therefore, it is estimated that there could be a considerable number of potential beneficiaries for cases of parents dying intestate, and disputes involving entitlement to the intestate estate are expected to increase in court.

¹⁵ J Gareth Miller, 'The Family Law Reform Act 1987 and the Law of Succession' (1988) *Conveyancer and Property Lawyer* 410.

¹⁶ This was one of the rationales given by the Law Commission of the United Kingdom, when it recommended for the removal of the special protection for trustees and personal representatives prescribed by section 17 of the Family Law Reform Act 1969. The said protection was removed by section 20 of the Family Law Reform Act 1987. See Law Commission, *Family Law: Illegitimacy* (Her Majesty's Stationery Office 1982) <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-118-FAMILY-LAW-ILLEGITIMACY.pdf>>.

¹⁷ Child Rights Coalition Malaysia, *Status Report on Children's Rights in Malaysia* (2013) <<https://www.mcri.org.my/wp-content/uploads/20131230-CRC-Report-English-FINAL.pdf>>.

¹⁸ 'Only 28% of Malaysian Workers Have a Will' *The Star* (18 June 2019) <<https://www.thestar.com.my/business/business-news/2019/06/18/only-28-of-malaysian-workers-have-a-will>>.

5. Some Concerns about *Tan Kah Fatt v Tan Ying*

While the Federal Court's landmark decision is laudable and viewed as a progression in law,¹⁹ there are some concerns that this article would like to raise against *Tan Kah Fatt*.

Although the Federal Court distinguished the objectives of the Distribution Act 1958 and the Legitimacy Act 1961 and held that the purposive rule of interpretation prevails over the literal rule of interpretation in construing a statute, it is humbly submitted that these two statutes should not be read in isolation in determining the Parliament's intention on the illegitimate child's entitlement to the biological parent's intestate estate. Legitimacy Act 1961 contains a specific provision, namely section 11(1) which provides for the entitlement of the illegitimate child and his issue to succeed on the intestacy of the mother if there is no legitimate issue surviving her. There is no similar provision for the illegitimate child's inheritance right to the biological father's intestate estate, which means that the Parliament does not intend to provide paternal intestate inheritance to the illegitimate child. This deliberate distinction in the Legitimacy Act 1961 is believed to be grounded on the relative difficulty in proving paternity as compared to the certainty of determining motherhood,²⁰ especially because the statute was enacted a few decades ago when the DNA test was not available. As pointed out by the respondent's counsel in *Tan Kah Fatt*, the Parliamentary debate on the Distribution (Amendment) Bill 1987 on 5 August 1987, which involved an amendment to section 6 of the Distribution Act 1958, showed that the Parliament's intention on the said amendment was to consider the legitimate children from the legal marriage only.²¹

In interpreting the statutes, a statutory presumption which is highly relevant in this context is the principle of harmonious construction. According to this principle, statutes do not contradict one another, and they should be construed to operate harmoniously.²² Such principle applies not only to the interpretation of provisions in different statutes but also to provisions within the same statute. It is humbly submitted that the Distribution Act 1958 should not be read in isolation but in harmony with another statute, namely the Legitimacy Act 1961 that encapsulates the legislature's intention. Therefore, when the judges referred to the Parliament's intention in the Distribution Act 1958 about the intestacy scheme, it should be consistent with the Parliament's intention in the Legitimacy Act 1961, bearing in mind that there is expressed and specific provision on the condition when an illegitimate child will be entitled to succeed on the mother's intestate estate. By reading both the Distribution Act 1958 (together with the Hansard on Parliament Debate on 5 August 1997) and the

¹⁹ Trevor Jason Mark Padasian, 'Federal Court: Illegitimate Issue Entitled to Inherit From Deceased Parent's Estate' (*Skrine*, 8 February 2023) <<https://www.skrine.com/insights/alerts/february-2023/federal-court-illegitimate-issue-entitled-to-inher>>.

²⁰ There is a Roman law principle called '*mater semper certa est*' which means 'the mother is always certain' or 'the mother is always known' because motherhood can be established through giving birth to a child.

²¹ Pernyataan Rasmi Parlimen Dewan Rakyat, DR 5.8.1997 (Hansard on Parliament Debate dated 5 August 1997), 21 <<https://www.parlimen.gov.my/files/hindex/pdf/DR-05081997.pdf>>.

²² *Commissioner of Police v Eaton* (2013) 294 Australian Law Reports 608, [48] and [98].

Legitimacy Act 1961 (especially section 11), it is humbly submitted that the harmonious construction of the provisions will lead to the conclusion that an illegitimate non-Muslim child is not entitled to the biological father's intestate estate, although he may be entitled to the mother's intestate estate if the mother does not have any legitimate issue surviving her. In addition, there is also a strong presumption that a legislature 'would not alter a statute that forms part of a collaborative and uniform national scheme, save in express terms'.²³ Both the Distribution Act 1958 and section 11 of the Legitimacy Act 1961 should form a uniform intestacy scheme, which includes the restricted entitlement of an illegitimate child to the mother's intestate estate and his non-entitlement to the biological father's intestate estate.

Indeed, the word 'issue' in section 3 of the Distribution Act 1958 has a wider meaning than the word 'child'. 'Issue' covers not only the first generation of descendants of the parents but also the descendants of the deceased children. 'Child' refers to a first-generation legitimate descendant of the parents and also a child adopted under the Adoption Act 1952. Applying the principle of harmonious construction in which the Distribution Act 1958 should be interpreted in harmony with the Legitimacy Act 1961, the meaning of 'issue' should be read together with 'child'. It follows that 'issue' which includes children and the descendants of the deceased children should refer to those from the legitimate link.

If the Parliament had intended otherwise, it would have provided expressly to that effect through amendments to the Distribution Act 1958 as well as the Legitimacy Act 1961. It should be pointed out that section 11(1) of the Legitimacy Act 1961 in Malaysia is *in pari materia* with section 9(1) of the Legitimacy Act 1926 ('the 1926 Act') in the United Kingdom. Under this provision, an illegitimate child can succeed on his mother's intestacy as if he has been born legitimate provided that the mother is not survived by any legitimate issue. However, section 9(1) of the 1926 Act was repealed by section 14(7) of the Family Law Reform Act 1969 ('the 1969 Act') in the United Kingdom. Instead, section 14(1) of the 1969 Act provided that an illegitimate child could inherit from his unmarried parent who died intestate on or after 1 January 1970 as if he had been born legitimate. The 1969 Act did not distinguish between an intestate mother and father. The illegitimate child had the right to succeed his deceased parent's estate, regardless of whether there was any legitimate issue surviving the parent. However, the illegitimate child was not entitled to share in the intestacy of his intestate grandparents, siblings, uncles, or aunts.²⁴ This limited recognition of the illegitimacy was subsequently extended beyond the parent and child relationship, under the Family Law Reform Act 1987 ('the 1987 Act'). According to section 1(1) of the 1987 Act, references to any relationship between two persons shall be construed without having regard to whether the parents are legally married to each other.²⁵ This general principle is applied in section 18(1) of the 1987 Act, which deals with entitlement on intestacy under the Administration of Estates Act 1925. Therefore, an illegitimate child in the United Kingdom

²³ *R v Porter* [2001] New South Wales Court of Criminal Appeal 441, [59].

²⁴ Law Commission (n 16); NV Lowe, 'The Family Law Reform Act 1987: Useful Reform but an Unhappy Compromise?' (1988) 3(1) *Denning Law Journal* 77, 82 <<https://doi.org/10.5750/dlj.v3i1.173>>.

²⁵ Family Law Reform Act 1987, s 1(1).

can succeed not only on the intestate estate of the parents but also on the intestate estate of his siblings, grandparents, uncles, and aunts. The 1987 Act applies to persons who die intestate on or after 3 April 1988.

As compared to the United Kingdom, Malaysia has not amended its section 11(1) of the Legitimacy Act 1961. Its position remains like section 9(1) of the 1926 Act in the United Kingdom. In contrast, the United Kingdom subsequently changed its laws and substantially improved the position of illegitimate children. While legitimacy is no longer relevant for intestate succession rights in the United Kingdom, the same may not apply to Malaysia due to the absence of amendments to the Legitimacy Act 1961 read together with the Distribution Act 1958. It is submitted that an illegitimate child is not placed in the same position as a legitimate child in Malaysia as far as the intestate succession right is concerned, based on the current legal provisions of the Legitimacy Act 1961 read together with the Distribution Act 1958. The Federal Court's construction of the Distribution Act 1958 and the Legitimacy Act 1961 in *Tan Kah Fatt* may be challenged.

The Federal Court in *Tan Kah Fatt* referred to section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 as an additional ground in allowing the appeal, although this provision was not raised nor addressed in the courts below. According to this provision, a child of a void marriage shall be regarded as a legitimate child if at the time of the solemnisation of the marriage, either or both of the parents reasonably believed that the marriage was valid. Although section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 applies to the devolution of property to children after the appointed date,²⁶ the meaning of 'disposition' should be the same as that in the Legitimacy Act 1961.²⁷ According to section 2(1) of the Legitimacy Act 1961, the word 'disposition' is defined as 'an assurance of any interest in property by any instrument, whether *inter vivos* or by will'.²⁸ Therefore, it is submitted that section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 does not render an illegitimate child to be treated as a legitimate child for intestacy succession, since there will not be any instrument assuring any interest in property for intestacy succession.

In fact, section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 is also *in pari materia* with section 2 of the United Kingdom's Legitimacy Act 1959, in which the word 'disposition' bore the same meaning as in the United Kingdom's Legitimacy Act 1926.²⁹ It should be borne in mind that the provision on the illegitimate child's entitlement to the estate of his parent who died intestate on or after 1 January 1970 was only enacted through the 1969 Act in the United Kingdom. Therefore, it is submitted that the reference to section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 in *Tan Kah Fatt* as an additional ground to allow the appeal is highly disputed.

²⁶ Law Reform (Marriage and Divorce) Act 1976, s 75(3)(b).

²⁷ Law Reform (Marriage and Divorce) Act 1976, s 75(7).

²⁸ This provision is *in pari materia* with the Legitimacy Act 1926 (UK), s 11.

²⁹ Legitimacy Act 1959 (UK), s 2(5). Under s 11 of the Legitimacy Act 1926 (UK), the word 'disposition' is defined as 'an assurance of any interest in property by any instrument whether *inter vivos* or by will'.

6. The Way Forward

When the Legitimacy Act 1961 was enacted in Malaysia, a distinction was clearly made between the entitlement to the intestate estate for a legitimate child and an illegitimate child. This could be due to the policy and the need to protect, strengthen, and safeguard the institution of marriage. Intestate succession involving claims by an illegitimate child reveals a conflict between the sanctity of marriage and compassion towards innocent children born out of wedlock. If the policy of the country and the Parliament's intention has changed to eliminating the legal discrimination or disadvantages of illegitimate children in Malaysia, then the Legitimacy Act 1961 and the Distribution Act 1958 should be amended to clearly provide the illegitimate child the same right to inherit the intestate estate of the parents as if he was born legitimate, as what was done in the United Kingdom.

The Inheritance (Family Provision) Act 1971 ('the 1971 Act') in Malaysia also needs to be amended to make it clear that an illegitimate child can apply for provision. The 1971 Act seeks to allow certain persons to apply to the court for a share out of the deceased's estate, regardless of whether the deceased died testate, intestate, or partially intestate. The applicant must be a dependant of the deceased who has not been adequately provided for under the will or the intestacy rules. Under the 1971 Act, the court can make an order if the court is of the opinion that the deceased has failed 'to make reasonable provision for the maintenance' of a dependant under the will or that the Distribution Act 1958 does not adequately provide for the dependant.³⁰ The 1971 Act is based on the premise that the deceased's obligations to provide for the dependants during his lifetime should not be ended by the death of the deceased. However, the Malaysian laws on family provision are rather narrow and are strictly limited to the categories of dependants under section 3(1) of the 1971 Act. An illegitimate child is not recognised as a dependant of the deceased under the family provision law of Malaysia, especially in respect of intestate succession.

In the United Kingdom, the Inheritance (Provision for Family and Dependents) Act 1975 (as amended) ('the 1975 Act'), recognises a wider category of people as dependants of the deceased. The 1975 Act allows cohabitants to apply as dependants. It also allows any child of the deceased to apply as a dependant.³¹ This is regardless of the age of the child and whether the child is legitimate or illegitimate. Besides that, the 1975 Act allows any person who is not a child of the deceased, but who has been treated by the deceased as a child of the family in relation to any marriage to which the deceased was at any time a party, to claim. Most remarkable of all, the 1975 Act allows anybody who could show that he was maintained by the deceased immediately before the death of the deceased to apply for family provision out of the estate of the deceased. One could argue that United Kingdom law is more in line to have such family provision laws in the first place and will afford some degree of protection to innocent 'victims' like the illegitimate child of the deceased.

³⁰ Inheritance (Family Provision) Act 1971, s 3(1).

³¹ Inheritance (Provision for Family and Dependents) Act 1975 (UK), s 1(1).

In summary, if Malaysia intends to reform the law by providing the same inheritance right to the illegitimate child in respect of the intestate estate as that of the legitimate child, amendments to the Legitimacy Act 1961, Distribution Act 1958, and the 1971 Act should be made to clearly reflect such purpose and intention. However, if Malaysia is concerned with the possible effects of degeneration of the sanctity of marriage and wishes to maintain the current laws, it is humbly submitted that the Federal Court's decision in *Tan Kah Fatt* should be revisited in the future.

7. Conclusion

The landmark decision of the Federal Court in *Tan Kah Fatt* which recognised the non-Muslim illegitimate child's inheritance right to the biological father's intestate estate is welcomed by certain sections of the society. This is because the legal position before *Tan Kah Fatt* is considered as penalising the innocent child for the ignorance or fault of the parents. On the other hand, some may be concerned about whether the change in the legal position may influence people's behaviour, affect healthy family life, or even weaken the institution of marriage.

As highlighted above, the grounds of the Federal Court's decision in *Tan Kah Fatt* may be debated as its wide interpretation of the provisions in the Distribution Act 1958 may appear to conflict with the express provision of the Legitimacy Act 1961. Section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 should not be read in isolation. This is because section 75(7) requires the word 'disposition' in section 75 to bear the same meaning as defined in the Legitimacy Act 1961, and it does not seem to cover intestate succession.

If Malaysia truly intends to equalise the inheritance rights of legitimate and illegitimate children in cases of intestacy, such legal reform should be made through amendments to the Legitimacy Act 1961, the Distribution Act 1958, and the 1971 Act, as what was done in the United Kingdom. Until the legal position is clearly altered by the statutory amendments, it may be prudent for parents to make a will during their lifetime to avoid any unpleasant dispute over their property after their demise.

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