Children’s Right in Custodial Disputes: The Extent of the Application of Best Interest of the Child Principle under the Malaysian Laws

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Abstract

Best interest of the child is the utmost fundamental right of children which is applicable to all matters relating to children for the purpose of safeguarding their well-being. In child custodial disputes, the tremendous shift from parental rights to parental responsibilities throughout the centuries had made the principle of best interests of the child as the utmost matter which the parents and judges must uphold.

Although the commitment to this principle is significantly enshrined in the United Nation Convention on Rights of the Child and being mandated in the custody legislations of most nations in the world, the content and application of the principle differs across borders. Differences persist notwithstanding many countries have experienced a substantial shift over the last several decades in the types of custodial arrangements that are thought to best serve children’s interests and maintaining their rights. The laws in Malaysia similarly support the child’s best interest principle but do not provide further deliberation on the matter. It is entirely developed by the courts through decided cases.

Thus, this paper seeks to discuss the extent of the application of best interest of the child principle in custodial disputes. In doing so, it attempts to provide an overview of the current laws and the approach of the Civil and the Shariah courts in Malaysia in applying the principle and for purposes of comparison, it briefly examines the legislation and the courts practices in Australia on this matter since the country has undergone a substantial development in its child custodial policy and legislation. The purpose is to determine the best standard to be adopted by Malaysia and to propose improvement to the laws whenever appropriate. The vast developments in the Australian law could provide suggestion for reforming the custody policy and law in Malaysia. The reformation is pertinent to ensure that children’s right in custody disputes will always be upheld for their future development and wellbeing.

Keywords: Best interest, children right, custody, Malaysian laws
Introduction

The parent-child relationship is obviously one of the key relationships in family law and the nature and focus of this legal relationship has undergone profound change. The growing acceptance of a child as a person in his own right has given rise to the need of recognition of his welfare and protection. At the international level, the fundamental principle of “in the best interests of the child” has been upheld as the primary consideration in all action concerning children. It means that in each and every circumstance and decision affecting the child, the various possible solutions must be considered and due weight should be given to the child’s best interests. The principle is developed to limit the extent of adult authority over children (parents, professionals, teachers, medical doctors, judges etc.) It is based upon the recognition that an adult is only in a position to undertake decisions on behalf of a child because of the child’s lack of experience and judgement. This principle derives from the Welfare System or Protective system that developed at the beginning of the 20th century and has been transformed by the UN Convention on the Rights of the Child into a rule that can be applied to determine if a State, through its decision-makers, has acted proportionally and appropriately when considering the best interests of the child. This in turn places significant emphasis on the right of the child to exercise her or his right to freedom of expression and to have her or his wishes heard and considered (Zermatten J., 2010)

Best interest or welfare of the child as the courts’ paramount consideration in determining custody disputes has been the prevailing standard of the custody legislations of various nations in the world. Nevertheless, the content and application of the principle differs across borders. Differences persist notwithstanding many countries have experienced a substantial shift over the last several decades in the types of custodial arrangements that are thought to best serve children’s interests. Commentators argue that some of the variation, between nations is attributable to the indeterminacy of the best interest principle. Many jurisdictions do not incorporate definite term of the principle in their legislations. This allows flexible interpretations being made by judges according to their broad discretionary power. The most widely accepted judicial interpretations of best interest or welfare principle are the interpretations made in two English cases, namely, in Re Mc Grath (Infant) [1893] 1 Ch. 143 and J v C [1970] A.C.668. In substance, these cases concluded that ‘welfare’ must be
construed in its widest sense; in which it encompasses all matters, which are required for the child's upbringing and these matters must be taken into account and weighed carefully by the court before arriving to a decision and that decision must reflect that the child's welfare is the first and paramount consideration.

It has been argued that indeterminacy of the principle contributes to the court's inability to make predictions as to what really amounts to the best interests of the child (Robert H. Mnookin, 1975). In many jurisdictions, judges are given great discretion to determine children's welfare. However, very often than not, they tend to set legal standards of welfare principle that gave too little weight to the psychological wellbeing of the child, such as the continuity of the child's relationship with either parent or other person perceived by the child as parent (J. Goldstein, A. Freud and A. Solnit, 1973). Neglecting the psychological aspect of the child when making a custody decision will jeopardize the whole process of child development and ultimately the interpretation of an overall standard of welfare principle could not be achieved. It was also argued that the judges' wide discretion in interpreting the best interest principle may contribute to the unpredictability and arbitrariness of the decisions made. Decisions are unpredictable if they cannot be justified by a precise rule or standard. Accordingly, such circumstance will make judges, unconsciously, to interpret the principle according to their own prejudices and personal experiences, which may appear to be arbitrary (Katherine O’ Donovan, 1980).

The complexity of this matter has instigated some jurisdictions like Australia to develop comprehensive best interest checklists in its custody legislation to assist the court in carrying out its duty of implementing the best interest principle. Nevertheless, other countries including Malaysia do not provide similar checklists but continue to rely on the interpretation of the principle by the courts through decided cases.

Objective
This paper examines the extent of the application of best interest of the child principle in custodial disputes under the Malaysian laws. In doing so, it attempts to provide an overview of the current laws and the approach of the Civil and the Shariah courts in Malaysia in applying the principle. As a comparison, it briefly examines the legislation
and the courts’ practices in Australia on this matter since the country has undergone a substantial development in its child custodial policy and legislation. The purpose is to determine the best standard to be adopted by Malaysia and to propose improvement to the laws whenever appropriate.

**The Application of Best interest Principle in Custody Disputes in Malaysia**

In general, Malaysia practices two separate legal systems in regulating family matters. Muslims’ family matters are governed by the Islamic family laws, while for the non-Muslims, their family matters are governed by the civil laws. Thus, disputed family matters are dealt by two separate courts, namely, the Shariah court for the Muslims and the civil court for the non-Muslims. Whilst this is the background of the Malaysian legal system, both laws concede the principle of best interest of the child in custody disputes.

1) **Civil Family Law**

In relation to the non-Muslims’ children, the governing custody legislations are the Law Reform (Marriage & Divorce) Act 1976 (LRA 1976) and the Guardianship of Infant Act 1961 (GIA 1961). Both laws specifically upheld the welfare or best interest of the child as the utmost matter to be considered by the court in custodial determination. Nevertheless, these laws provide no further deliberation on the principle of the welfare of the child itself. There is no specific definition or comprehensive checklist of factors provided in both statutes to assist the court to implement the principle. It is entirely developed by the courts through decided cases. The civil courts in Malaysia widely accepted the meaning of welfare or best interest of the child as being defined by the court in two important English precedents, Re McGrath and J v C. In Re McGrath, the word ‘welfare’ was interpreted to covers a wide range of matters including moral and religious welfare, physical well-being, ties of affection and financial needs. Accordingly, welfare of the child implies all factors which will affect the overall upbringing of the child. Meanwhile, in J v C, the court elaborated on the term ‘welfare of the child as the court’s paramount consideration’, whereby it must weigh all relevant matters as to the child upbringing carefully before arriving to a decision and that decision must reflect that the child’s welfare is the first and paramount consideration. The court further stated that the word ‘paramount consideration’ does not mean that it should view the matter of the child’s welfare as the first of the list of factors to consider, but rather that
it must be the overriding consideration. Both cases show that there are various matters, which should be considered by the court in determining the welfare of the child.

In Malaysian context however, question may arise as to the extent of the Malaysian courts’ discretion in considering other factors, than those enumerated in the welfare provisions of the GIA 1961 and LRA 1976. The provision of the GIA 1961 only stipulates two factors for the court’s consideration: firstly, the welfare of the child and secondly, the wishes of the parents (section 11). Conversely, the LRA 1976 provides more options for the court to consider, which include, wishes of the parents (Section 88(2)(a)), wishes of the child, if he or she is of an age to express an independent opinion (Section 88(2)(b)); the rebuttable presumption that ‘it is for the good of a child below the age of seven years to be with his or her mother, subject to whether the application of such presumption will disturb the life of the child by changes of custody’ (Section 88(3)), and ‘if the court has to decide on the custody of more than one child, each child’s welfare is to be considered independently, and the court is not bound to place siblings together’ (Section 88(4)).

Despite of the factors provided by the LRA 1976 for the court to consider, it was argued that the court’s discretion in interpreting the welfare principle is still limited since the wording of the welfare provisions of the GIA 1961 and of the LRA 1976 suggested that the court’s discretion is limited to the matters enumerated in the provisions only; and that there would be no point to listing all these matters to which the court must have regard, if the legislative intention is to permit other extraneous matters, which are not mentioned to be imported into the statute (Katherine O’ Donovan, 1980). However, it is observed that the courts in many decisions did incorporate matters other than those enumerated in the welfare provisions of the GIA 1961 and of the LRA 1976 when outlining the factors that must be considered in determining the welfare of the child. For instance, in Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, the parties initially entered into a deed of separation by which the custody of their two daughters aged seven and eight and a half respectively were given to the husband. Subsequently, the wife returned to Bombay India and applied for a divorce and the custody of her children. The Bombay Court granted her application. The father then made similar application in Malaysian High Court but his application was dismissed as the court ruled
that it would be in the best interests of the children if they were given to the mother. Amongst the factors considered by the court in relation to the best interests or welfare of the children were conduct, financial and social status of the parents, the sex and age of the child, the child wishes, the report of the welfare officer regarding the custody of the child, and the welfare and happiness of the child to be with one parent compared to the other parent. The father then appealed to the Federal Court but again dismissed as the court confirmed the decision of the High Court that it was in the best interests and welfare of the children that they live with their mother. It is to be noted that although the factors specified by the High Court may not be exhaustive, this case is considered as the leading case for specifying the checklist of factors for the court's consideration in determining the welfare of the child.

In Chuah Thye Peng [1978] 2 MLJ 217, the judge argued that the use of the word “primarily” in the welfare provision of the GIA 1961 (section 11) implies that there are other circumstances that are to be considered in the process of determining what amounts to the welfare of the child. It was further asserted that although special weight must be given to the welfare of the child, it does not mean that other factors should be left out.

In another case, Loura Dorris a/p Laurence v Thurasingam a/l James [1995] 2 MLJ 229, the court had to consider whether the mother’s conduct of committing adultery may affect her right to the custody of her child. In this case, the mother admitted that she had committed adultery with a married man. However, her counsel argued that based on the presumption that it is for the good of a child below the age of seven years old to be with his mother, and on the decision of an earlier case (Re KO (an infant) [1990] 1 MLJ 494), which held that adultery of the mother could not rebut such presumption, the right to the custody of her child, should therefore be given to her. Nevertheless, the High Court was of the view that the mother’s adulterous conduct was inappropriate in a multi-racial society such as in Malaysia where living in adultery is frowned upon by the community. Thus, it would be contrary to custom to allow the child to be cared by the mother, who wished to live a life of freedom and adultery with a married man. The court also listed out at length the factors that should be taken into consideration when determining the welfare of the child. These factors must include the physical, mental,
moral and the future of the child that can be expected, the age, sex, religion of the child, the customs that the child was used to and brought up with, the background, race, culture and behaviour of the parents, the educational and material advantages that the child would enjoy, the child’s health and the changes that a child would encounter when the court makes the custodial decision. Having considered the effect of the above aspects on the welfare of the child, the High Court dismissed the mother’s application.

The court in Sivajothi K. Suppiah v Kunathasan Chelliah [2000] 3 CLJ 175 made an interesting observation regarding the factors related to the welfare of the child. In this case, the court listed down nine relevant factors for its consideration in determining the child’s welfare, most of which were factors that emphasis on the mother’s relationship with the child. But in other custody cases, the court only laid down factors that have direct bearing on the welfare of the child depending on the circumstances of the case. This seems to indicate that the checklist of factors that relates to welfare of the child may serves as a guideline for the court in making custody decisions and they are subjected to whether or not they can best serve the interests of the child.

2) Islamic Family Law

The law governing custody of Muslim children is based on Islamic law and has been codified in the statutes of the respective States. There are fourteen States in Malaysia and each State has its own statute governing family matters. Despite of variation of statutes, the laws applicable are in pari materia. For the purpose of the discussion, reference is only made to the provisions of the Federal Territory Islamic Family Act 1984 (IFLA), which representing other States since it has been among the pioneer statutes on Islamic family law.

Under the Islamic law, the rules and regulations relating to custody of children are stipulated under the law of al-Hadhanah. The law is based on the assumption that the best interests of the child would be generally assumed if each parent carries out their respective responsibilities in upbringing their child after separation. In general, the mother is more entitled to the right of custody or hadhanah of the infant child especially during the first two years of the child’s life. This is based on the assumption that the mother is the best person to provide physical and emotional needs of the child. In other
words, the interests of the minor child are assumed to be best served when he or she is under the custodianship of the mother. As the child reaches the age of mumayyiz or age of discernment, his or her needs may also change. Therefore, this assumption may no longer applicable. At this stage, the child is given an option to choose with whom he or she should stay for he is already assumed to be capable of determining the best for his or her own interest.

The capability of the custodian to provide for physical and emotional needs of the child is also vital to be considered as it will ensure that the welfare of the child is best served during the period of al-Hadhanah. Right to access is another issue which is assumed to be in the best interests of the child. Generally, when the hadhanah is given to the mother, the father has the right of access to the child in order to ensure their relationship continue despite the parental separation. The relationship clearly promotes the principle that parents are forever and this is assumed to be for the best interests of the child. In addition, the custodian mother and the child are expected to stay nearer to the non-custodian father so as he has an easy access to supervise the child. This is again to ensure that the interest of the child is best served.

Islamic law also pointed out the right of the custodian parent is not an exclusive right, but rather a response of the parental responsibility. This is supported by a ruling which says that the right of the child is greater or stronger than the right of the custodian (Sayid Sabiq, n.d.) This connotes that the protection of the interests of the child in determining his or her custody is more important than to satisfy the interests of other parties including the parents.

The welfare of the child is the central focus of the provisions relating to children under the Islamic Family Law Enactments of all states in Malaysia. For instance, IFLA clearly establishes that the paramount consideration of the court in custody disputes is the welfare of the child (Section 86(2)). Nevertheless, IFLA, as in the civil family law statutes, does not provide detailed explanation as to the meaning of welfare principle or a checklist of factors which constitutes child welfare in custody determination. The Shariah Court judges, as of the civil court counterparts, are empowered to discretionarily interpret the principle. In addition, it is observed that the interpretation
of the child welfare principle by the judge in hadhanah is in accordance with the Islamic law. For instance, in two leading cases on child’s welfare in hadhanah, Siti Aishah bte Abdul Rahman v Wan Abdul Aziz b. Ahmad (1975) 1 JH 47 and Wan Abdul Aziz b. Ahmad v Siti Aishah bte Abdul Rahman (1977) 1 JH 50. In the first case, the parties had been divorced after few years of marriage. After the divorce, the youngest child remained with the mother, while the father took the eldest. The eldest child had lived with the father and paternal grandmother since she was two years old. The mother claimed custody of the child and the lower Shariah court allowed the mother’s claim on the ground that the mother had a better right to the custody of the infant child under Islamic law. On appeal, the Shariah Appeal Committee reversed the decision by emphasizing the basis and aim of custody is the welfare of the child, which is considered the child’s basic right. It is evident in this case that the child had developed a natural feeling and affection towards her paternal grandmother and it would seriously affect her feeling if she were to be separated from her paternal grandmother. In the second case, the same principle applies when deciding the fate of the other sibling who later remained under the custody of the mother and maternal grandmother. Here it appears that the court highly emphasized on the welfare of the child even though the IFLA has yet to be enacted at the time.

In the case of Nooranita bte Kamaruddin v. Faeiz bin Yeop Ahmad [1989] 2 MLJ cxxiv, the Shariah Court Appeal Committee dismissed the mother’s appeal as the mother remarried another man who is not within the prohibited degree of marriage with the child, and also because the child had been living comfortably with the father and his/her new stepmother for more than four years. The Committee observed that the paramount consideration in all custody cases under Islamic law is the right of the child, since the purpose of custody is to serve the interests and welfare of the child and not of the contesting parties.

Apart stipulating welfare of the child as the paramount consideration, the provisions of the IFLA also indicate that the court may consider several other matters when making custody decisions. These include wishes of the parents (Section 86(1)) and wishes of the child if he or she is already in the age capable to express an independent opinion. Other considerations are the rebuttable presumption that it is good for a child during
his or her infancy to be with his or her mother, that changes of custody will not disturb
the life of the child if the court has to decide the custody of more than one child, each
child’s welfare should be considered independently (Section 86(3)) and that the court is
not bound to place siblings together (Section 86(4)).

The Position in Australia
The Australian family law had made some tremendous changes on its child custodial
law due to the influence of the changes in United Kingdom, and to be in conformity with
the United Nation Convention on the Rights of Child. The changes are believed to
represent better understanding of custody arrangements. The Family Law Act 1975 (Act
No. 53 as amended) (hereinafter referred to as FLA), primarily emphasises on the
concept of ‘parental responsibility’ (Section 61B) ‘parenting orders’ (section 64B) and
‘parenting plan’(section 63C) in replacement of the old concept of ‘guardianship’,
‘custody’ and ‘access’. Replacement of these old concepts was originally made in the
1995 reform of the former FLA (John Dewar 1996). The changes in the terminology are
said to counteract the notion of win and lose mentality that was seen to accompany the
language, and to encourage parents to take an active shared parental role (Geoff
Monahan & Lisa Young, 2006).

1) Paramountacy of The Best Interest of the Child Principle
Paramount consideration of the child’s welfare is also the main theme governing
matters concerning children’s upbringing under the current FLA. The application of the
welfare principle is expressed in a number of provisions in Part VII of the FLA, the part
that exclusively deals with child related issues. In substance, the Part includes the
benefit of the children for their parents having “a meaningful involvement in their lives,
to the maximum extent consistent with the best interests of the child; protection of
children from physical or psychological harm as a result of being subjected to, or
exposed to, abuse, neglect or family violence; ensuring that children receive adequate
and proper parenting to assist in them achieving their full potential and ensuring
parents fulfilling their duties and meeting their responsibilities concerning the care,
welfare and development of their children (section 60B).”

It is noted that the term ‘welfare of the child as the paramount consideration’ is
substituted with the word ‘best interests of the child as the paramount consideration’
under the former 1995 Family Law Reform Act. The substitution is said a result of a recommendation by the Australian Family Law Council that the terminology ‘best interests’ would bring Australian Law in conformity with the United Nation Convention on the Right of the Child (James McConvill & Eithne Mills, 2004). Despite this change, it is observed that it does not intend to affect the content or operation of this principle. In Re Z (1996) 20 Fam LR 651, the judge asserted that although it may be argued that the new term ‘best interests’ is a more all-embracing concept than welfare, the change has certainly not narrowed the test to be applied under the new Act. Meanwhile in B v B: Family Law Reform Act 1995 (1997) 21 Fam LR 676, the court accepted that no change was intended and thus, proceeds with the proceedings as no change had been effected.

The main provision which emphasises on the paramountcy of the best interests of the child is the one that concerns parenting order; which deals with all aspects of parenting of the child and consist of a number of elements including residence, contact, maintenance and specific issues. It stipulates that the court must have regard to the best interests of the child as the paramount consideration when deciding whether or not to make a particular parenting order in relation to a child (section 60CA). Apart from the above provision, the welfare principle equally applies in a number of other provisions, like provision which encourages parents to reach agreement on parenting plan (section 63B(e)), provision on setting aside registered parenting plans (section 63H(2)), provision on making parenting orders other than maintenance orders (section 65AA), provision on consideration on child spending equal time or substantial time and significant time with each parent in certain circumstances (section 65DAA (1)&(2)), provision on assistance or supervision of parenting order (other than maintenance order) (section 65L(2)), provision on order of attendance in a post-separation parenting programme in proceedings for a parenting order (other than maintenance order) (section 65 LA (1)&(2), provision on location orders (section 67L), provision on recovery orders (section 67V) and provision on welfare orders (section 67ZC(1)&(2). In addition, there are other provisions which invoke the child’s best interests, but not required to be clearly expressed that they must be the paramount consideration (section 60B(2).

2) Best Interest Statutory Checklist
As in other jurisdictions, the FLA too does not specifically define the term “best interests of the child”. Nevertheless, it provides the general meaning of the term ‘interest’, where it is defined to mean ‘in relation to a child including matters related to the care, welfare or development of the child’ (section 4). Thus, the term ‘interests’ is clearly intended to be a concept of broad application, encompassing all matters relevant to a child’s upbringing. In determining what are the matters relevant to a child’s upbringing that must be in the child’s best interests when making parenting orders, the courts are guided by a statutory checklist as stipulated in the FLA (section 60CC). The checklist is set out in two-tiered approach, which consists of the primary and additional considerations. It was argued that the purpose of the two-tiered approach is to elevate the importance of the primary factors as well as to direct the court’s attention to the object of Part VII of the FLA (Patrick Parkinson, 2006). In the primary considerations a court must have regard to, among others, the benefit of the child to have a meaningful relationship with both of the child’s parents and the need to protect the child from physical and psychological harm, or neglect or family violence (section 60CC(2)). These considerations are also the object of Part VII that governs children’s issues under the FLA (section 60B). Meanwhile, the additional considerations include, the child’s views, willingness and ability of each parents, the likely effect of any changes in the child’s circumstances, the practical difficulty and expense of a child having contact with a parent and its effect on the child’s right to maintain personal relations and direct contact with both parents, the capacity of each of the child’s parents and any other person, to provide the needs of the child; the characteristics of the child and of either of the child’s parents; the child’s right to enjoy his culture if the child is an Aboriginal or a Torres Strait Islander child and the likely impact of a parenting order on that culture; the attitude of the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents and any family violence involving the child or a member of the child’s family and matters related to it (section 60CC(3)). It is observed that the court must consider both sets of considerations when determining the best interests of the child on the basis that the interpretation of the additional considerations must promote the object of the primary considerations. In the case of In the Matter of N and M [2006] FamCA 958, the judge affirmed the direct link between the primary and additional considerations in which the additional considerations are considered to be the factual platform for the purpose of primary consideration.
From the above discussion, it seems that the paramountacy of the best interest principle is greatly emphasized in the FLA. Stipulation of two-tiered approach of considerations gives a wide spectrum of guidance to judges in making parenting orders, though it is not exhaustive in nature. On the other hand, it also limits the judicial discretion in a way that the court must always comply with the primary consideration which is also part of the object of the FLA. As such, this may lead to a more consistent and predictable court’s decision-making.

**Findings**

The paramountacy of the best interest or welfare principle in custody is expressly stipulated in the Malaysian statutes though the relevant provisions are lack of precision in terms of definition and content. In addition, there seems to be a discernible difference in the statutory guidelines to be considered by the court. The GIA 1961, emphasise only two considerations namely, welfare of the child and wishes of the parents, while the LRA 1976 and IFLA includes some other factors for the court’s consideration in deciding custody cases. Nevertheless, the guidelines seem to be inadequate as other important matters such as the capability of the parents, the duration for the custody cases to be resolved and the involvement of child psychologist are not included. With regard to the law of access, it seems that the statutes guaranteed the rights of both the non-custodian parent and the child to have continuous relationship through access order. Nevertheless, it should be expressly provided that an order for access is subject to the welfare of the child in order to be in line with the United Nation Convention.

The vast development in the legislation of Australia on custody of children particularly in placing the welfare of the child as the paramount consideration and incorporating proper and comprehensive guidelines in their custody legislations can provide a significant precedent for Malaysia. The welfare checklists as provided in the Australian law, though not exhaustive in nature, are seen as mechanism to promote greater consistency in judicial decisions. The changes in some of the terminologies under the Australian law to new concepts which highly emphasized on the parental responsibility, intended to reinforce that both parents have a continuing role to play in relation to their
children despite the separation or divorce. Accordingly, these changes are very significant for the best interests of the child.

Conclusion
In conclusion, it seems that the Malaysian law of custody can still be improved in various aspects and the vast developments in the Australian law could provide suggestion for reforming the custody policy and law in Malaysia. The reformation is pertinent to ensure that children’s right in custody disputes will always be upheld for their future development and wellbeing.

References

Chuah Thye Peng [1978] 2 MLJ 217


Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189.

Nooranita bte Kamaruddin v. Faeiz bin Yeop Ahmad [1989] 2 MLJ cxxiv

Re Mc Grath (Infant) [1893] 1 Ch. 143
Re Z (1996) 20 Fam LR 651

