

## GUARDIANSHIP AND CUSTODY OF DIVORCED COUPLE'S CHILDREN UNDER UNCRC VS MALAYSIAN LAW: WELFARE OF THE CHILDREN OR BEST INTEREST OF THE CHILD

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### ABSTRACT

*There are several matters must be looked into when divorces happened. Properties and children are matters usually contested by divorced couple. Where and who should take care of the children of the divorced couple are the subjective issues and depending on the circumstances of the case. The **welfare concept of the child** and **best interest of the child** are the clue where the court have to look into. The objective of this paper is to determine the distinction between these two concepts. This conceptual research paper will significantly resolve the confusions on different theories of welfare of child and theories of best interest of child. The information gathered from books, articles, magazines and previous researches supported by the statutory and decided case are discussed thoroughly in accordance to recent situation. The statutory solution by referring to **Law Reform Act (Marriage and Divorce) Act 1976 (Act 164)**, **Guardianship of Infant Act 1961 (Act 351)** and **United Nations Convention on the Rights of the Child (UNCRC)** are also discussed.*

Keywords: child, guardianship, custody, divorce, welfare, best interest,

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### INTRODUCTION

The term 'child' gives vary interpretation according to the statutes concern. Generally, child is referred to a human aged below than eighteen years old. Due to his/her minor age, he/she is considered as unable to decide what is the best for himself/herself. Hence, the parent and guardian are empowered to decide for them as such persons are presumed will decide what is the best for the children. However, in the situation where the parents are lacking of parental behaviour or the parents are dead or even the parents are just quarrelling and striving for the custody of their children, the court has jurisdiction to decide which party are entitled to the custody of the child. United Nations Convention on the Rights of the Child (UNCRC) provides guidelines in general approaches including all matters concerning the child best interest doctrine becomes preference. Malaysia on the other hands is much concern on the doctrine of welfare of the child rather than best interest. This principle clearly expresses the main statutes relating to the issue of custody and guardianship as provided by Law Reform Act (Marriage and Divorce) Act 1976 (Act 164) and Guardianship of Infant Act 1961 (Act 351). However recently Malaysia is started to apply the concept of best interest together with the theory of welfare of the child.

### RESEARCH ISSUES

Malaysian jurisdictions have been applying the theory of welfare of the child in determining child custody for divorced parents. This is due to the statement in Section 88(2) Law Reform (Marriage and Divorce) Act 1976 and Section 11 of Guardianship of Infants Act 1961. Recently, Malaysia has expanded its jurisdictions beyond the statutory interpretation of welfare. This suggests that Malaysia has been starting to apply the theory of best interest of the child. However, it seems complicated to differentiate between the theory of best interest of the child and the theory of welfare of the child (Noraini Md Hashim, 2015).

### RESEARCH METHODOLOGY

Yarborough (2008) suggests search engines and databases are the most helpful methods that could be utilised by the researchers in writing conceptual paper. Therefore, review and analysis of research, data and information from the literature is the ultimate method utilised for this conceptual paper. There were three main methods involved in collecting and analysing the data and information for this paper namely search engine, databases, and books.

The first method involved are search engines, specifically Google and Google Scholar. The most frequently inserted keywords are 'best interest of child in Malaysia' and 'welfare of the child'. There were a lot of articles found by using those search engines, however it was quite challenging to find the specific articles of the cases in Malaysia. Fortunately, the articles from Noraini Md Hashim and Fadzlina Nawi were very helpful.

The second method used are databases pertaining to best interest of child and welfare of the child issues. Among the databases used are Irish Journal of Applied Social Studies, Journal of Law & Family Studies, and Jurnal Undang-undang dan Masyarakat. Most of the articles retrieved from those databases related to the jurisdiction and legal issues.

Last but not least, books were fully utilised in gathering the information for this conceptual paper. Other than books, dictionaries were also used as the main reference in providing the definitions of terms related to this paper.

## DEFINITION OF CHILD, CUSTODY AND GUARDIANSHIP.

Child can be defined as young human being below the age of full physical development. The age requirement of a child is vary and subject to any specific legislation and areas of law. For instance, the minimal age of a child to consent differs from the age of a child under adoption or to determine a criminal liability. Therefore there is no definite definition of a child and it has been used for persons under the age of fourteen, sixteen and sometimes eighteen years old.

**Art 1 UNCRC** defines a child by stating that;

*“For the purpose of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”.*

In Malaysia, the definition of child is provided under Section 2 of the **Child Act 2001**. It covers;

- a) a person under the age of eighteen years; and
- b) in relation to criminal proceedings, the person must attain the age of criminal responsibility as prescribed under Section 82 of Penal Code; 10 years old

Martin (1994) ‘Custody of child’ means legal right and responsibility for raising a child and personally supervising the child's upbringing, especially a person's right to keep the child in his or her home. Usually the issue of custody will appear in the case of divorce and the court will determine either paternal side or maternal side is competent to the custody of the children. There are three types of custody which includes legal custody physical custody and access or visitation custody.

Jeniffer H.J (2016) stated that guardianship includes custody, upbringing of the child and administration of child's property. The word guardianship can be seen wider in the sense that it covers the custody and the nurture of the child.

## DOCTRINE OF BEST INTEREST

Among the important question need to be highlighted in the situation of divorce is with whom will the children live? The court will uses all the creativity supported by the evidences given in answering the question. **United Nations Convention on the Rights of the Child (UNCRC)** give solution by saying that in the case of divorce, the custody of the children will be granted to the party who can served the best interest of the child. This is clearly stated in **Article 3 of the UNCRC** which provides that;

*“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*

There is no standard definition ‘best interest of the child’. Generally, this term is refer to the deliberation that the court made when ordering which party obtained the right of custody of children. The safety of the child and well-being are among the most consideration factors (Pruett, M.K. et al (2000). Geraldine van Bueren, (an international scholar who assisted in the drafting of the UNCRC) interpreted best interest as what the best for the child in the sense that the decision and policy made by the authority to substitute their own decisions for either the child's or the parents' by taking into consideration of the best interests of the child.

## ASSESSING THE BEST INTEREST OF THE CHILD

In determining the best interests of the children in the context of a separation of the parents, the court may order various investigations to be undertaken by social workers, Family Court's advisors, psychologists and other experts as to determine the living conditions of the child and his custodial and non-custodial parents. Such issues as the stability of the child's life, links with the community, and stability of the home environment provided by each parent may be considered by the court in deciding the child's residency in custody and visitation proceedings.

Carbone (2014), Gray (2015) and Prueet (2000) had listed down the paramount elements in determining what are the best for the children as below:

1. The emotional ties and relationships between the child and his/her parents, siblings, family and household members.
2. The capacity of the parents to provide a safe home and adequate food, clothing and medical care.
3. The mental and physical health needs of the child.
4. The mental and physical health needs of the parents.
5. The presence of domestic violence in the home.

Unlike Malaysia, Australian legislator has made innovation by setting up the comprehensive best interest checklist in its custody legislation. This checklist considers the needs, wishes and feelings of the child. and young person and this analysis is vital to ensure that the human rights of children are always in the forefront of all consideration(Noraini Md Hashim).

## APPLICATION OF “BEST INTEREST OF CHILD” IN MALAYSIA

Malaysia has ratified the UNCRC on 17 February 1995 but subjected to several reservations. As regard to the concept of Best Interest of the child, Malaysia is standing apart of other Convention countries. Hence Malaysia is rather bound the doctrine of welfare of the child which is well applied in this country rather than the doctrine of best interest of the child. There are many cases the judges in the preference to apply doctrine of welfare of the child. The detailed cases and explanations will be discussed below.

However, Malaysia is currently starting to apply doctrine of child's best interest but still in the concept that resemblance with the welfare of the child. For instance, it was decided in the case of **NGANG NGUK MOI V. CHEN AI CHOO [2008] 1 LNS 421** where Suriyadi Halim Omar, JCA had decided that the interest of the child are given priority in the case of custody. The learned judge held that;

*“where the respondent appears to be a person of somewhat loose morals, having to support three children out of wedlock, fathered by a married foreigner, and the full weight of her family against her, surely additional evidence may be required to assist the court. Bottom line, **the interest of the infant** would have been well served if a proper social evaluation report had been obtained, to ascertain the actual picture prior to the making of the custody order”.*

## DOCTRINE OF WELFARE OF CHILDREN

Welfare means action or procedure designed to promote the basic physical and material well-being of people in need. Welfare of child refers to the procedure that gives effect to society's responsibility for the well-being of children. It is related to such matter of social security, protection, health, housing, legal aid and social support. The 'main role' of welfare of the child in relating to the case of custody, guardianship and adoption is to ensure that the child will be having the best condition upbringing in conform with his needs and lifestyle such as an ease accommodation, education, safety, healthy and other elements.

This doctrine is widely applied in the case of custody in which the court will look at the position of both paternal and maternal side and decide which side is more competent to serve the best facility in the upbringing of the child. The child then will be passed to that party. This concept is also applied in non-parental case whereby both parents are incompetent. In that case, the claimant come from grandfather or grandmother or even by government body such as *Jabatan Kebajikan Masyarakat* or other NGOs.

## WHAT CONSTITUTED WELFARE?

There is neither specific yardstick nor statutory interpretation as to determine what elements are considered as welfare to the child. This word has a subjective determination, vary and it depends on the circumstances of each case. Hence, there are several judgments interpretation defined by the judges as to define the meaning of child's welfare. In the case of **Re F [1969] 2 Ch. 238**, Lord Darries LJ; “welfare of child includes material advantage and inability to provide an adequate home environment is a determining factor”.

## APPLICATION OF WELFARE IN THE CASE OF CUSTODY IN MALAYSIA

Section 88(2) of the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) ranking *in pari pasu* with Section 11 of Guardianship of Infants Act 1961 (GIA 1961) provides that in deciding the custody of the child, the paramount consideration shall be the welfare of the child and subject to this, the court shall have regard to the wishes of the parent and the wishes of the child.

Both statutes are applied for the case of non Muslim in Malaysia. The LRA 1976 is referred in the case of divorced couple only where the trial will also determine the issue of validity of separation of the married couple, issue of maintenance of spouse as well as the issue of custody of the child. On the other hands, GIA 1961 is referred not necessarily in the case of divorced couple. This statute may be referred in the case where the biological parent claim the right of custody of the child who are in the hands of incompetent person. It also may happen in the case where the third party (grandfather, grandmother, relatives, body of authority, NGO) claim the right of custody of child who are in the hands of incompetent biological parent.

**Section 88(2)** of the LRA 1976 provides;

*“In deciding in whose custody a child should be placed the **paramount consideration shall be the welfare of the child** and subject to this the court shall have regard -*

*(a) to the wishes of the parents of the child; and*

*(b) to the wishes of the child, where he or she is of an age to express an independent opinion”*

This section states that welfare of the children must be the first and paramount consideration and other considerations must be subordinated such as the wishes of the parents and the wishes of the child. In the case where there are two or more children of a marriage, the court shall not be bound to place both or all in custody of the same person but shall consider the welfare of each independently. In the case of **K SHANTA KUMARI V VIJAYAN [1986] 2 MLJ 216**, **Wan Yahya J** (later FCJ) applied the welfare of the children as the paramount consideration, having regard to the care, comfort, attention, well-being and happiness of the child and held in favour of the mother being given custody of younger infants.

Peh Swee Chin J (later FCJ) in the case of **CHAN BEE YEN v. YAP CHEE KONG [1988] 1 LNS 212; [1989] 1 MLJ 370 HC** and Wan Suleiman FJ, who applied Section 88(2) and affirmed in the case of **MANICKAM V INTHERAHNEE [1984] 1 LNS 90; [1985] 1 MLJ 56 FC** applied the following principles:

1. The paramount consideration is the welfare of the child, but this is not the sole consideration though it is predominant, and subject to this, the wishes of the unimpeachable parent prevail over those of the other,
2. The age of the child (seven years old) comes within the rebuttable presumption that it is good for the child to be with his mother; and
3. The mother did love the child more than the father did, and the child has now represented the only meaningful thing in life to her.

In the case of **Re KO (an infant) [1990] 1 LNS 8; [1990] 1 MLJ 494 HC**, **Edgar Joseph Jr J** (later FCJ) held, *inter alia*, that the child's own views would be relevant to his own welfare.

Raja Azlan Shah LJ in **MAHABIR PRASAD V MAHABIR PRASAD [1982] 1MLJ 189** has granted the child to the mother in India due to the welfare and best interest of the child and held that;

*"We are here dealing with the future of these two children. We must therefore consider the reality of the situation which is designed to promote their interests and welfare, and not to demote the claims of either parent. The learned judge approached the matter by considering the welfare of the children as the first and paramount consideration. The phrase 'first and paramount consideration' does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather that it must be the overriding consideration. We think that "it connotes a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed." (per Lord MacDermott in J & Anor v. C & Ors [1970] A C 668, 710-711)*

Although there are many authorities cited for the parties do provide guidelines in relation to similar applications which involve the interpretation of the considerations contained in Section 88(2) of the Act, the court in hearing and determining such an application must be in the ultimate analysis, as to examine and evaluate the facts and circumstances prevailing in each particular case in order to arrive at a just and fair decision. It is by no means easy to find two cases sharing identical facts and circumstances.

#### APPLICATION OF WELFARE IN THE CASE OF GUARDIANSHIP

**Section 11** of the Act provides that;

*"The Court or a Judge, in exercising the powers conferred by this Act, shall have regard **primarily to the welfare** of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be".*

The application of **Section 11** of Guardianship of Infants Act 1961 is discussed in **CHEN AI CHOO V. NGANG NGUK MOI [2007] 3 CLJ 488** where the court decided to hand the child back into custody of the plaintiff, the natural mother as the court was of the view that it was in the best interest of the child. The reasons are as follows:

- i) no evidence was produced by the defendant to demonstrate that there may be factors present that would make the plaintiff unfit in her role as a mother.
- ii) the child will have better access to her natural father who lives just across the causeway in Singapore.
- iii) the court took into consideration the fact that the child is a female of tender age and would benefit from the care and affection that will be afforded to her by her natural mother.

**Section 5** of Guardianship of Infants Act 1961 has been amended in 1 October 1999 with gives effect to the equality between father and mother in the case of guardianship of child. In other words, after the amendment, the word 'parent' is now refer to both father and mother and thus both father and mother may be given joint guardianship. The court has to regard primarily to the welfare of the infant and the wishes of the infant's parents simultaneously.

Low Hop Bing J in the case of **JENNIFER PATRICIA THOMAS v CALVIN MARTIN VICTOR DAVID [2005] 7 CLJ 133** held that *"In relation to the custody or upbringing of an infant ; a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal"*.

In this case, the court order for joint guardianship of the children but the daily custody, care and control of the children shall remain vested in the wife. The father is allowed to have weekly overnight access of the children and alternative overnight access to the children during festivals and birthdays.

**FINDING : DOCTRINE OF BEST INTEREST OF CHILD VS DOCTRINE OF WELFARE OF CHILD**

Basically, doctrine of child's best interest and welfare of the child carry the same objective in which it is a paramount to consider the child is having an excel and good upbringing. The court has the duty to scrutinize this matter thoroughly before the order of custody is granted. What can be concluded is best interest of the child covers wider application compared to the concept of child's welfare. The later is more concern on the matter of the custody of the child in family or domestic litigation. Thus, the parental competency becomes the utmost consideration as to determine which party is entitled to take care of the child.

Best interest of child concept on the other hands concern to the matter other than domestic custody cases such as in the matter of punishment of the child, medical issue, property proportion and so on. In the case of **F v R (1983) 33 S.A.S.R 189**, the Chief Justice Kiy held that:

*"the duty of the doctor to act in what he conceives to be the best interests of the patients is to be considered together with the right of the patient to control his own life and to have information necessary to do so"*.

At the first place, Malaysia still applies the welfare concept in all cases but recently it starts to expand the application of best interest including cases related to the custody of child as promoted by UNCRC (Roslina Che Soh, 2015 and Fadzlina Nawi, 2009).

The Judge in the case of **CHEN AI CHOO V. NGANG NGUK MOI [2007] 3 CLJ 488** highlighted that there are resemblances in the elements of both best interest and welfare of child. The elements can be clearly seen in the table below:

|  |  |
|--|--|
| <b>Welfare</b> → K SHANTA KUMARI V VIJAYAN [1986] 2 MLJ 216    | Carbone (2014), Gray (2015) and Prueet (2000)  |
| care, comfort, attention, wellbeing and happiness of the child | <ol style="list-style-type: none"> <li>1. The emotional ties and relationships between the child and his/her parents, siblings, family and household members.</li> <li>2. The capacity of the parents to provide a safe home and adequate food, clothing and medical care.</li> <li>3. The mental and physical health needs of the child.</li> <li>4. The mental and physical health needs of the parents.</li> <li>5. The presence of domestic violence in the home.</li> </ol> |

The elements of care, comfort, attention, wellbeing and happiness prescribed as welfare are the resemblance of the five elements of best interest of a child. The elements can be applied interchangeably. For example, the value of care and comfort under welfare principle reflect the value of wishes and feeling of child under the principle of child's best interest.

**CONCLUSION AND RECOMMENDATION**

UNCRC applies the doctrine of best interest of the child in all field governing the affairs of the child. Being ratified of the convention, states like United Kingdom, Saudi Arabia, India and other countries have already applied the concept of best interest in the matter concerning of the child.

Malaysia on the other hands is much concern on the doctrine of welfare of the child rather than best interest. This principle clearly expresses the main statutes relating to the issue of custody and guardianship as provided by Law Reform Act (Marriage and Divorce) Act 1976 (Act 164) and Guardianship of Infant Act 1961 (Act 351). However, the Malaysian's court does not reject the principle of best interest of child in total. From time to time, Malaysia has started to apply the doctrine of welfare of the child and best interest of the child in duel and even in some cases, Malaysian court has independently applied best interest doctrine solely. This approach is considered a golden in the eyes of legislature whereby the law must be interpreted in the wider approaches so that the justice can be uphold. What is meant by the best interest of a child considered by judges are actually the resemblance of the elements prescribed under the welfare of a child.

Therefore, it is highly recommended that Malaysian legislators will consider to incorporate the principle of best interest of child into LRA and GIA for the prosperity and benefit of child. The incorporation will then be parallel with the UNCRC's provision with regard to the custody of children.

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