

Factors Determining Welfare of the Child in Malaysian Civil Law of Custody: An Analysis of Decided Cases

NORMI ABDUL MALEK

ABSTRACT

The welfare or interest of the child is the paramount consideration in deciding disputes relating to custody. Several factors, such as wishes of both the child and parents, preservation of status quo and the age of the child, are usually taken into consideration in determining the interests of the child. The question arises as to how far wishes of the parents are considered by the court. Are the child's views followed in all situations? Is the mother always the best in care taking? Another issue is whether to separate the children or not (if there is more than one child in the dispute) in deciding custody disputes. How does conduct of the disputed parties contribute to the interests of the child? Shall the status quo be preserved at all times? Should 'physical, moral and emotional well being' factor be included in the statute? What is the role of a welfare officer in promoting the interests of the child? This article attempts to provide answers to the above questions and at the same time suggestions will be made to improve the law, wherever appropriate.

Keywords: family law, custody, child, welfare, interests

ABSTRAK

Kebajikan atau kepentingan kanak-kanak adalah pertimbangan yang paling utama dalam menentukan pertikaian berhubung dengan penjagaan. Beberapa faktor seperti hasrat kedua-dua pihak iaitu kanak-kanak dan ibu bapa, pemeliharaan status quo dan umur kanak-kanak itu biasanya diambil kira dalam menentukan kepentingan kanak-kanak. Soalan yang timbul adalah tentang sejauh mana pandangan ibu bapa diambil kira oleh mahkamah. Adakah hasrat kanak-kanak diikuti dalam semua keadaan? Apakah ibu sentiasa menjadi pilihan yang terbaik dalam isu penjagaan? Satu lagi isu ialah samada kanak-kanak boleh dipisahkan atau tidak sepatutnya dipisahkan diantara satu sama lain (jika ada lebih daripada satu kanak-kanak dalam pertikaian itu) dalam memutuskan pertikaian. Bagaimana kelakuan pihak-pihak yang mempertikaikan hak penjagaan menyumbang kepada kepentingan kanak-kanak itu? Patutkah status quo dikekalkan pada setiap masa? Wajarkah faktor 'fizikal, moral dan emosi' dimasukkan dalam undang-undang sedia ada? Apakah peranan pegawai kebajikan dalam mempromosikan kepentingan kanak-kanak itu? Karya ini cuba untuk memberikan jawapan kepada soalan-soalan di atas dan pada masa yang sama cadangan akan dibuat untuk memperbaiki undang-undang, di mana-mana yang sesuai.

Kata kunci: undang-undang keluarga, penjagaan, kanak-kanak, kebajikan, kepentingan

INTRODUCTION

Battle for custody is usually one of the major disputes arising after divorce. Each party, in most cases, the mother and father of the child tries to convince the court that he or she should be given custody instead of the other. Nonetheless, the law provides that the interests or the welfare of the child shall be the paramount consideration and not the interests of the disputing parties. Many factors are taken into account by the court in determining the welfare of the child based on two important laws which govern matters pertaining to custody in Malaysia; the Law Reform (Marriage and Divorce) Act 1976 (LRA) and Guardianship of Infant Act 1961 (GIA) as well as common law cases. This paper

highlights each of the factors considered by the court in order to bring about the ultimate purpose of the law of custody that is the welfare or interest of the child.

MEANING OF CUSTODY

Neither the GIA nor the LRA gives any exact definition of the word 'custody'. The Interpretation Act 1967 is also silent regarding this matter. Section 89(1) of the LRA, however, provides that:

- (1) An order for custody may be subject to such conditions as the court may think fit to impose and subject to such conditions, if any, as may from time

to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.

The above section explains that, subject to certain conditions specified in the custody order, a person who is given custody of a child shall have the right to determine all questions relating to the upbringing and education of the child. From this section, it can be understood that the meaning of custody is not limited to the care and control of the child but also includes the right to determine the upbringing of the child or what is sometimes referred to as legal custody.¹ It seems such a definition was adopted by the courts in various cases even before the LRA came into force. In *Kok Yoong Heong v Choong Thean Sang*² the court cited with approval the definition given by the Singapore Court of Appeal in the case of *Helen Ho Quee Neo v Lim Pui Heng*.³ In this case, Arulanandom J. observed:

... a difference was also made between custody and care and control of the child and it was held that care and control was only a constituent element of custody and not synonymous with it.⁴

The same concept of custody was understood in the case of *Teh Eng Kim v Yew Peng Siong*.⁵ Raja Azlan Shah F.J. (as he then was) said:

On appeal the appellant's attitude changed. He conceded, in my view very rightly, that he did not wish to interfere with the present arrangement that care and control be given to the respondent, but urged that custody be given to him as he feared that his wishes to have a supervisory role of deciding the children's future and education would not be respected by the respondent.⁶

Later cases seem to follow the same line. In *Re KO (an infant)*,⁷ the court said that the crucial question in this case is whether custody, care and control of the child, a boy, aged seven years and three months, should be given to the plaintiff or defendant. In *Chang Ah May @ Chong Chow Peng (f) v Francis Teh Thian Sar*,⁸ the court made an order allowing the custody, care and control of the infant to be committed to the mother. In both cases, the courts used the phrase 'custody, care and control' and not the word 'custody' simply to show that custody means more than care and control only and that care and control is merely a constituent element of custody. In *Winnie Young v William Lee Say Beng*,⁹ the court, however, used the term physical custody as defining what normally means care and control of the child when the court said that 'the custody of the child be given to the defendant but the arrangement was that the physical custody of the child was with the defendant's parents'.¹⁰

However, the provision of section 5 of the GIA is quite ambiguous. It is not very clear whether the legislator tries to give the meaning of custody as understood under the LRA or otherwise. Section 5 provides:

- (1) In relation to the custody or upbringing of an infant or the administration of any property to or held in trust for an infant..., a mother shall have the same rights and authority as the law allows to a father...

The ambiguity arises due to the fact that the provision seems to distinguish the word custody and upbringing of the child as two separate things. This is because there appear to be three separate items in the section i.e, custody, upbringing and administration of property. If this is what intended by the legislator, the word custody might confine to care and control or 'physical custody' only.¹¹

In *Tang Kong Meng v Zainon bte Md Zain*,¹² the court, in defining the word 'custody' in section 6(1) of the Registration of Adoptions Act 1952, deduced it to mean physical custody. James Foong J. (as he then was) said:

With the meaning of custody in a state of uncertainty (see 5(2) Halsbury's Laws of England para 729 at p 413), as being used in various contexts to connote different purposes, and the Act or other relevant Malaysian Enactment giving no definition to it means, this court can only deduce it to mean physical custody in this case.

Thus, it seems here that the word 'custody' seems to vary in meaning in different statutes. Even though the common practice seems to refer to it as carrying the meaning of 'legal custody', in some cases, for example, adoption cases as shown above it connotes only physical custody. Thus it is suggested that these uncertainties should be removed by providing clear definition of the word 'custody' in the relevant statutes.

WHAT ARE USUALLY CONSIDERED BY THE COURT IN DETERMINING THE INTERESTS OR WELFARE OF THE CHILD?

In the classical English case of *J. & Anor. v C. & Ors.*,¹³ the court came to the view that in determining interests or welfare of the child, several important factors need to be taken into account, which are as follows:

...all the relevant facts, relationship, claims and wishes of 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 child's welfare.¹⁴

Ajaib Singh J. (as he then was) in the case of *Mahabir Prasad v Mahabir Prasad*,¹⁵ outlined the factors that must be considered in order to decide on the question of the welfare of the child as the paramount consideration.

It is well established that in an application for custody of a child the court will in exercising its discretion regard the welfare of the child concerned as the first and paramount consideration. It is equally established that this does not mean that the court will not take other relevant factors into consideration. Indeed in order to decide on the question of the welfare of an infant as of paramount importance it is necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his wishes as far as they can be ascertained depending on the age of the child, the confidential reports which a social welfare officer may put up and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. But always it is the welfare of the child which is of paramount importance.¹⁶

In *K. Shanta Kumari v Vijayan*¹⁷ the court also said that in considering the paramount consideration, the care, comfort, attention, the well being and happiness of the child are matters that should be taken into account.¹⁸ In *Louisa Dorris a/p Laurence v Thuraisingam a/l James*¹⁹ the court listed at length the factors that should be taken into consideration when defining the word 'welfare'. The court said that it should consider the question of the child's welfare from various aspects including physical, mental, moral and the future of the child that can be expected.²⁰ Consideration should also be given to the age, sex and 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.²¹ Other than that, the educational and material advantages that would be enjoyed by the child, the child's health and the changes that a child would encounter must also be taken into account.²² In *Teh Eng Kim v Yew Peng Siong*,²³ the court was of the view that the maintenance of a stable and secure home in which the children can enjoy love and affection seemed to be the most important thing that should be taken into consideration in that case.²⁴

Thus, among the factors that are usually considered by the court in determining the welfare of the child are; age and sex of the child, wishes of the child if it is of an age where it is appropriate to consider them, preservation of status quo, physical, moral and emotional well being of the child, conduct of the parties, report of the welfare officer and wishes of the parents.²⁵

HOW FAR WISHES OF THE PARENTS ARE CONSIDERED BY THE COURT?

Both the GIA and LRA include consideration of the wishes of the parents as a statutory requirement as

shown in sections 11 and 88(2) respectively. These provisions seem to show the importance of the wishes of the parents in custody cases. The question, however, arises as to how far the wishes of the parents will be followed by the court. The court in the case of *Teh Eng Kim v Yew Peng Siong*²⁶ observed the following:

As the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim. ... Parental rights are overridden if they are in conflict with the welfare of the child.²⁷

Thus, it can be concluded that wishes of the parents most of the time will not be that significant unless it can be shown that those wishes are in line with the interests of the child. Nonetheless, if the welfare of the child is equally balanced with either of the parties, the wishes of the parents might tip the scale. This can be seen in the case of *Chuah Thye Peng & Anor v Kuan Huah Oong*,²⁸ where the facts were that a child aged seven months was left with the maternal grandmother just before the parents' death in an air crash. The paternal grandparents later applied for custody of their grandson. The court held that the infant's paternal grandparents would be the more proper persons to bring him up as a Buddhist which would have been the wishes of his parents if they were alive and thus custody was given to them.

TO WHAT EXTENT ARE WISHES OF THE CHILD CONSIDERED AND FOLLOWED BY THE COURT?

The LRA has made it a statutory requirement to consider the wishes of the child who is of an age to express an independent opinion.²⁹ Section 88(2) of the LRA provides that the court shall have regard:

- (b) to the wishes of the child, where he or she is of an age to express an independent opinion.³⁰

In *Teh Eng Kim's* case³¹ the court considered and followed the views of two of the children aged ten and fifteen years respectively. In *M Saraswathi Devi v Monteiro*,³² the opinion of a fourteen years old boy who preferred to stay with the father was accepted by the court. In this case the boy felt more at ease to live with the father who lived in more familiar surroundings to the boy compared to the mother who had moved to a new place.

As with other matters considered by the court in determining who should have custody of a child, the court will only follow the opinions given if they are consonant with the interests of the child. In the case of *Re KO*,³³ Edgar Joseph Jr. J. (as he then was) said:

...I reminded myself that how influential an infant's wishes are will clearly depend upon the extent to which they coincide with his best interests in the opinion of the court.³⁴

While considering the wishes of the child the court is also aware of the possibility that the wishes are expressed under the influence of other people. In *Chan Bee Yen v Yap Chee Kong*,³⁵ the court was of the opinion that the wish expressed by the child that he preferred to stay with his father was not an independent opinion and was therefore not reliable as the court had the impression that there was a possibility that the child was being persuaded by his father and his family what to say. Similarly, in the case of *B Ravandran s/o Balan v Maliga d/o Mani Pillai*,³⁶ the court did not follow the views of the child as the court commented that in all probability he was influenced by material gains promised to be given or already given by the father.

An interesting question that arises is at what age a child can be considered as mature enough to express an independent opinion. In *Manickam v Intherahnee*³⁷ the failure of the lower court to question an eight-year-old child was one of the grounds of complaint at the appeal level. The Federal Court, however, held that a child of eight years who was in the custody of one party and his family could not reasonably be expected to express any independent opinion on his preferences.³⁸

In *Mahabir Prasad's* case,³⁹ children aged seven and half and eight and half years respectively were given the opportunity to express their wishes. In *Chang Ah May's*⁴⁰ case, the court gave an opportunity to a ten-year-old child to express her opinion. In *Lim Fang Keng v Toh Kim Choo*,⁴¹ the views of two children aged nine and eleven years respectively were considered and accepted by the court. From these cases it appears that whether a child can be considered as mature enough to express his or her wishes and whether the wishes will be followed depends greatly on the opinion of the judge in that particular case. Nonetheless, taking section 88(3) as a guideline, to consider (of course not necessarily accepting) the wishes of children above the age of seven might seem to be reasonable.

What if the child expresses equal liking to stay with both of the parents? In cases like this, which parent would have more right? The answer is; that as in cases where the child prefers one parent over the other, the overall welfare of the child will be the utmost concern of the court in determining which parent has the better right. The only difference, perhaps, in the case where the child expressly prefers one over the other is that the task of the judge would be a little easier if the preference expressed by the child is in line with its overall interests. In *Re KO (an infant)*,⁴² the child aged seven years and three months expressed his equal liking to be with both of his parents. The court finally concluded that, as other factors such as physical and emotional well being were

almost similar, it was better for the child to be with the mother, taking into account his age; as a mother (quoting from Sir John Pennycuick in *Re K (Minors)*)⁴³ "not as a matter of law but in the ordinary course of nature is the right person to have charge of young children".

IS MOTHER ALWAYS THE BEST?

Unlike the GIA, the LRA provides that there shall be a rebuttable presumption that it is for the good of a child under the age of seven years to be with the mother. Section 88(3) of the LRA provides that in deciding the custody of the child;

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

In fact, because of this presumption, it is suggested that it is better for a mother to apply for custody of her young infant under LRA rather than under GIA.⁴⁴ Nonetheless, in applying this presumption the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

In *K. Shanta Kumari v. Vijayan*,⁴⁵ the applicant mother applied for custody of her 20 month-old-child who had been abducted by the father during a visit. Before the incident, the child had always been under the loving care of her mother since her birth and was neglected by the father. In this case, Wan Yahya J. said:

Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependent on its own mother than anyone else.⁴⁶

In *Thilagavathi a/p Suppramaniam v Chandran a/l Raman*⁴⁷ the court also said that:

I would also add that there is no substitute to a natural mother's love, care and devotion for her children and in the context of the factual matrix herein the love and care of the grandmother would not be the same as that of the natural mother.⁴⁸

Thus, as suggested by Clement Skinner J. (as he then was) in the case of *L v S*,⁴⁹ it seems that strong

grounds would be needed to rebut the presumption. In this case, the judge pointed out that none of the grounds argued by the defendant father was strong enough to rebut the presumption. The case of *Venaja a/p Rajoo v R Ravindran a/l Ramasamy III*⁵⁰ also illustrated that mere failure or refusal to breastfeed an infant cannot become a good reason to rebut the presumption.

However, in *Amar Kaur a/p Ram Singh v Najar Singh a/l Sagar Singh*,⁵¹ the court held that the presumption was rebutted. In this case the mother who sought custody of her six children, one of whom was under the age of seven, had a history of suicidal tendency. The court commented that the mother was not in a position even to take care of herself properly far less to look after the children. The same reason was given by the court in the case of *Re T (A Minor)*⁵² in dismissing the application made by a mother who was suffering from severe mental depression for the custody of her four-year-old daughter. In the case of *Chong Siew Lee v Lau Mun Chong*⁵³ the mother always came home very late at night and her role in looking after the child was negligible as she did not devote her time for that purpose.

With regard to the second part of the provision, i.e. preservation of status quo, the court in the case of *Re T (A Minor)*⁵⁴ said:

...even if the mother is otherwise suitable the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.⁵⁵

Similarly, in *Tay Chuen Siang v Wang, Chiao-Wen*,⁵⁶ the status quo of two children below the age of seven who were living with the father and his family was not disturbed. In this case, the court found that the children were brought up in a stable and caring environment. Furthermore, there was evidence of irrational behaviour on the part of the mother in this case.⁵⁷ Nevertheless, in the case of *Chan Kam Tai (F) v Kong Pen Keong*,⁵⁸ the court came to a different conclusion when it awarded custody to the mother and thus not preserving the status quo of the children who were under the care of the paternal grandmother. The court was of the opinion that to preserve the status quo will not be in the interests of the children as they would be living far away from both of their parents.

When dealing with this presumption and the proviso provided by it, the question arises as to whether this proviso should extend to other cases besides cases where the child is under the age of seven. The court, in the case of *Khoo Cheng Nee (p) v Lubin Chiew Pau Sing*,⁵⁹ seems to suggest that the proviso should be considered in all cases. However, the wording of section 88(3) suggests that it should only be applied in the case where the presumption applies. Nevertheless, in any other case as discussed below, the court, even before the enforcement of the LRA, has always regarded

the question of preserving the status quo as an important consideration in determining the welfare of the child. Thus, it is suggested that in order to emphasise this consideration and to avoid confusion, the section should be amended. A clear provision should be included in order to demonstrate preservation of status quo should be considered in all cases.

SHALL STATUS QUO BE PRESERVED AT ALL TIMES?

As discussed above, one consideration that is always taken into account by the court in deciding custody cases is the preservation of the status quo of the children. It is observed from the decided cases that there are several points usually considered by the court in dealing with preservation of status quo. Firstly, the length of time spent by the child with the familiar person or persons. In *Masam v Salina Saropa & Anor*,⁶⁰ the court had to consider the situation where the natural mother was asking for custody of her son from the foster parents who had been taking care of him since he was nine days old. In this case the court held that since the infant had been living with the foster parents for a period of approximately two years and since they had cared for it with love and affection, custody should remain with them. The court further said that if the infant were taken away from the foster parents after such a length of time the result might be that he would develop a permanent emotional scar.⁶¹

In the case of *Tang Kong Meng v Zainon bte Md Zain & Anor*,⁶² the question of preserving the status quo was also discussed. In this case, Alvina was given to the defendants, Zainon and Suhaimi when she was only three months old on the basis that they would be Alvina's baby sitters. Subsequently, the plaintiff applied for declarations that he was lawfully entitled to the custody and care of Alvina who was nine years old at the time of the judgment. The court held that the defendants were entitled to custody of Alvina taking into account, among others, the length of time that she had spent with them.⁶³

Nevertheless, in the case where the child has in fact stayed longer with some other parent or person but because of certain (usually) unavoidable reasons the child was in the custody of the other parent at the time of proceedings, status quo will normally not be preserved. In *Mahabir Prasad v Mahabir Prasad*,⁶⁴ even though the children were left with the appellant father for a few months when the respondent mother left for India, most of the rest of the time the children were with the mother. In fact, at one time during the marriage, the children were staying with the respondent mother alone for more than three years when the appellant father came back to Malaysia. The Federal Court in dismissing the appeal held that the welfare of the children must be the paramount consideration and other considerations must

be subordinate and that it was in the best interests of the children to stay with their mother in India.⁶⁵

In *Chang Ah May @ Chong Chow Peng(f) v Francis Teh Thian Sar*,⁶⁶ the court distinguished the facts of this case from those of *J v C*.⁶⁷ Lim Beng Choon J. (as he then was) said:

Furthermore unlike the *J v C* case where the infant had lived for over eight years with his foster parents who had a stable home life, the infant in the present case had been staying with the mother at all material times until the father lured the infant away...⁶⁸

Secondly, the test 'whether the change of status quo would provide better or significant improvement to the child's welfare' would usually be applied by the court. In *Khoo Cheng Nee v Lubin Chiew Pau Sing*,⁶⁹ the court said:

A party seeking an order for custody away from their current arrangements must therefore show that what he or she offers benefits the welfare of the children better. The court must evaluate whether the improvement to the welfare of the child is sufficient to justify disturbing the life of that child by that change of custody. It has to be shown there will be positive advantages accruing for the welfare of the children by that change. Those advantages must be real and not merely promissory or speculative.⁷⁰

In *Manickam v Intherahnee*,⁷¹ the Federal Court, while taking into consideration the fact that the status quo of the child should be preserved, held that the care and attention of the natural mother can be reasonably expected to be superior to that of a step-mother, particularly one who has a child of her own and with every prospect of additions to the family.⁷² In *Hoo Tat Fong (P) v Lim Cheun Eng*,⁷³ the status quo was also not preserved as certainly it was better for the children to be with the father since there was evidence of sexual molestation by the mother's family members.

The third consideration is medical evidence provided by the disputed parties. In responding to the concerns of the learned counsel for the respondent that the children might suffer trauma and psychological damage on being uprooted from a stable environment, the court in *Chan Kam Tai (F) v Kong Pen Keong*⁷⁴ commented that there was no medical evidence to suggest that it would be so. Similarly, in the case of *Re KO*,⁷⁵ the court commented that no medical evidence was adduced to show that the child would suffer any adverse effect to his mental or physical health or any distress in the event of his being removed from the care of the husband to that of the wife. In *Winnie Young v William Lee Say Beng*,⁷⁶ the court was given a difficult task of deciding whether preserving the status quo would be of more benefit to the child than otherwise as conflicting opinions were given by the psychiatrists on this matter. The court

finally accepted the opinion given by the psychiatrist on behalf of the father and supported it with the wishes of the child who did not want to stay with his mother as he was not accustomed to her.⁷⁷

Fourthly, besides the people whom the child is used to, the court also takes into consideration the surroundings and the way of life that the child is accustomed to when dealing with the problem of the preservation of the status quo. In *Neoh Cheng Kim v Goh Ah Hock*,⁷⁸ the judge made a comparison between the life that the children were enjoying and the life that the children would have undergone if custody were given to the plaintiff. In this case, the children were staying happily in the matrimonial home which was a semi-detached house with five bedrooms. They were attending different schools and were provided with transportation and extra tuition. The court was of the opinion that this status quo most probably would not be preserved if they were living with the plaintiff.

THE IMPORTANCE OF PHYSICAL, MORAL AND EMOTIONAL WELL BEING IN DETERMINING THE BEST INTERESTS OF THE CHILD

Things such as a good, stable home and secure environment will promote the physical well being of the child.⁷⁹ In *Lee Soh Choo*,⁸⁰ one important reason why custody was not given to the mother is due to the fact that she could not convince the court the place that the child would be living if custody was given to her. Similarly, in the case of *Neoh Cheng Kim v Goh Ah Hock*,⁸¹ one of the considerations taken into account by the court was the comfortable semi-detached house which the children were living in at that time compared to the new house (which was uncertain) if the children were to be living with the mother.⁸² In the case of *Chong Siew Lee v Lau Mun Chong*,⁸³ the court went further to say that the comfort, safety, love and warmth of the matrimonial home might rebut the presumption under section 88(3) of the LRA.

Nevertheless, this physical wellbeing needs to be balanced with moral needs as illustrated by the judge in the case of *L v S*:⁸⁴

...in matters of custody, the authorities show that the word welfare must be taken in its widest sense so that the welfare of the child is not to be measured by which parent earns the most money and can provide the child with best physical comforts alone. A child's moral needs must be taken into account as well.⁸⁵

In this case, after considering the fact that both parents might provide equal physical well being (judging from the homes they had), the court decided to award custody to the mother as unlike the father, the mother

was more qualified to take care of the child taking into account its moral and emotional needs, as the father was a bad tempered and violent person. Similarly in the case of *Chuah Thye Peng*,⁸⁶ after having considered that both grandparents may provide equal physical comfort to the child in term of houses, custody was awarded to the paternal grandparents taking into account the religious upbringing of the child.

With regard to emotional well being, In *Lim Fang Keng v Toh Kim Choo*,⁸⁷ the court took into account the unhappiness voiced by the children due to bullying tactics of the cousins and the slur made by their aunt against their mother while they were under the care of the aunt when the father was at work. In *Sivajothi a/p K Suppiah v Kunathan a/l Chelliah*,⁸⁸ the court paid attention to the psychological and emotional needs of the three young girls which can best be attended to by the mother rather than the father and thus granted custody to her.

As has been illustrated by many decided cases above, the court always emphasizes the element of physical, moral and emotional well being of the child. Nevertheless, both LRA and GIA are silent with regard to this matter. Thus, it is suggested that this factor should also be embodied in the statute in order to emphasize the importance of this element in determining the interests of the child.

HOW DOES CONDUCT OF THE DISPUTED PARTIES CONTRIBUTE TO THE INTERESTS OF THE CHILD?

The court in *Teh Eng Kim v Yew Peng Siong*⁸⁹ held that criticism of the conduct of parents because they transgressed conventional moral codes have no place in custody proceedings, except in as far as they reflect upon the parent's fitness to take charge of the children. Similarly in *Marina Nahulandran v Appiah Nahulandran & Anor*.⁹⁰ the argument that the party who committed adultery should not be given consideration at all in custody applications was rejected by the court.

Further, in *Khoo Cheng Nee(p) v Lubin Chiew Pau Sing*,⁹¹ the court held that adultery, although frowned upon by Malaysian society, by itself is not a sufficient ground to disqualify a mother from having custody of her children. The court distinguished the facts of this case from those of *Louira Dorris*⁹² where the mother remained the cohabitee of a married man and left the child behind and thus she was not entitled to custody. In this case, the mother, however, had not walked out of the matrimonial home and she had had the children with her almost all the time. The court stressed that an applicant might fail in his custody application not due to his conduct per se but due to his conduct which affected the interests of the child.

Violent and dangerous behavior, as well as irresponsible behaviour of the parties, nevertheless, will be taken into account in determining custody disputes as these will certainly affect the interests of the child. In *L v S*,⁹³ the court came to the opinion that it would not be in the best interests of the child to be brought up by the father who was a person of 'volatile and uncontrollable temper with a propensity to resort to impulsive, violent and dangerous behaviour'.⁹⁴ Similarly in *Sivajothi a/p K Suppiah v Kunathan a/l Chelliah*,⁹⁵ the father who was a violent, abusive and unreasonable person, was not entitled to custody. On one occasion he chased the wife and children out of the matrimonial home at 2.30 in the morning.

The irresponsible behaviour of the parties, or showing a no interest attitude, may also become a consideration of the court in determining custody disputes. In *Re A and B (Minors)*,⁹⁶ the mother left the two children aged twelve and nine years old respectively alone by themselves in the afternoon when she was at work. In other words, she was a woman who prioritized her career to the detriment of her children. Besides this, she was also a hot tempered person which affected the interests of the child. In the case of *Chong Siew Lee v Lau Mun Chong*,⁹⁷ the mother came home very late at night and did not spend much time looking after the children. While in the Singapore case of *Tan Siew Kee v Chua Ah Boey*,⁹⁸ the mother was very keen on playing mahjong and seemed to have no interest in taking care of the child.

Even though in general, conduct of the parties is not an important consideration; in many cases as illustrated above, the conduct may give a direct impact on the child. Thus, it is submitted that conduct of the parties as far as it affects the interests of the child should be embodied in the statute as one of the factors that need to be considered by the court. This is important in order to emphasise to the public that conduct of the parties, to a certain extent, will have an impact in custody cases.

SEPARATE OR NOT TO SEPARATE?

In the case where there are two or more children of a marriage, section 88(4) of the LRA provides that the court shall not be bound to place all the children in the custody of the same person as illustrated in the case of *Tan Chong Pay v Tan Swee Boon*.⁹⁹ In this case the court decided that Marcus who was above seven years should stay with the father as that was his wish while the younger brother, Nicholas who was four years old should be given to the mother, taking into account the presumptive provision of section 88(3) of the LRA. A similar decision was made in the case of *Chong Siew Lee v Lau Mun Chong*.¹⁰⁰ In this case, taking into account the interests of the children, the court came to the opinion

that custody of the elder child remained with the mother while the younger child was given to the father.

Nonetheless, it seems that in most of the cases the courts are of the opinion that it is in the children's best interests not to separate them from one another. In the case of *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah*,¹⁰¹ Faiza Tamby Chik J. (as he then was) quoting *Adams v Adams*¹⁰² said:

All these cases depend upon their facts, but it is undesirable, other things being equal, that children should be split when they are close together in age and obviously fond of one another...Children do... support one another and give themselves mutual comfort, perhaps more than they can derive from either of their parents...¹⁰³

THE ROLE OF WELFARE OFFICER IN CUSTODY CASES

Section 100 of the LRA provides that whenever it is practicable, the court shall take the advice of the welfare officer when dealing with custody matters. The function of a welfare officer in making his report is only to help the court in making its decision. In *Tan Chong Pay v Tan Swee Boon*,¹⁰⁴ the court observed the following: The reports of the Welfare Department were valuable sources of information and assisted me in coming to a fair and speedy decision.

In *Re KO (an infant)*¹⁰⁵ the court outlined some of the facts that the welfare officer would be expected to research:

- (1) the proposed arrangements for the care of the child;
- (2) the relationship between the child and the proposed caretaker or competing caretakers;
- (3) the wishes and feelings of the child;
- (4) the respective merits of the parents;
- (5) whether access to a particular person is desirable, and if so, the amount of access.

The opinion given by the welfare officer may or may not be followed by the judge.¹⁰⁶ In *Re A and B (Minors)*,¹⁰⁷ the court concluded that the opinion of the officer was in line with that of the observation made by the court. Similarly, in the case of *Lim Fang Keng v Toh Kim Choo*,¹⁰⁸ the suggestion made by the officer is parallel with the conclusion made by the court.

However, in *Hoo Tat Fong (P) v Lim Cheun Eng*,¹⁰⁹ the court departed from following the recommendation made by the welfare officer that the child should remain with the mother taking into account the medical report by the specialists and the safety of the child. Edgar Joseph Jr. J. in *Re KO (an infant)*¹¹⁰ also said "I need hardly say that a recommendation made by the welfare

officer need not be followed by the court."¹¹¹ The judge quoting from Omrod LJ in *J v J*,¹¹² further commented that, unlike a judge, the disadvantage of a welfare officer is not having the benefit of hearing witnesses under cross-examination.¹¹³ Thus, the basis of opinion given by the welfare officer might not be as comprehensive as the assessment made by the judge deciding the case after taking into account all the relevant factors. The court was also of the opinion that it should explain why its opinion differs from that of the officer.¹¹⁴ Another interesting issue that should be highlighted is that there should be only one officer assessing both parties and situations. This is in order to avoid conflicting opinions from two different officers.¹¹⁵

CONCLUSION

In conclusion, it can be seen from the discussion above that the courts always regard the welfare of the child as the paramount consideration and take many factors into account before coming to a decision. It should be emphasized here that the reason why various factors are taken into consideration by the court is none other than to make sure that the overall interests of the child will be ultimately achieved at the end of the proceedings. It can also be observed from the discussion above that the court gives different emphasis to the different factors considered by it, depending on the facts of the case. It seems that in the case where the child is below seven years, the presumption factor might become one of the most important considerations taken into account. Nevertheless, this consideration needs to be balanced with the physical, moral and emotional well being of the child and preservation of the status quo. This consideration also needs to be supported with the conduct of the parties, especially the mother.

On the other hand, in the case where the child already has the capability to express its opinion, the choices expressed by it may become one of the important considerations. As in the case of child below seven, these views must be balanced with other factors especially the physical, moral and emotional well being of the child as well as preservation of the status quo. Thus in the case where the child prefers to be with the father who is a drug addict, the views should not be followed as they certainly lead to no benefit to the child's physical and moral well being. Nevertheless, in circumstances where both parties equally or almost equally meet the other requirements, the views of the child are important to be regarded as they more or less indicate the emotional needs of the child, as usually the child will likely choose the person that it feels more comfortable with as compared to the other person. Finally, the opinion of the welfare officer might enhance the view that has been formulated by the judge.

With regard to the fact that both the LRA and GIA provide as statutory requirements some of the factors that should be taken into consideration in determining the welfare of the child, but not others, seems to make both statutes incomplete and may sometimes lead to confusion. As has been highlighted before, matters such as the preservation of the status quo with regard to a child above seven years, physical, moral and emotional well-being of the child and conduct of the parties as long as it affects the interests of the child should be stated clearly in the statute. Hence, it is submitted that a more complete checklist should be considered by the legislators.

NOTES

¹ The term legal custody was used in the case of *Tang Kong Meng v Zainon bte Md Zain & Anor*. [1995] 3 MLJ 408 at p 415.

² [1976] 1 MLJ 292.

³ [1974] 2MLJ 51 at p 52. This case was in fact following English authorities. See *J v C* [1970] A.C. 668; *Jussa v Jussa* [1972] 2 All ER 600; *Re W (J.C.)* [1963] 3 All ER 459. See further Normi Abdul Malek, Malaysian Law of Custody: A Comparative Study with Islamic, English and Scottish Laws, Ph.D thesis(unpublished), Department of Law and Public Administration, Glasgow Caledonian University, Glasgow, November 1997.

⁴ [1976] 1 MLJ 292 at p 293.

⁵ [1977] 1 MLJ 234.

⁶ [1977] 1 MLJ 234, p 238.

⁷ [1990] 1 MLJ 494.

⁸ [1991] 1 CLJ 309.

⁹ [1990] 1 MLJ 123.

¹⁰ [1990] 1 MLJ 123, p125.

¹¹ Nevertheless, the GIA similar to the LRA, originates from English law and as has been highlighted before, English cases will be of highly persuasive value in interpreting the law. Thus, most probably the meaning of custody in the GIA will be similar to that in the LRA, taking into account the cases that have been discussed above which were very much influenced by English cases. Further discussion with regard to the relationship between custody and guardianship will be made in a proposed book entitled Family Law for Non-Muslims: Development and Reform which is expected to be published end of this year.

¹² [1995] 3 MLJ 408.

¹³ [1970] A.C. 668.

¹⁴ [1970] A.C. 668, pp.710-711.

¹⁵ [1982] 1 MLJ 189.

¹⁶ [1982] 1 MLJ 189, p 192.

¹⁷ [1986] 2 MLJ 216.

¹⁸ [1986] 2 MLJ 216, p 218. This consideration was also followed in the case of *Tan Sew Yoke* [1989] 3 MLJ 381, p 383.

¹⁹ [1995] 2 MLJ 229.

²⁰ [1995] 2 MLJ 229, p 232.

²¹ [1995] 2 MLJ 229.

²² [1995] 2 MLJ 229.

²³ [1977] 1 MLJ 234.

²⁴ [1977] 1 MLJ 234, p 239.

²⁵ Mahdi Zahraa and Normi Abdul Malek, The Concept of Custody in Islamic Law, *Arab Law Quarterly* [1998] 155-177, at pp 168 – 174 for a comparative view under Islamic Law. See also Normi Abdul Malek, Hadanah Menurut Undang-undang Islam Dan Pelaksanaannya Di Malaysia, *IKIM Law Journal* 2004 Vol. 8 No. 2, 33.

²⁶ [1977] 1 MLJ 234.

²⁷ [1977] 1 MLJ 234, p 239. See also *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, at p 193.

²⁸ [1978] 2 MLJ 217.

²⁹ LRA, section 88(2)(b).

³⁰ This in line with article 12 of the UN Convention.

³¹ [1977] 1 MLJ 234, p 236.

³² [2006] 2 AMR 630.

³³ [1990] 1 MLJ 494.

³⁴ [1990] 1 MLJ 494, p 498. See also *Chang Ah May @ Chong Chow Peng (f) v A Francis Teh Thian Sar* [1991] 1 CLJ 309, pp 312-313.

³⁵ [1989] 1 MLJ 370.

³⁶ [1996] 2 MLJ 150.

³⁷ [1985] 1 MLJ 56.

³⁸ [1985] 1 MLJ 56, p 57.

³⁹ [1982] 1 MLJ 189.

⁴⁰ [1991] 1 CLJ 309.

⁴¹ [1995] 4 CLJ 733.

⁴² [1990] 1 MLJ 494.

⁴³ [1977] Fam 179.

⁴⁴ Wu Min Aun, Guardianship, Custody and Abduction of Children Across National Boundaries, [1995] 1 *MLJ* i, p xii.

⁴⁵ [1986] 2 MLJ 216.

⁴⁶ [1986] 2 MLJ 216, p 218. See also *W v H* [1987] 2 MLJ 235.

⁴⁷ [2002] 3 AMR 2718.

⁴⁸ [2002] 3 AMR 2718, p 2725. See also *Masam v Salina Saropa & Anor* [1974] 2 MLJ 59 where at p 60, the court said 'Every case must plainly be determined upon the particular circumstances affecting that case, though, it is of course, true to say that as a matter of human sense an infant is better with his mother and needs a mother's care'; *Kalyani Subramaniam v Mahalingam Padavettan* [1997] 3 CLJ Supp 439; *L v S* [2002] 2 AMR 1347; *Gan Koo Kea v Gan Shiow Lih (f)* [2003] 4 MLJ 770; *Re Orr* [1972] 2 DLR 77.

⁴⁹ [2002] 2 AMR 1347.

⁵⁰ [2001] 3 AMR 3708

⁵¹ [1991] 1 CLJ 294.

⁵² [1993] 1 AMR 21, 887.

⁵³ [1995] 4 MLJ 559; See also *Thavamavenni Deve a/p Govindasamy v N Sugamaram a/l Neelmehan & Anor* [1996] 1 AMR 1037.

⁵⁴ [1993] 1 AMR 21, 887

⁵⁵ [1993] 1 AMR 21, 887, p 894.

⁵⁶ [2009] 9 CLJ 84.

⁵⁷ See also *Lee Soh Choo v Tan Ket Huat* [1986] 2 CLJ 143; *Thavamaven ni Deve a/p Govindasamy v N Sugamaram a/l Neelmehan & Anor* [1996] 1 AMR 1037; *Kali a/p Kuppusamy v Tharmalingam a/l Maniam* [2008] 7 MLJ 24.

⁵⁸ [2008] 5 MLJ 369.

⁵⁹ [1996] 1 AMR 450.

⁶⁰ [1974] 2 MLJ 59.

⁶¹ [1974] 2 MLJ 59, p 60.

⁶² [1995] 3 MLJ 408.

⁶³ [1995] 3 MLJ 408, p 416.

⁶⁴ [1982] 1 MLJ 189.

⁶⁵ See also *Tan Siew Yoke v Ng Keng Huat* [1989] 3 MLJ 381 where the court held that custody of the child must be returned to the mother as it had been in the mother's care for nine years before he was snatched by the father.

⁶⁶ [1991] 1 CLJ 309.

⁶⁷ [1970] A.C. 668.

⁶⁸ [1970] A.C. 668, p 313.

⁶⁹ [1996] 1 AMR 450.

⁷⁰ [1996] 1 AMR 450, at p 458. See also the case of *Thavamani Deve a/p Govindasamy v N Sugumaram a/l Neelmehan & Anor* [1996] 4 MLJ 195.

⁷¹ [1985] 1 MLJ 56.

⁷² [1985] 1 MLJ 56, p 58.

⁷³ [2001] 5 MLJ 660.

⁷⁴ [2008] 5 MLJ 369.

⁷⁵ [1990] 1 MLJ 494; See also *Kalyani Subramaniam v Mahalingam Padavettan* [1997] 3 CLJ Supp 439.

⁷⁶ [1990] 1 MLJ 123.

⁷⁷ See further the case of *Chuah Thye Peng & Anor. v Kuan Huah Oong* [1978] 2 MLJ 217, at p 220 to find out the view of the judge as to how far medical evidence will influence a judge's opinion.

⁷⁸ [1990] 2 CLJ 268.

⁷⁹ *Re KO* [1990] 1 MLJ 495, at p 500; *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; *Hoo Tat Fong (P) v Lim Cheun Eng* [2001] 5 MLJ 660, where in this case the court came to the opinion that the home that the child was living in at that time was no longer safe as there was a serious allegation of sexual abuse.

⁸⁰ [1986] 2 CLJ 143.

⁸¹ [1990] 2 CLJ 268.

⁸² See also *Tan Chong Pay v Tan Swee Boon* [1997] 4 CLJ 625, at p 631; *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20.

⁸³ [1995] 4 MLJ 559.

⁸⁴ [2002] 2 AMR 1347.

⁸⁵ [2002] 2 AMR 1347, p 1363. See also *Re McGrath* [1893] 1 Ch 143, at p 148.

⁸⁶ [1978] 2 MLJ 217.

⁸⁷ [1995] 4 CLJ 733.

⁸⁸ [2000] 6 MLJ 48.

⁸⁹ [1977] 1 MLJ 234.

⁹⁰ [1976] 1 MLJ 137.

⁹¹ [1996] 1 AMR 450.

⁹² *Loura Dorris a/p Laruence v Thuraisingam a/l James* [1995] 2 MLJ 229.

⁹³ [2002] 2 AMR 1347.

⁹⁴ [2002] 2 AMR 1347, p 1370.

⁹⁵ [2000] 6 MLJ 48.

⁹⁶ [1997] 2 MLJ 154.

⁹⁷ [1995] 4 MLJ 559.

⁹⁸ [1988] 3 MLJ 20.

⁹⁹ [1997] 4 CLJ 625.

¹⁰⁰ [1995] 4 MLJ 559; See also *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97 where in this case, in its interim custody order the court decided that three children remained with the father and one child remained with the mother, taking into account their best interests.

¹⁰¹ [2000] 6 MLJ 48.

¹⁰² [1984] FLR 768, 772.

¹⁰³ [2000] 6 MLJ 48, p 62. See further in *B Ravandran s/o Balan v Maliga d/o Mani Pillai* [1996] 2 MLJ 150 where at p 157 the court said that "the four children have been living with the respondent all these years and I do not think it is appropriate that their togetherness should be disturbed because of the matrimonial problems of their parents" *Kho Cheng Nee (p) v Lubin Chiew Pau Sing* [1996] 1 AMR 450, at p 457; *Lim Fang Keng v Toh Kim Choo* [1995] 4 CLJ 733, at p 739; *Wong Phila Mae v Shaw Harold* [1991] 2 MLJ 147, at p 150; *Thilagavathi a/p Suppramaniam v Chandran a/l Raman* [2002] 3 AMR 2718, at p 2725; *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, at p 192.

¹⁰⁴ [1997] 4 CLJ 625 at p 633.

¹⁰⁵ [1990] 1 MLJ 494.

¹⁰⁶ See LRA, section 100.

¹⁰⁷ [1997] 2 MLJ 154.

¹⁰⁸ [1995] 4 CLJ 733 at p 738.

¹⁰⁹ [2001] 5 MLJ 660. See also *Manickam v Intherahnee* [1985] 1 MLJ 56 at p 57.

¹¹⁰ [1990] 1 MLJ 494.

¹¹¹ [1990] 1 MLJ 494, p 500.

¹¹² (1978) 9 Fam Law 91.

¹¹³ [1990] 1 MLJ 494, at p 500.

¹¹⁴ [1990] 1 MLJ 494, at p 500, p 500.

¹¹⁵ [1990] 1 MLJ 494, at p 500.

REFERENCES

Wu Min Aun. 1995. Guardianship, Custody and Abduction of Children Across National Boundaries. *MLJ* 1: i.

Dr. Normi Abdul Malek
Assistant Professor
Ahmad Ibrahim Kuliyyah of Law
International Islamic University
53100 Gombak
Kuala Lumpur.
Email: normi@iiium.edu.my