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About

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FOREWORD BY DEPUTY RECTOR OF RESEARCH, INDUSTRIAL LINKAGES & ALUMNI



Since 2018, the INSIGHT JOURNAL (IJ) from Universiti Teknologi MARA Cawangan Johor has come up with several biennial publications. Volume 1 and 2 debuted in 2018, followed by Volume 3 this year as well as Volume 4 with 19 published papers due to the great response from authors both in and out of UiTM. Through Insight Journal, lecturers have the ability to publish their research articles and opportunity to share their academic findings. Insight Journal is indexed in MyJurnal MCC and is now an international refereed journal with many international reviewers from prestigious universities appointed as its editorial review board

members.

This volume 5 as well as volume 6 (which will be published in 2020) are special issues for the 6th International Accounting and Business Conference (IABC) 2019 held at Indonesia Banking School, Jakarta. The conference was jointly organized by the Universiti Teknologi MARA Cawangan Johor and the Indonesia Banking School Jakarta. Hence, the volumes focus mainly on the accounting and business research papers compiled from this conference, which was considered a huge success as over 66 full papers were presented.

Lastly, I would like to thank the Rector of UiTM Johor, Associate Professor Dr. Ahmad Naqiyuddin Bakar for his distinctive support, IJ Managing Editor for this issue Dr. Noriah Ismail, IJ Assistant Managing Editor, Fazdillah Md Kassim well as all the reviewers and editors who have contributed in the publication of this special issue.

Thank you.

ASSOCIATE PROF. DR. SAUNAH ZAINON Deputy Rector of Research, Industrial Linkages & Alumni Editor-in-Chief for INSIGHT Journal Universiti Teknologi MARA Cawangan Johor



Guardianship and Custody of Divorced Couple's Children: Welfare of The Children or Best Interest of The Child, A Comparison Study Between Malaysia and Indonesia

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Abstract

There are several unavoidable matters that must be looked into when divorces happened. Properties and children are matters usually contested by divorced couples. Who should take care of the children and where are they going to be brought up are the subjective issues and depends on the circumstances of the individual case. The welfare concept of the child and best interest of the child are the clues that the family court must deal with delicately. The objective of this paper is to determine the application of these concepts by Malaysian law as compared to Indonesian law. This conceptual research paper will significantly indicate as to what extend these two countries successfully apply the theories of child welfare as well as best interest theories. The information gathered from books, articles, magazines and previous researches supported by the statutory and decided case are discussed thoroughly in accordance to recent situations. The Malaysian statutory solution refers to Law Reform Act (Marriage and Divorce) Act 1976 (Act 164), Guardianship of Infant Act 1961 (Act 351) while Indonesian statutory reference are Law No. 23 of 2002 on Child Protection jo. Law No. 35 of 2014 Amending Law on Child Protection and Law No. 1 of 1974 on Marriage. In addition, United Nations Convention on the Rights of the Child (UNCRC) are also discussed in this paper.



Keywords: Malaysia, Indonesia, child custody, divorce, welfare, best interest,

1. Introduction

The term 'child' has various interpretation depending on the statutes concerned. Generally, a child is referred to as a human being aged below 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 parents and guardians are empowered to decide for them as such persons are presumed to be able to decide what is the best for the children. However, in a situation where the parents are lacking of parental behavior 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 is entitled to the custody of the child.

2. Problem Statement

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 start 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). In contrary, Indonesian law is more applying best interest theory rather than welfare theory of the child. The court however still applying welfare theory in certain situation.

3. Literature Review

Child can be defined as a young human being below the age of full physical development. The age requirement of a child varies and is 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, definition of child is provided under Section 2 of the **Child Act 2001**. It coversa person under the age of eighteen years and 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.



As comparison, there is still no harmonization in determining the legal definition of a child In Indonesia. Formally and juridically there exists a variety of child age limit, which is formulated according to a variety of laws, such as KUHPerdata (Indonesia's Civil Code), KUHP (Indonesia's Criminal Code), Law Number 3 Year 1997 on Child Court, Law Number 4 of 1979 on Child Welfare, Law Number 1 of 1974 on Marriage, Law Number 39 of 1999 on Human Rights, Law Number 23 of 2002 on Child Protection, and others. Each regulation formulated quantitative child age limit such as 18 years of age, 21 years, 17 years, 16 years, 15 years, or other ages.

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 use all the creativity supported by the evidences given in answering the question. **United Nations Convention on the Rights of the Child (UNCRC)** offers a solution by saying that in the case of a 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 of 'best interest of the child'. Generally, this term refers to the deliberation 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 considered factors (Pruett, M.K. et al (2000). Geraldine van Bueren, (an international scholar who assisted in the drafting of the UNCRC) interpreted best interest aswhat is 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 the best interests of the child.

ASSESSING THE BEST INTEREST OF THE CHILD

Carbone (2014), Gray (2015) and Prueet (2000) had listed 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).

Meanwhile, in Indonesia, the foundational principles of child protection is formulated in Article 2 Law Number 23 of 2002 on Child Protection which follows from the principles of protection contained in the Indonesian 1945 Foundational Law (UUD 1945). The general foundational principles in Law 2002 are: 1) non-discrimination, 2) child's best interest, 3) child's right to live, grow, and develop, 4) valuing child's opinion. As such, the state is obligated to guarantee that children are given opportunities to state their opinion in any adjudication or administrative processes relevant to their rights, directly or indirectly.

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 bound to 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 where the judges are in preference to apply the doctrine of welfare of the child. In the case of **NGANG NGUK MOI V. CHEN AI CHOO** [2008] 1 LNS 421 Suriyadi Halim Omar, JCA had decided that the interest of the child is given priority in the case of custody. The learned judge held that;

While in Indonesia, **Law Number 23 of 2002** on Child's Protection apply doctrine of child's best interest which stated on **Article 14**; *"Every child has the right to be cared for by his own parents, unless there are reasons and / or rules valid law indicates that the separation is in the best interest of the child and is a final consideration."*

APPLICATION OF "BEST INTEREST OF CHILD" IN INDONESIA

Like Malaysia, applying the doctrine of child's best interest in Indonesia is still in the concept that has resemblance with the welfare of the child.For instance, it was decided in the case of **decision number 336/Pdt.G/2009/PTA.Sby** which judges granted the custody of the child to the mother based on the best interest of the child.

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 relationship to the case of custody, guardianship and adoption is to ensure that the child will have the best upbringing conditions in conform with his needs and lifestyle such as suitable 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. The same situation happens in Indonesia.

WHAT CONSTITUTED WELFARE?

There is neither a 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 judgement 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 Daries 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 paripasu* 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 child custody. On the other hand, GIA 1961 is referred not necessarily in the case of divorced couples. 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 an 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.

PehSwee 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.

APPLICATION OF WELFARE IN THE CASE OF CUSTODY AND GUARDIANSHIP IN INDONESIA

In Indonesia, for both Muslims or Non muslims, judges decide that the custody of child in Indonesia will give to "mother". For Muslims, judges apply Article 105 of the Compilation of Islamic Law (KHI), which is it stated that:"In the event of a divorce,

a. Maintenance of children who have not been *mumayyiz* or are not yet 12 years old is the right of their mother;

b. Maintenance of children who are already *mumayyiz* handed over to the child to choose between father and mother as the holder of their maintenance rights;

c. maintenance fees borne by his father".

While for non-Muslims, the legal basis refers to jurisprudence (previous court decision), as follows:

 Decision of the Supreme Court of the Republic of Indonesia No. 126 K / Pdt / 2001 dated August 28, 2003 stated that:
 "... If there is a divorce, the child who is still underage is supposed to be handed

"... If there is a divorce, the child who is still underage is supposed to be handed over to the closest and closest person to the child, namely Mother ..."

 Decision of the Supreme Court of the Republic of Indonesia No. 102 K / Sip / 1973 April 24, 1975, stated: "Based on the jurisprudence regarding child guardianship, the benchmark is that

the biological mother is prioritized, especially for young children, because the child's interests are a criterion, except if it is proven that the mother is not reasonable to care for her child".

But for some cases, judges do not always apply jurisprudences above or legal basis above. As regulated in Indonesia Law Number 4 of 1979 on children's welfare, Article 9 strictly states that ;" *Parents are the first to be responsible for the realization of children's welfare both spiritually, physically and social.*"

While in Article 10 of Law Number 4 of 1979 on children's welfare states that;



(1) Parents who are proven to neglect their responsibilities as referred to in Article 9, resulting in the emergence of obstacles in the growth and development of children, revocation of foster power as parents to his child. In that case the person or body is appointed as guardian.

(2) Revocation of foster power in paragraph (1) does not abolish the obligation of the parents concerned to finance, accordingly with his ability, livelihood, maintenance, and education his child.

(3) Revocation and return of parental care is determined with the judge's decision.

(4) The implementation of the provisions of paragraph (1), (2) and (3) is regulated more continued with Government Regulation.

One of case is in decision of Religious district court No. 881/Pdt.G/2008/PA.JB, case of Mohammad Arief and SurvitaWidiyanti which in the verdict stated that Survita often refused to fulfil marital obligations, she often leaves their children while her husband is working, they even have separate residence since the 14th August 2008, and Survita had affairs with Non Muslim men. So it was clear from the case that Survita was not eligible for rights to bring up their children. One of the requirements for a person entitled to receive this right is trustworthy and moral.

In spite of article 105 has regulated that child care rights are not yet *mumayyiz* (adult) or 12 years old is the right of his mother. And inside Article 49 Law no. 1 of 1974 explained that the right to power for child care by each party can be withdrawn by other parties if: 1) she greatly neglect her obligations to her children; 2) Her behavior is bad. The negligence and irresponsibility of the wife as the mother made it the panel of judges dropped the custody of his father in decision **No. 881 / Pdt.G / 2008 / PA.JB**. In addition, psychological considerations and benefit of children which is indeed a major consideration in giving custody is a reference for the panel of judges.

Different with previous decisions, there is decision that guardianship and custody of child is given to child's grandmother. It is in Religious Supreme Court of the **Republic of Indonesia No. 372 K/Pdt/2008.** The consideration of judge is currently the whereabouts of child's mother are unknown and existence of an underhanded deed that has been legalized in the form of a statement by JelyNonny, states that Jelly Nonny ; Mother of Cindyana, Melvina and Ricky Wijaya will not bring these children if divorced from Suwandi Alain Wijaya (The Deceased), in other words that the underhanded deed in the form of this statement is the same as an authentic deed.

EXECUTION OF COURT DECISIONS ON CUSTODY OF CHILD IN INDONESIA

In field, execution of decisions on custody of child is not running well. Both of father and mother of child not accepted it even it is for "best interest" or "welfare" for their children. Such as what happened at **Bojonegoro**, East Java, Indonesia, when a boy who was only 2 years old was the victim of a legal case for the fight for custody due to the divorce of his parents. The boy was executed by the Bojonegoro Religious Court from his biological father to his biological mother.

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 latter is more concerned 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".

In 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 FadzlinaNawi, 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:



Best Interest	Welfare
K SHANTA KUMARI V VIJAYAN [1986]	Carbone (2014), Gray (2015) and Prueet
2 MLJ 216	(2000)
care, comfort, attention, wellbeing and happiness of the child	 The emotional ties and relationships between the child and his/her parents, siblings, family and household members. The capacity of the parents to provide a safe home and adequate food, clothing and medical care. The mental and physical health needs of the child. The mental and physical health needs of the parents. The presence of domestic violence in the home.

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.

Decision of the Supreme Court of the Republic of Indonesia No. 102 K / Sip / 1973 April 24, 1975, states that: "Based on the jurisprudence regarding child guardianship, the benchmark is that the biological mother is prioritized, especially for young children, because the child's interests are a criterion, except if it is proven that the mother is not reasonable to care for her child."

4.Research methodology

There are three main methods that have been applied in collecting and analysing the data and information for this paper namely search engine, databases, and books. The first method involved is search engines, specifically Google and Google Scholar. The most frequently inserted keywords are 'best interest of child' and 'welfare of the child' in both Malaysia and Indonesia. The second method used is 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 are related to the jurisdiction and legal issues. Finally, related books are fully utilised in gathering information for this paper. In addition, dictionaries are also used as main reference in providing definitions of terms related to this paper.



5. Conclusion And Recommendation

UNCRC applies the doctrine of best interest of the child in all fields 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 hand is much concerned 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, Malaysian's courts do 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 courts have 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 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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