

DETERMINING THE WELFARE OF THE CHILD  
IN CUSTODY ADJUDICATION IN MALAYSIA:  
AN APPRAISAL

by

OSART JALLONG

A Project Paper submitted in partial fulfillment of  
the requirements for the  
Diploma in Law  
at the  
MARA Institute of Technology  
March, 1982

Signature of Author : OSART JALLONG

Certified by : BEATRIX VOHRAH

(BEATRIX VOHRAH)

## ABSTRACT

The most important principle which a court in Malaysia has to apply in determining a custody case is that the welfare of the child is primary or paramount. No doubt, the welfare of the child as a concept has gained world-wide acceptance. But what exactly does it require is not very clear. Legislatures, the courts and experts from related disciplines where the children's welfare are their concern have, at various times, attempted to provide content to it, or at least laid down some broad guidelines upon which the courts may make their decisions. Considerable development has taken place in this area of the law. What are the reactions of the Malaysian courts and legislature to all these? How did the courts apply and define the concept? From an analysis of the decided cases, several conclusions are made, out of which are the courts' tendency to take into account the conduct of the parents, the "tender-years presumption", and the wishes of the child, as some of the factors in determining the child's welfare. With regard to parental conduct, must the court restrict itself to consider it as relevant only as one of the factors in determining the child's welfare, or can it also consider it as a separate consideration from the child's welfare? It is thought that in a limited number of situation there is justification for the court in doing the latter. It maybe argued that there is no statutory restriction on the court in doing so. The tender-years presumption or the rule favouring a mother as the appropriate custodian for a child of tender years found popularity in many countries including Malaysia. But there is now increasing sociological, psychological and anthropological evidence invalidating this rule. In the light of these modern development,

## CONTENTS

	<u>Page</u>
Preface	i
Contents	iii
Table of Cases	vi
Table of Statutes	viii
Abbreviations	ix
CHAPTER I - INTRODUCTION	1
CHAPTER II - AN EXAMINATION OF THE RELEVANT PROVISIONS OF THE STATUTES ON CHILD CUSTODY	10
A. The Law on Child Custody Prior to the Law Reform (Marriage and Divorce) Act, 1976	10
1. West Malaysia	10
2. East Malaysia	12
B. The Law Reform (Marriage and Divorce) Act, 1976	13
1. Problems arising	14
a) Illegitimate Children	15
b) Age Limit	15
c) The Law Reform (Marriage and Divorce) Act, 1976, or the the Guardianship of Infants Act, 1961, etc.....?	16
CHAPTER III - TOWARDS A MALAYSIAN INTERPRETATION OF THE WELFARE PRINCIPLE	21
A. An Analysis of the Decided Cases	22
B. Conclusions	39
CHAPTER IV - PARENTAL CONDUCT	40
A. The Relevance of Parental Conduct in Custody Disputes in Malaysia	40
B. Parental Conduct in the English Courts	42

## CHAPTER I

### INTRODUCTION

In deciding a custody case that come before it, the Malaysian court is bound by statutory provisions to give paramount<sup>1</sup> or primary<sup>2</sup> consideration to the welfare of the child. Besides, it is invested with an inherent jurisdiction which it derives from the Crown's prerogative powers as parem patriae of the child to hear custody cases.<sup>3</sup> Thus by virtue of this it has a duty to make orders pertaining to the child where his welfare requires it, and which order must be consistent with this principle.

It is interesting to note that this welfare concept has won world-wide acceptance<sup>4</sup>. In the United Kingdom, the United States and other Commonwealth countries like Australis, New Zealand, Canada and India, this principle has become an unquestioned law. That this principle has been enacted in all legislations governing child custody in Malaysia clearly shows that the Malaysian legislature has come to accept it as indispensable. In spite of this, however, there is still much uncertainty as to what the welfare of the child really means and requires. Lawyers, child psychologists and people from various other disciplines who are involved in the promotion and determination of child welfare have made many attempts to define the concept. For example, Joseph Goldstein, Anna Freud and Albert Solnit, a team of a lawyer, a child psychoanalyst and a child psychiatrist respectively, discuss the concept from a psychoanalytical approach in their book Beyond the Best Interests of the Child<sup>5</sup>, and their theories have tremendous impact in

countries like the United States, Canada and Great Britain.

Another of the many notable attempts (which infact is a totally different approach) is that of Robert H. Mnookin<sup>6</sup>, who, instead of attempting to provide content to the concept, considers the best interest of the child in any particular case as "quite indeterminate"<sup>7</sup> as it involves the "imposition of values about which there appears to be little consensus in our societies today....."<sup>7</sup>. This being the case, instead of investing the court with the power to decide what the best interest of the child is he suggests that the child's parents in a divorce case should be given considerable freedom to decide custody matters, and this freedom should as much as possible be subject only to the same minimum standards for child protection that the state imposes on all families with respect to child neglect and abuse.

Until recently there had been little dissatisfaction with the confrence of discretionary power on the court to decide on the welfare of the child. But now there are evidence of a move towards a rule-based approach. In Great Britain for example, a report by "Justice" on Parental Rights and Duties and Custody Suits<sup>8</sup> which was particularly influenced by Goldstein, Freund and Solnit's formulations, suggests formulation of some guidelines. In Canada, there is already legislation providing guidelines for the court in determining the welfare of the child. The Child Welfare Act, 1978 of Ontario provides in section 1(b) that in determining the "best interest of the child" the court shall have regard to, inter-alia, "..... (ii) the child's relationship and to be a wanted and needed member within a family structure.....