ORIGINAL ARTICLES

Unresolved Issues In Custody Matters: The Position In Malaysia

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ABSTRACT

There are still many issues which require attention with regard to matters pertaining to custody of children in Malaysia. First and foremost, the meaning of custody is not clearly defined in the two important statutes dealing with custody in Malaysia namely Law Reform (Marriage and Divorce) Act 1976 (LRA) and Guardianship of Infant Act 1961 (GIA). This causes confusion in its application. As a result of this unclear definition, the difference between custody and guardianship is also not clear. The Federal Court’s judgment in the case of Amarapathi a/p Periasamy v Muniandy a/l Periasamy, which ruled that LRA and GIA are only applicable to parents of the child, also gives an impact to other relevant and interested parties in custody cases such as grandparents, aunts or foster parents. The law should also stress on parental responsibilities rather than parental rights in order to ensure that the ultimate aim of protecting the interests of the children will always be given special attention. Thus, access to the child should also be viewed as a responsibility on the part of parents rather than merely a right. This paper highlights and discusses the above issues. Suggestions and recommendations, wherever appropriate, are made in order to improve the law.

Key words: Custody, Guardianship, Parental responsibility, Parental rights, Access.

Introduction

The governing rule in the Malaysian law of custody as provided by the Law Reform (Marriage and Divorce) Act 1976 (LRA) and the Guardianship of Infant Act 1961 (GIA) is that the interests or welfare of the child shall be the paramount consideration. This is in line with article 3 of the United Nation Convention on the Rights of the Child. Many factors including the wishes of parents and child, age, physical and emotional well beings and preservation of status quo are taken into account when deciding who should have the better right to take care of the child. Nevertheless, some other important issues pertaining to law of custody, which can further promote the interests of the child, should also be dealt with in order to provide a better and more effective law. This paper highlights the issues which remain unresolved with regard to custody matters in the Malaysian law on custody.

Meaning of Custody:

The meaning of custody has not been defined clearly under any statute. The GIA and LRA do not give an exact definition of the word 'custody'. The Interpretation Act 1967 is also silent on this matter. Section 89(1) of the LRA, however, provides:

(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 just the care and control of the child but also includes the right to determine the upbringing of the child or to what is sometimes referred to as legal custody. It would appear that 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 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 which in fact was following English authorities (J v C; Jussa v Jussa; Re W, J.C; Normi, 1997). In this case, Arulanandum 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.

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The same concept of custody was understood in the case of Teh Eng Kim v. Yew Peng Siong. 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.

Later cases seem to follow the same line. In Re KO (an infant), the court said that the crucial question in this case was 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 The Thian Sar, 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 just care and control and that care and control is merely a constituent element of custody.

Nevertheless, in some other cases the court tends to use the word custody with some added terms; as if to differentiate it with the real meaning of custody. In Winnie Young v. William Lee Say Beng the court 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’. Later, in the case of Jennifer Patricia Thomas v. Calvin Martin Victor David, the court used another terminology, i.e. daily custody while referring to care and control of the child. In Tang Kong Meng v. Zainon bte Md Zain, 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 pare 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.

The GIA also does not provide any definition of custody. The provisions of section 5 are also rather 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 that is, custody, upbringing and administration of property. If this is what was intended by the legislator, the word custody might only be confined to care and control or ‘physical custody’. 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.

The above discussion shows that the word ‘custody’ has no common definition. It may connote the meaning of care and control together with the right to determine the upbringing of the child as provided by the LRA, but it may also be confined to only care and control only as illustrated in adoption cases or if the word is added to other terms such as physical or daily.

Similar difficulties were actually experienced by English and Scottish Laws until the introduction of Children Act 1989 and Children (Scotland) Act 1995, respectively (Normi, 1997). Under the old law, the actual meaning of custody was not clearly defined. Bromley and Lowe observed:

It may denote a state of fact, that is, that a child is under an adult’s physical control or it may denote a legal concept. (Bromley and Lowe 1987; Hewer v Bryant).

The case of Dipper v Dipper changed the concept of what had previously been believed that a sole custody order would enable the custodial parent to control over the day-to-day and long term decisions of a child’s upbringing. In this case, the court held that:

Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.

In 1989, the Children Act was introduced in England to remove all the difficulties and uncertainties arising from the old law. A new concept was introduced. Instead of custody order, residence order was introduced. The important difference between custody and residence order is that in the latter order, the parent who does not have the child with him will still retain full responsibility for the child and the power to act independently unless it is incompatible with the court’s order (Law Commission, 1988). This means that parents should be treated equally by schools and others (Law Commission, 1988). In fact, one important reason for the introduction of the
new law in England and Scotland is to remove the misconception of the old law of custody that the ‘winner takes all’ and the ‘loser loses all’ (Law Commission, 1988 and Scottish Law Commission, 1992). Both parents, even after separation, should normally have a continuing parental role to play in relation to a child’s upbringing (Scottish Law Commission, 1992). The Law Society of Scotland was also of the view that ‘the right of custody required further consideration and that some distinction should probably be drawn between the basic right of custody and rights in relation to major life decisions’ (Scottish Law Commission, 1992). Furthermore, it was discovered that the children who were able to maintain a good relationship with both parents after the divorce or separation got on better (Law Commission, 1988 and Wallerstein and Kelly, 1980).

In Malaysia, this was actually the fear voiced by the appellant father in Teh Eng Kim v. Yew Peng Siong. In this case, the appellant urged that the custody of the children should be given to him as he feared that his wishes to have a supervisory role in deciding the children’s future and education would not be respected by the respondent. However, in Khoo Cheng Nee (p) v. Lubin Chiew Pau Sing, the court seems to adopt a different view. In this case, Abdul Wahab Patail JC said:

While the petitioner is given the custody, care and control of both children, it must not be forgotten that the respondent remains the legal guardian. The court therefore orders that the petitioner should give full information as to all matters affecting the children’s welfare, health and education pursuant to s.3 of the Guardianship Act, and that the respondent’s wishes so far as is reasonable shall be observed.

Thus, it is submitted that these uncertainties should be removed by providing clear definition of the word ‘custody’ in the relevant statutes. The meaning of custody should only be limited to care and control, taking into account the experience in England and Scotland. This means that even though custody is given to one parent, both parents still have the right and responsibility with regard to major decisions including education, religious upbringing, discipline, medical treatment, consent to marry, the child’s surname, agreement to adoption and removal of the child out of jurisdiction. Thus, the fear as voiced out in Teh Eng Kim, will no longer become an issue. Most importantly, parents should know that even though custody is given to one parent, his or her right and responsibility with regard to the child is never extinguished. The legislator may also consider changing the terms or words used as what happened in England if that will remove the ambiguities or difficulties as discussed above.

Definition of Child:

The definition of a child seems to vary according to different pieces of legislation. According to the GIA, a non-Muslim child is a person who has not completed his age of 21 years. The LRA, however, provides that a child is a person who is under the age of eighteen years. Similarly, the Age of Majority Act 1971 provides 18 years as the age of majority.

These different definitions of a child cause difficulty in application; as happened in Kanagalingam v Kanagarajah. The issue in this case was whether a child aged over 18 years but less than 21 years should still be considered a child. In view of these difficulties, it is suggested that the definition of the word ‘child’ should be standardized in order to avoid confusion in its application. It seems here that the definition given by the LRA and the Age of Majority Act is preferable as this definition would be in line with that provided by article 1 of the UN Convention on the Rights of the Child.

Who May Apply for Custody?

Most of the cases demonstrate that the persons who applied for custody were the children’s parents. Section 88 (1) of the LRA states:

The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

Further section 5(2) of the GIA provides: “the mother of an infant shall have the like powers of applying to the court in respect of any matter affecting the infant as are possessed by the father”. In Amarapathi a/p Periasamy v Muniandy a/l Periasamy, the Federal Court came to the conclusion that the right to apply for custody as provided under section 88 of the LRA is only limited to the parents of the children of the marriage. Thus, other persons (other than the parents) have no right to apply for custody under LRA. The court observed:

The factual matrix of the instant appeal does not fall within the framework of the subsection. The custody battle is not between the natural parents of the child but between her aunt and her father. The appellant cannot claim to fit into the shoes of a parent as the 1976 Act makes no provision as to the custodial right of a foster parent which the appellant claims to be.
The Federal Court also held that GIA do not have the jurisdiction to hear cases from other than parents. In fact, a similar issue was being debated in England that is, whether both Guardianship of Infants Act 1886 and Guardianship of Infants Act 1925 were only applicable to parties to the marriage or also applicable to other persons. In re Carroll, the Court of Appeal held that the 1925 Act only applied between spouses. However, in J. and Anor v C and Ors. the House of Lords overruled the Court of Appeal’s decision. In this case, the dispute was between the natural parents and the foster parents. Lord Upjohn was of the view that the Guardianship of Infants Act 1925 as opposed to Guardianship of Infants Act 1886 extended its application to other people and not only to spouses. Thus, in that case, the House of Lords held that it had the jurisdiction to hear the case even though the disputing parties were not spouses. His Lordship observed: … while in re A. and B. (Infants) [1897] 1 Ch. 786 it had been held that the 1886 Act virtually only applied between spouses, the principle laid down in the 1925 Act applied wherever the custody of an infant is in issue and whoever are the parties …

In West Malaysia, the existing GIA, unlike the Guardianship of Infants Ordinance (Sarawak) 1953, is based on the Guardianship of Infants Act 1886 and thus the extension provided by the Guardianship of Infants Act 1925 does not seem to apply to our GIA.

Having established that both LRA and GIA do not apply to third party, the important question that arises is how can the right of other persons be protected? Other persons may include grandparents as can be seen in Chua Hui Peng & Anor. v. Kuah Huah Oong and S. Thayalnayagan v. G.M. Kodogoda or other relatives such as an aunt as illustrated in the case of Amarapathi a/p Periasamy v Muniandy a/l Periasamy, Jayakumar a/l Karuppanan & Anor v Jeyakumar Krishnan and Nanga Nguk Moi v Chen Ai Choo. Other persons may also include foster parents as can be seen Masam v. Salina Saropa & Anor and Tang Kong Meng v. Zainon bte Md. Zain & Anor.

This issue needs to be tackled judiciously as some cases, like the Jayakumar’s case, the need to protect the interests of the child necessitated the third party (in this case the maternal aunt) to bring the case to the court. The Court of Judicature Act 1964 (CJA), which empowers the court with inherent jurisdiction, might be of help. Nevertheless, the general protections given by the CJA might not ensure that the interests and welfare of the child would be protected as there is no specific provision touching on such issue in the CJA; even though common law might be applicable in this situation. To ensure that the best interests of the child are preserved in all types of custody cases, some amendments to the existing laws need to be made.

Custody of Illegitimate Children:

There is no clear provision in our legislation with regard to the position of an illegitimate child. Following the principle under common law as highlighted in the case of R v Brighton (Inhabitants), where Cockburn C.J. mentioned: ‘the father of an illegitimate child is not recognized by the law of England as to civil purposes’ and also in Thomas John Barnardo v Margaret McHugh Lord Herschell said: ‘the obligation cast upon the mother of an illegitimate child to maintain it till it attains the age of sixteen appears to me to involve a right to its custody’ The, thus, is that only the mother has the right to custody of illegitimate child. In Tam Ley Chian v Seah Heng Lye, the court, basing its decision on the common law, held that:”…where a child is illegitimate, the putative father has no rights over him under common law.”

Issues, however, arise as to whether the High Court has jurisdiction to entertain applications for the custody of illegitimate children under the GIA, and whether the High Court has original jurisdiction to deal with custody and guardianship proceedings by virtue of section 24 of the CJA. The courts differ in dealing with this issue.

In Re Balasingam & Paravathy, infants Kannamah v. Palani, the applicant mother applied for custody of her two illegitimate children. The issue before the court was whether it had jurisdiction to entertain an application by the de facto mother for a custody order under the GIA, and whether the High Court had original jurisdiction to deal with the matter. It was argued by the applicant that besides the GIA, the court had been granted original jurisdiction under section 24(d) and (e) of the CJA. Section 24 of the CJA states:

Without prejudice to the generality of the provisions of the last preceding section, the civil jurisdiction of every High Court shall include:

(d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;
(e) jurisdiction to appoint and control guardians and keepers of the persons and estates of idiots, mentally disordered persons and persons of unsound mind’.

It was also argued on behalf of the respondent that Parliament must have illegitimate children in contemplation when drafting the GIA because section 1(2) (a) specifically mentions illegitimate children. Section 1(2) (a) of the GIA provides:

Nothing in this Act shall apply in any State to persons professing the Muslim religion until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that –

(a) Nothing in this Act which is contrary to the Muslim religion or the custom of the
Malays shall apply to any person under the age of eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion [emphasis added].

Raja Azlan Shah J. (as he then was), however, was of the opinion that the High Court had no jurisdiction to make the order sought as, according to him, the word ‘infant’ referred only to a legitimate infant. By virtue of section 27 of the Civil Law Act 1956, he referred to the Guardianship of Infants Acts, 1886 and 1925 to discover the law as it stood in England in 1956. His Lordship said:

The case of In Re C.T. (an infant) is of help in determining whether the court of England in 1956 had jurisdiction to entertain custody proceedings by the facto parents of illegitimate children. It was there held that the court had no jurisdiction to make an order granting custody of two illegitimate children to the putative father. The court considered in great length the meanings to be given to the words “father” and “mother” use in the Guardianship Acts of 1886 and 1925 and came to the conclusion that prima facie, the titles of “mother” and “father” belonged only to those who had become so in the manner known to and approved by the law, …

Furthermore, adopting the approach taken by Viscount Simonds in Galloway v. Galloway it is safer that ‘infant’ means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word.

With regard to sub-section 24(d) and (e) of the CJA, his Lordship was of the opinion that this section is meant to grant jurisdiction on the High Court to entertain proceeding under GIA. As illegitimate children were not within the scope of the GIA, it was therefore wrong to say that the jurisdiction to entertain such applications had been granted by the CJA. In other words, sub-sections 24(d) and (e) of the CJA did not confer on the High Court the original jurisdiction to deal with matters pertaining to custody of illegitimate children. This decision, however, was subjected to many criticisms.

In Low Pek Nai v Koh Chye Guan @ Koh Chai Guan, Justice Mohd Hishamudin held that the GIA applied to illegitimate children. His Lordship was of the opinion that if section 3 of the Act contemplates that the Act be applicable to Muslim children regardless of whether they are legitimate or illegitimate; the Act should then apply to all children, legitimate or illegitimate. The High Court, therefore, has jurisdiction to hear applications for custody of illegitimate children.

In Sinnakaruppi a/p Periakaruppan v Bathumalai a/l Krishnan, the court after discussing at length the differences of opinion with regard to the applicability of GIA to the illegitimate children, concluded:

Indeed, in the light of the latest amendments to the GIA (see Guardianship of Infants (Amendment) Act 1999, effective 1 October 1999), the substitution of the former s 5 by an altogether new s 5 providing for equality of parental rights, there is less reason to doubt that the GIA in present form does not apply to illegitimate children.

With regard to the issue of whether the High Court has the jurisdiction to deal with custody and guardianship cases based on the CJA alone, Mahadev Shankar J (as he then was) in W v H, viewed the jurisdiction granted to the court by virtue of section 24(d) of the CJA as follows:

“this jurisdiction has its source in the relationship between the crown (acting through the courts) and its subjects, who owe allegiance to the Crown and to whom the Crown offers its protection, observing a special obligation as parens patriae to minors. All Malaysian minors are wards of the court because they are subject to the parental jurisdiction entrusted to the courts.

This view was in agreement in Tam Ley Chian v Seah Heng Lye where the court held that the CJA confers jurisdiction on the High Court to deal with matters pertaining to the appointment of guardians and custody of illegitimate children. The court said:

It will be seen that while paras (a) and (c) of s 24 refer to the jurisdiction of the High Court under any written law, paras (d) is in general terms which must necessarily mean jurisdiction of the nature stipulated under a written law as well as common law’.

The above opinion was concurred by the court in Sinnakaruppi a/p Periakaruppan v Bathumalai a/l Krishnan. The court mentioned:

Still, the preponderant view is that the court has jurisdiction under s 24 of the CJA to grant custody and guardianship of both legitimate and illegitimate infants, regardless of the GIA.

Thus, it is submitted that even though the GIA might not confer to the court the jurisdiction to hear application pertaining to illegitimate children, the court as parens patriae is empowered to hear custody cases from all category of children including illegitimate children by virtue of section 24 of the CJA.

The Relationship Between Custody and Guardianship:

The relationship between guardianship and custody under Malaysian law is not clearly distinguishable. Is guardianship similar to ‘legal’ custody? The court in Mohan Raj St Patmanathan v Prema Rani a/p Kandiah Ponnampalam & Anor, seems to equate guardianship with legal custody. Similar difficulty was pointed out by
the counsel for the appellant in Teh Eng Kim’s case while referring to sections 3 and 5 of the GIA. Sections 3 and 5 of the GIA provides:

The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

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 …

There seems to be many uncertainties with regard to the above provision. The issue might not be that complicated when parents are married and staying together. The matter will become complicated when there is a divorce and parties live separately. There will be questions where no clear answers can be found. The matter becomes more complicated since the Act does not provide clearly who is the guardian of the child. Will the one who is given custody automatically considered as the guardian? Does this mean that the one who is not given custody is no longer considered as guardian? If legal custody is given to the mother, is she alone responsible for the support of the child?

The decision made in Jennifer Patricia’s case does not really clarify the matter. In this case, based on section 5, the court awarded joint guardianship of the children to both parents but the daily custody, care and control of the children was given to the wife. Unfortunately, the court did not explain what he meant by joint guardianship. How does joint guardianship differ from joint custody? It seems that in this case, with regard to responsibility to support or maintain the child, even though joint guardianship was awarded to both parents, the responsibility to pay maintenance was only made against the father and not against the mother (even though section 3 provides that the guardian (which includes the mother) shall be responsible for the infant’s support). From the above discussion, it is apparent that Malaysian legislations do not clearly distinguish the concepts of custody and guardianship and it seems that the concepts are overlap with one another. These resulted in much confusion in their applications as can be seen in the cases discussed above. Thus, it is suggested that clarification of the term ‘custody’ as opposed to ‘guardianship’ should be made. It is also submitted that the law should clarify the matter by providing clearer provisions. Clear provisions regarding the rights and duties of custodians and guardians should also be made.

Parental Rights and Responsibilities:

What constitutes rights and responsibilities of parents should be made clear by Malaysian legislation. (Children (Scotland) Act 1995) The reason is that it will clarify to the parents what their rights and responsibilities are with regard to their children. Consequently, it is hoped that their commitments toward fulfilling their duties will increase.

The English Children Act 1989 defines parental responsibility as “all the rights, duties, powers, responsibilities and authority which, by law, a parent of a child has in relation to the child and his property”. A better version, perhaps, can be seen in Scottish law as unlike English law, it distinguishes parental responsibilities from parental rights. Section 1(1) of the Children (Scotland) Act 1995, outlines four main responsibilities of parents including to safeguard and promote the child’s development, to provide direction and guidance, to maintain contact and to act as the child’s legal representative. With regard to parental rights, the same Act provides that a parent has the right to have the child living with him, to control the child’s upbringing, to maintain contact and to act as the child’s legal representative (Children (Scotland) Act 1995).

In line with the above concept, Article 18 of the Convention on the Rights of the Child 1989 provides:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern.

Access: A Right or Obligation?

Section 89(2) of the LRA provides that an order for custody may –
(d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court may consider reasonable. (Article 9 of the UN Convention and Children’s Rights Development Unit, UNICEF)

The above section provides that a non-custodial parent or his family is given the right of access. Many cases established that the one who is not given custody will be given the right to access. In Foo Kok Soon v Leony Rosalina, the court mentioned that access is a parental right and this right is essential to both the parent deprived of custody as well as the children.

A question, however, arises as to whether it can also be regarded as an obligation on the part of non-custodial parent. In M v M (child: access), the court mentioned:
...the companionship of a parent is in any ordinary circumstances of such immense value to the child that there is a basic right in him to such companionship. I for my part would prefer to call it basic right in the child rather than basic right in the parent.

Based on the above quotation, it may be argued that usually, if it is a right of one person, it can become an obligation on the other person. Thus, if access can be considered as a basic right of a child, it can also be considered as an obligation on the part of the parent.

Section 1(1) of Children (Scotland) Act 1995 further provides:

...a parent has in relation to his child the responsibility –

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis;

The Scottish Law views that maintaining personal relations and direct contact with the child should be considered as a responsibility rather than merely a right. This is due to its importance in the development of the child, provided that it is in the best interests of the child.

Thus, we may conclude that access can be both; responsibility and right. It can be a right from the viewpoint of a parent who wants to exercise his right to see and visit the child. On the other hand, it can be considered as an obligation on the part of the parent to see and visit the child in order to ensure the development of the child. This sense of responsibility is especially important in the case of some parents seem to forget the fact that he or she has a child or children who is or are living with other persons who also need attention from him or her. This is in line with Article 9(3) of the United Nation Convention on the Rights of the Child which provides:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

Conclusion:

From the above discussion, we may conclude that there are still matters pertaining to ‘custody’ in Malaysia that may be improved. The unclear definition of the word ‘custody’ itself causes confusion in its application. Thus, a clear definition of the word ‘custody’ should be provided. It is submitted that the meaning of custody should only be limited to care and control; taking into accounts the experience of England and Scotland. This means that even though custody is given to one parent, both parents still have the rights and responsibilities with regard to the upbringing of the child, including matters pertaining to education, religion, discipline, medical treatment, consent to marry, surname, agreement to adoption and removal of the child out of jurisdiction.

The law should also pay attention to the other interested applicants (other than parents) including the close relatives of the child such as grandparents or aunts, as both the LRA and GIA do not apply to them. Even though the CJA might be of help, the law does not specifically provide that the interests of the child will be the paramount consideration. It should also be emphasized here that the ineffective law should not become the reason for these interested parties not to pursue their application as it should be born in mind that in some cases the interests of the child lie with them rather than with the natural parents as illustrated in Jayakumar a/l Karuppanan & Anor v Jeyakumar Krishnan. Thus, some amendments to the law are required in order to ensure that at the end of the day, the interests of the child remain upheld.

With regard to whether the GIA and CJA have the jurisdiction to hear custody application pertaining to illegitimate children, it is submitted that even though the GIA might not confer to the court such jurisdiction, the court as parens patriae is empowered to hear custody cases from all category of children including illegitimate children by virtue of section 24 of the CJA.

The relationship of custody and guardianship is also not clearly defined. The concepts overlap with one another which resulted in much confusion in their applications as highlighted in the discussion above. Thus, it is suggested that clarification of the term ‘custody’ as opposed to ‘guardianship’ should be made. What constitutes parental rights and responsibilities should also be made clear by Malaysian legislation. Hopefully, by doing so, parents will be more aware of their rights and responsibilities toward their children and, as such, their commitments toward fulfilling their duties will increase. Experience from England and Scotland with regard to this matter may be of help in enacting a better and more effective law. In connection to this, access to the child should not only be viewed as parental right but also parental responsibility. This emphasis is especially important in cases where parents tend to neglect the well beings of their children when they are not living with them.

Finally, it is hoped that by improving the law, the ultimate aim of protecting the interests and welfare of the child would always be preserved and safeguarded.

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