

CHILDREN'S PARTICIPATION IN CUSTODY AND ACCESS PROCEEDINGS

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ABSTRACT

The right of children to express their views in all matters affecting their lives is regarded as one of the important factors that concern their welfare. The United Nations Convention on the Rights of the Child and social science research support children's right to participate in family law proceedings, particularly in decisions of custody disputes, though there is no clear consensus on how this should be done. Many jurisdictions such as Australia and England incorporate several measures in their legislations in ensuring the meaningful involvement of children in family dispute resolution processes. The laws in Malaysia similarly uphold this right but do not provide specific measures to obtain the views of children. This paper seeks to discuss the importance of the child's participation in the context of custody disputes and to examine the measures in which the views of children can be obtained. In doing so, it attempts to provide an overview of the current laws and the approach of the Civil and the Shariah courts in Malaysia in considering the views of children in custody disputes. For purposes of comparison, it briefly examines the legislations and the court practices in Australia and England on this matter. The purpose is to determine the best measure to be adopted by Malaysia and

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to propose statutory and non-statutory changes to ensure that children in Malaysia are given the right to have their voices heard in family law proceedings.

Keywords: Child's right, Child's view, Family proceedings, Custody and access proceedings.

PENYERTAAN KANAK-KANAK DALAM PROSIDING HAK PENJAGAAN DAN AKSES TERHADAP ANAK

ABSTRAK

Hak kanak-kanak bagi menyatakan pandangan mereka dalam perkara-perkara yang menyentuh kehidupan mereka disifatkan sebagai salah satu faktor penting dalam menentukan kebajikan mereka. United Nations Convention berhubung dengan Hak –hak Kanak-kanak dan kajian sains sosial menyokong hak kanak-kanak untuk turut serta di dalam prosiding yang berkaitan dengan Undang-undang Keluarga terutama dalam keputusan-keputusan yang berhubung dengan pertikaian hak penjagaan anak. Walaubagaimanapun, tiada persetujuan bersama yang jelas tentang bagaimana ia harus dijalankan. Di kebanyakan negara yang mempunyai bidangkuasa seperti Australia dan England, beberapa peruntukan dan kaedah dimasukkan di dalam perundangan mereka bagi memastikan penglibatan bermakna oleh kanak-kanak di dalam proses penyelesaian pertikaian keluarga. Sama seperti di Malaysia, undang-undang negara ini mengiktiraf hak tersebut tetapi tiada peruntukan tentang kaedah khusus bagi mendapatkan pandangan kanak-kanak di dalam prosiding pertikaian keluarga. Kertas Kerja ini membincangkan kepentingan penyertaan kanak-kanak dalam konteks pertikaian hak penjagaan anak juga kajian tentang kaedah-kaedah yang boleh digunakan bagi mendapatkan pandangan kanak-kanak. Kajian ini juga cuba memberi gambaran keseluruhan ke atas undang-undang semasa dan pendekatan yang diambil oleh Mahkamah Sivil dan Mahkamah Syariah di Malaysia dalam menimbangkan pandangan-pandangan yang diberikan oleh golongan kanak-kanak dalam

pertikaian mengenai hak penjagaan anak. Bagi maksud perbandingan, kajian ini juga menyentuh secara ringkas perundangan dan amalan-amalan mahkamah di Australia dan England dalam perkara ini. Ia bertujuan bagi menentukan apakah kaedah terbaik yang harus digunakan di Malaysia dan juga mengemukakan cadangan-cadangan berbentuk pindaan undang-undang dan perubahan selainnya. Ia bagi memastikan kanak-kanak di Malaysia diberi hak menyuarakan pandangan mereka di dalam prosiding undang-undang keluarga.

Kata kunci: Hak kanak-kanak, Pandangan Kanak-kanak, Prosiding keluarga, Prosiding Hak Penjagaan dan Akses Terhadap Anak.

BACKGROUND

In many jurisdictions, children's participation in the family law decision-making process is increasingly considered as important in the determination of decisions made on their behalf.¹ The obligation of the State in considering children's views is reflective of the international obligation under the United Nations Convention on the Rights of the Child. The Convention states:

“State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an

¹ Carol Smart, “From Children's Shoes to Children's Voices.” *Family Court Review* 40, No. 3 (2002): 307–319. See also Nicola Taylor, “What Do We Know about Involving Children and Young People in Family Law Decision-making?” A research update. *Australian Journal of Family Law* 20, No.2 (2006): 154–178; Christine D. Davies, “Access to Justice for Children: The Voice of the Child in Child Custody and Access

appropriate body, in a manner consistent with the procedures of national law.”²

The United Nations Committee on the Rights of the Child, which is responsible for monitoring implementation of the Convention, conceives that Article 12 of the Convention recognises the right of children to meaningfully participate in proceedings affecting their interests. At the same time, the Convention acknowledges that a child’s maturity should influence the weight to be given to the child’s wishes and that the manner of a child’s participation need not be direct.³

Sometimes referred to as the doctrine of “evolving capacities,” the theory underlying Article 12 is that as children grow towards maturity, they should be given rights in accordance with their varying stages of development.⁴ The weight that must be given to children’s views needs to reflect their level of understanding of the issues involved. This does not mean that the views of young children will automatically be given less weight. There are many issues that very young children are capable of understanding and to which they can contribute thoughtful opinions. Competence does not develop uniformly according to rigid developmental stages. The social context, the nature of the decision, the particular life experience of the child and the level of adult support will all affect the capacity of a child to understand the issues affecting them.⁵

Under this Article, the child must be capable of forming his or her own views in order to have the right to express those views, and the child’s age and maturity must be considered in determining the weight to

Disputes.” *Canadian Family Law Quarterly* 22, No.2 (2004): 153-175.

² Article 12(1) of the UNCRC.

³ United Nation Committee on the Rights of the Child, General Comment No. 12: The right of Child to be Heard, (2006) [40] <http://www.ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendation_afterDGD.doc> at 12 February 2010.

⁴ Barbara A. Atwood, “The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestion for Reform,” *Arizona Law Review* 45 (2003): 651.

⁵ Gerison Lansdown, “Promoting Children’s Participation in Democratic Decision-Making,” UNICEF Innocenti Insight, (2001) accessed January 15, 2014, <http://www.unicef-irc.org/publications/pdf/insight6.pdf>.

be given to those views. Existing research on children's views suggest that they want to be kept informed, and want their needs and interests heard. However, there remains much less consensus on *how* and *when* children should participate during parental breakdown and have their voices heard.⁶ There are several different mechanisms for allowing the participation of children in family proceedings in various countries, including reports from guardian *ad litem* in custody and access assessments, child legal representation,⁷ judicial interviews,⁸ and the use of a child specialist in collaborative family law.⁹ However, many of these processes remain within a traditional adversarial framework, with adults deciding whether and how children's voices will be heard.¹⁰

VIEWS OF THE CHILD IN CUSTODY AND ACCESS PROCEEDINGS

Many jurisdictions have relied on the theme of Article 12 when suggesting changes in child custody dispute resolution procedures. Two reasons are advanced for including children's voices in custody and access proceedings. The first concerns their rights, and argues that children are

⁶ Rachel Birnbaum & Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio," *International Journal of Law, Policy and the Family* 24, No. 3 (2010): 300–337, at 301.

⁷ For example, Ontario has the most comprehensive child legal representation program in Canada. Quebec also provides child legal representation, see Birnbaum & Bala, *ibid.*

⁸ Michelle Fernando, "Conversations between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters," *Australian Journal of Family Law* 23 (2009): 48–70. See also Susan Gamache, "Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce," *Louisiana Law Review* 65 (2005): 1455–85.

⁹ Susan Gamache, "Family Law Basics II: The Child Specialist in Collaborative Separation and Divorce" (paper presented to the Continuing Legal Education Society of British Columbia, 2006), as cited in Birnbaum & Bala, n. 6, at 301.

¹⁰ Birnbaum & Bala, n. 6, at 301.

entitled to have a say in decisions that affect their lives.¹¹ The concept that children have a right to be heard is the natural corollary of saying that they have substantive rights in relation to the outcome of custody disputes, for an awareness of children's perceptions, wishes and beliefs may well be significant in providing an understanding of how a court should give effect to their rights.¹² Nevertheless, it has been argued that the primacy of the children's inherent rights does not mean that children always know their best interests or that expressing their voice in legal proceedings never harms them. In certain situations, commentators believe that children's stated wishes often conflict with their best interests.¹³

The second reason for including children's voices in custody and access proceedings is that doing so serves the children's best interests. Custody and access decisions are now governed in many jurisdictions by the principle of the best interests of the child. Several jurisdictions explicitly include the child's own wishes as one consideration that judges must weigh in deciding individual custody and access disputes. Traditional custody and access proceedings entitle parents to decide post-parenting arrangements on the child's behalf, and this entitlement is based partly on the assumption that parents are best able to decide their children's best interests, or, if they fail, that courts can fulfill this role.¹⁴

¹¹ Pauline O'Connor, "Voice and Support: Programs for Children Experiencing Parental Separation and Divorce," Background Paper, Minister of Justice Canada, 2004, at 45, accessed January 12, 2013, http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_2/pdf/2004_2.pdf.

¹² Patrick Parkinson & Judy Cashmore, *The Voices of a Child in Family Law Disputes*, (Oxford: Oxford University Press, 2008), at 12.

¹³ See for example, Austin, G., P. Jaffe and P. Hurley, "Incorporating Children's Needs and Views in Alternative Dispute Resolution Approaches." *Canadian Family Law Quarterly*, 8, No.1 (1991): 69-79 & Carole Brown, "Involving Children in Decision Making Without Making Them the Decision Makers" (paper presented to the Association of Family and Conciliation Courts, Northwest Regional Conference, Skamania Lodge, Australia, November 2-4, 1995), accessed January 15, 2013, <http://www.familycourt.gov.au/papers/html/skamania.html>.

¹⁴ O'Connor, n. 11, at 45.

While the law of the majority of jurisdictions provides that courts may consider children's preferences in deciding custody, they vary widely in the discretion they provide their trial judges. They differ not only with respect to the weight given to children's wishes but also to the methods used by courts in ascertaining children's views. The common methods include the use of expert testimony, testimony by the parties, court-ordered custody evaluations, the appointment of counsel or guardian *ad litem* for the child, and the *in camera* interview. Outside the traditional adversarial frameworks, mediation is seen as an alternative as it is a more effective, less destructive, and more satisfying form of dispute resolution. In some jurisdictions, interviews with the children occur early in the mediation process so that parents are sensitised to the reality that the children's interests are separate from their own. Thus, the recognition that the child has a right to be heard should extend beyond the formal litigation context to non-litigative methods of resolving child custody disputes.¹⁵

THE CHILD'S RIGHT TO CHOOSE UNDER ISLAMIC LAW

As Malaysia practices dual legal systems in family matters, it is pertinent to discuss the classical views of the Muslim jurists on the child's right to choose in custody disputes under Islamic law.

In Islam, the period of custody or *al-Hadanah* is considered complete once the child attains the age of discernment or *mumayyiz*. *Mumayyiz* specifically means a period where a child has achieved some degree of independence, is able to feed, clothe and cleanse himself, and can differentiate between right and wrong.¹⁶ The period after reaching the age of *mumayyiz* is known as '*Kafalah*,' i.e. when the child no longer requires specific care and attention from the custodian mother as he or she is already capable to manage himself or herself and to distinguish between right and wrong.¹⁷ During this stage, the jurists of schools of

¹⁵ Barbara A. Atwood, n. 4, at 652.

¹⁶ Al-Shirbīnī, Shams al-Dīn Muḥammad Aḥmad, n.d. *Mughnī al-Muḥtāj*, Vol. 5. (Beirut: Dār al-Kutub al-‘Ilmiyyah, n.d.) at 452.

¹⁷ Al-Mawardī, Abū al-Ḥasan Ali ibn Muḥammad ibn Ḥabīb, *Al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi‘ī wa huwa Sharḥ Mukhtaṣar*

thought, the Shafi'is and Hanbalis agree that the child has the right to choose who he or she would stay with, in the event of divorce.¹⁸ The basis of their opinion is the *hadith* of the Prophet, which states:

“A woman came to the Prophet (may peace be upon him) and said, “My husband wants to take away my son, although he (the son) gives me comfort and brings me drinking water from the well of Abu Inabah.” Thereupon the husband appeared denying her claim over his son. The Prophet (may peace be upon him) then said: “Child! Here is your father and here is your mother; make a choice between the two whomsoever you want.” The son caught hold of the hand of his mother and she went away with her son.”¹⁹

The *hadith* signifies that a child, if capable to discern, is to be given the choice to stay with either parent and the chosen parent is assumed to be more kind and loving towards the child and that will serve his or her best interests.²⁰ The Shafi'i and Hanbali jurists, however, differ as to whether

al-Muzanī, Vol. 11 (Beirut: Dār al-Kutub al-‘Ilmiyyah, n.d.), 498-500, at 499-500.

¹⁸ Al-Mawardī, *ibid*, at 507; Al-Nawawī, Muḥyiddīn Abū Zakariyya Yaḥyā ibn Sharaf, *Minḥāj al-Ṭālibīn*, trans. E.C. Howard, (Pakistan: Lahore, Law Publishing Company, n.d.), p. 391 at 509-510; Ibn Qudāmah, Aḥmad ibn Muḥammad, *Al-Mughnī*, Vol. 9, (Riyadh: Maktabah al-Riya al-Hadithah, n.d.), 133, as cited in Mahdi Zahraa and Normi Abdul Malek, “The Concept of Custody in Islamic Law,” *Arab Law Quarterly* 13 (1998): Kluwer Law International, London, at 159, at 166, Wahbah al-Zuhaylī, *Al-Fiqh al-Islamī wa Adillatuh* Vol. 4, (Damascus: Dar al-Fikr, 1989), Malay Trans. Ahmad Shahbari Salamon et. al., *Fiqh & Perundangan Islam*, Vol. VII, (Kuala Lumpur: Dewan Bahasa & Pustaka, 2001) at 898.

¹⁹ Abū Dāwūd, *Sunan Abū Dāwūd, Kitāb al-Ṭalaq*, Vol. 2, trans. Ahmad Hassan, (New Delhi: Kitab Bhavan, 1990), at 616.

²⁰ Ibn Qudāmah, *Al-Mughnī wa Sharḥ al-Kabīr*, Vol. 9, (Dār al-Kitāb al-‘Arabī, n.d.) 300, as cited in Najibah Mohd Zain, “How the Best interests of the Child is Best Served in Islamic Law With Special Reference to its Application in the Malaysian Sharī‘ah Court” (paper presented at the

the option to choose is the right of both male and female child. It seems that the Shafi'is does not differentiate between the two on this matter,²¹ unlike the Hanbalis who limit such a right only to male child, based on the abovementioned *hadith* and on the judgment of Sayyidina 'Ali, who gave an option to a boy of seven or eight years old to choose between his paternal uncle and his mother.²²

A contrast to the above is the Hanafis and Malikis who maintain that the *mumayyiz* children are not given the right to choose as they are still young and would not make their choice well. They will naturally choose the parent to whom they are more attached to or who would give them more freedom. In such a case it might lead to choosing a parent who may not act in the best interests of the child.²³ The jurists of both schools agree that when the child, male or female, has attained the age of discernment, the father has the right to the custody.²⁴ However, the rationale for this argument is different between the male and the female child. As for the male child, the father is considered the best person to educate him about adulthood and other related matters. A female child who has reached the age of discernment is considered ready for marriage and at this time she needs the father more than the mother because he is her guardian in marriage.²⁵

The child is only given such a choice when two conditions are fulfilled, namely, both parents must be entitled to have the custody of the child, and the child must be sane. If the child is insane, he or she is to

4th World Congress on Family Law and Children's Rights, Cape Town, South Africa on the 20th – 23rd March 2005) at 337.

²¹ Al-Mawardī, n. 17, at 507; Al-Nawawī, n. 18 at 509-510.

²² Ibn Qudāmah, n. 18, at 142. In the judgment of Sayyidina 'Ali, it was reported from 'Ammerah al-Jarmi, he said, "Ali gave him the authority (to choose) between the mother and the uncle and at the time I was a child of seven or eight years." Then he said about his ('Ammerah's) brother who was younger than him, "It is (proper to do) so; I shall give him the same powers when he comes up to your age."

²³ Al-Kāsānī, Abū Bakr ibn Mas'ūd, *Badā'i' al-Ṣanā'i' fi tartīb al-Sharā'i'*, Vol. 4, (Beirut: Dār al-Ma'rifah, n.d.), at 68; al-Zuhaylī, n. 18, at 924.

²⁴ Al-Marghīnī, Burhan al-Dīn, *Al-Hidāyah*, Trans. Charles Hamilton, (Lahore: Premier Book House, 1982) at 139; Al-Kāsānī, *ibid*, at 67.

²⁵ Al-Zuhaylī, n. 18, at 924.

stay with the mother who is more compassionate and knows about his or her interests.²⁶

The rational of giving this right to choose is based on the needs of the growing child. Thus, it is presumed that the parent chosen by the child would be more kind and loving to him.²⁷ However, it is suggested that this right must be exercised with caution by taking into consideration that the basic interest of the child must be in conformity with the purpose of the custody itself.²⁸ For instance, when a boy chooses to stay with the father simply because he can have more time with his friends, the court can interfere by giving the custody to the mother who sends him to school every day.²⁹

The above discussion shows that the right to choose is not absolute. The welfare and interests of the child will be given preference as a child's judgment may also be discredited.

THE PRACTICE IN MALAYSIA

Malaysia ratified the Convention on the Rights of the Child (CRC) in 1995 to uphold its commitment to the protection and welfare of her children. As one of the ratifying countries, Malaysia generally upholds the right of every child to participation including a child's involvement in the family dispute resolution process. In custody and access proceedings, the Malaysian family laws expressly acknowledge child participation as one of the legislative criteria for determining the welfare and best interests of the child.

In general, Malaysia practices two separate legal systems in matters concerning family issues. Muslims' family issues are governed by the Islamic family laws, while for the non Muslims, their family matters are governed by the civil laws. Thus, disputed family matters are dealt with by two separate courts, namely, the Shariah court for the Muslims and the civil court for the non-Muslims. Whilst this is the background of

²⁶ Ibn Qudāmah, n. 18, at 144.

²⁷ *Ibid.*

²⁸ Mahdi Zahraa and Normi Abd al-Malek, n.18, at 166.

²⁹ Sayyid Sābiq, *Fiqh al-Sunnah* Vol. 2, (Beirut: Dār al-Kitāb al-‘Arabī n.d.), 303, as cited in Mahdi Zahraa and Normi ‘Abd al-Malek, at 313.

the Malaysian legal system, both laws concede child participation in custody disputes. For instance, the Law Reform (Marriage & Divorce) Act 1976 (LRA), which governs family matters of non-Muslims, states that:

- “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.”³⁰

Similar provisions can be found in the Islamic Family (Federal Territories) Act 1984 (Amendment 2006) (IFLA). Under both laws, consideration of the wishes of the child, besides being subjected to the paramount of welfare or best interest principle, is placed secondary to the wishes of the parents. The laws also provide that the child's wishes will be taken into consideration when the child is of the age to express an independent opinion. “Age to express an independent opinion” is not expressly defined in both laws but decisions in the majority of cases agree that the term connotes that the child must have reached a certain level of prudence or maturity where he or she can make sound judgments about his or her interests.

In determining whether or not the child is considered mature enough to express an independent opinion, the civil courts do not only rely on the age factor but also give weight to the level of understanding and most importantly whether the opinion given by the child is consonant with the child's best interests. For instance in *Chang Ah May @ Chong Chow Peng (f) v Francis Teh Thian Sar*,³¹ the court observed that it has been judicially accepted that the court will consider the child's opinions if the child is of the age of maturity to express its own wishes in order to determine what is best for the child's welfare and the court is justified to disregard his or her opinions if they are contrary to his or her long term interests. In this case, a ten-year-old girl was not considered by the court to have prudence or maturity to realise what is best for her own

³⁰ See section 88(2) of LRA; see also section 86(2) of IFLA.

³¹ [1991] 1 CLJ 309, at 312–313.

general interest as well as long term interests. In contrast, the judge in *Khoo Chee Nee v Lubin Chiew Pau Sing*,³² suggested that the age of twelve or thirteen years old is the age of having prudence to express an independent opinion regarding the child's own best interests. In this case, the court held that although the two children had attained the age of ten and seven respectively, they were still unable to determine what is best for their own interests and were easily persuaded by one of the parents. Therefore, in any dispute that involves a child of twelve years old, he or she is considered mature enough to express his or her wishes.

However, in *Manickam v Interahnee*,³³ the failure of the lower court to obtain the views of an eight year old child became one of the grounds of appeal. The Federal Court, however, held that a child of eight years old could not reasonably be expected to express any independent opinion on his preferences. Nevertheless, in *Re KO*,³⁴ a child, aged seven years and three months was given the opportunity to express his own wishes in which he expressed an equal liking to be with both of his parents. The judge also stressed that the degree of importance of a child's wishes in custody cases depended upon the extent to which, in the court's opinion, it coincides with his best interests.

Interestingly, in the high profile case of *Low Swee Siong v Tan Siew Siew*,³⁵ the child, aged eleven years was never consulted by the judge before she made her decision that the child be given to the mother. The judge was in favour of the mother to bond with the child since she was deprived of it for two years. In this case, the parents were married in 1999 and subsequently divorced in 2006. The custody of the child was given to the father. Two years later, the mother applied for and won custody and the father was given reasonable access. However, the child refused to be with her mother and insisted that she live with her father. When the case went for appeal, the Appeal court permitted the watching brief counsel for the Human Rights Commission of Malaysia (Suhakam) to address the court concerning the United Nations Convention on the Rights of the Child (CRC). The counsel pointed out the importance of

³² [1996] 1 AMR. 450.

³³ [1985] 1 MLJ 56.

³⁴ [1990] 1 MLJ 494.

³⁵ [2011] 2 MLJ 501.

adhering to Article 3 of the CRC which promotes the application of the principle of the best interests of the child in custody determination and Article 12 of CRC which states that parties should assure a child who was capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. He opined that the best interest of the child in this case cannot be actually served if the court primarily considers the right of the mother (to bond with the child) as opposed to the right of the child. Accordingly, the court did not seem to be interested in what the child wanted but merely what her parents wanted.

In considering the views of children in custody proceedings, the Malaysian courts primarily adhere to the method of judicial interviews, where children are interviewed in chambers without the presence of parents or lawyers representing them. In *Myriam v Ariff*,³⁶ the judge, before placing custody of an eight year old girl in her father, had interviewed her to determine whether it is in her best interests to be separated from her younger brother and mother. While In *Teh Eng Kim v Yew Peng Siong*,³⁷ the judge interviewed two of the children aged ten and fifteen where both expressed their wish to be with their mother who had migrated to Australia, despite the fact that they would live separately from their father. Similarly, in *M Saraswathi Devi K Govind v Keith Ian Monteiro*,³⁸ the judge confirmed that the interview procedure for ascertaining the child's wishes does play a vital role. In this case, the wish of a fourteen year old boy to live with his father was granted by the court as he was considered to have prudence and capacity to express an independent opinion.

As in the civil court, the Shariah court shall have regard to the views of the child in matters pertaining to custody or *Hadanah*³⁹ when

³⁶ [1971] 1 MLJ 265.

³⁷ [1977] 1 MLJ 234.

³⁸ [2006] 1 CLJ 303.

³⁹ In Islamic law, *Hadanah* carries the meaning of the act of educating and caring for someone who is unable to care for himself and who has not attained the discerning intellect like children of tender years and a lunatic. It is a process of care and upbringing of the minor child that covers management of his affairs and protection from harm. See Al-

the child attains the age where he or she can express an independent opinion.⁴⁰ This is clearly stated in section 86(2) (b) of IFLA. Besides this provision, IFLA also specifies in another provision that a child who has reached the age of *mumayyiz*, is given an option to choose either parent with whom he/she wants to live.⁴¹ From the precedent or available cases, this term can be equated with the meaning of 'age to express an independent opinion' as provided in section 86(2) (b) of IFLA.

The emphasis on the views of the child has been reflected in many Shariah court cases. In *Mohamed Koyamo v Sapura*,⁴² for example, the father claimed the custody of his three children, aged thirteen, twelve and nine years old respectively. The court considered all of them *mumayyiz* and therefore gave them opportunity to choose with whom they would like to stay with. All of them opted to be with the mother. Similarly, in *Maimunah bt Hamzah v Mohammad bin Embong*,⁴³ the mother claimed for the custody of her two children, aged fifteen and four years old respectively. The court allowed the first child to choose either parent to live with since he was considered to have attained the age of *mumayyiz* and hence capable of expressing his independent opinion regarding this matter. He preferred to live with the mother. The second child was also given to the mother after the court was satisfied that the mother had fulfilled all the conditions of *ahl-Hadanah* or custodian. Other cases which followed the same line of reasoning are *Marthias v Ahmad Sulaiman*⁴⁴ and *Wan Mohd Kamil bin Wan Abdul Ghani v Rosliza @ Mazwani bt Mohamed Mustafa*.⁴⁵ All these cases seem to show that the courts are more inclined towards the view of the Shafi'i which gives recognition to children in making choices upon attaining the age of *mumayyiz*.

Wahbah Zuhaili, *Al-Fiqh al-Islami wa Adillatuh* Vol. 4, (Damascus: Dar al-Fikr, 1989), Malay Trans. Ahmad Shahbari Salamon et. al., *Fiqh & Perundangan Islam*, Vol. VII, (Kuala Lumpur: Dewan Bahasa & Pustaka, 2001) at 898.

⁴⁰ See section 86(2)(b) of the IFLA.

⁴¹ Section 84(2) of IFLA.

⁴² [1407H] 5 JH (II) 352.

⁴³ (1426H) XX JH (II) 270.

⁴⁴ (1407H) V JH (II) 335.

⁴⁵ (1427H) XXI JH (I) 135.

The overwhelming recognition of the views of the child in custodial determination may have, to such an extent, superseded other conditions required for *Hadanah*. Examples are cases which involve the remarriage of the mother to some other person who is not related to the child. The classical Islamic law upholds the principle that the remarriage of the mother will disqualify her to the *Hadanah* if it affects the child's interests.⁴⁶ In *Wan Abdul Aziz v Siti Aishah*,⁴⁷ a nine year old girl was given the choice of whether she should stay with the father or remained with the mother in spite of the mother's remarriage. The girl preferred the mother as she had been living with her since the parents' divorce. Similar lines of judgment are found in *Mohammed v Azizah*,⁴⁸ and *Harun v Che Gayah*.⁴⁹

In case the child refuses to make a choice, the court will decide based on the best interests of the child. This happened in *Nooranita bte Kamaruddin v Faiez bin Yeop Ahmad*.⁵⁰ In this case, the mother appealed against the court's decision granting custody of her six year old daughter to the husband because of her remarriage. The appeal was unfortunately heard only four years later when the child had attained the age of ten years and had been receiving proper education and was living comfortably with the father. The girl was then given an option to express her preference either to stay with the father or mother but was not able to decide for herself. Therefore, the court gave her custody to the father for the interests of the child.

The above discussion proves that the importance of obtaining the views of children in custody determination depends on whether or not it is for their benefit. It has been argued that the rationale of giving the right to the child to choose is based on the need of the child when he or she is getting older.⁵¹ However, this right must be exercised with caution

⁴⁶ Based on a hadith of the Prophet "You have more right to him as long as you do not marry." Sunan Abū Dawūd, *Kitāb al-Ṭalaq*, at 604-605.

⁴⁷ (1977) 1 *JH* 50.

⁴⁸ (1979) 1 *JH* 79.

⁴⁹ [1980] 1 *JH* (I) 66.

⁵⁰ [1989] 2 *MLJ* cxxiv; (1990) 7 *JH* 52.

⁵¹ Najibah Mohd Zin, "How the Best Interests of the Child is Best Served in Islamic Law with Special Reference to its Application in the Malaysian Shariah Court," *IKIM LJ* 9, No.1 (2005): at 338.

by taking into consideration that the basic interests of the child are in conformity with the purpose of the custody itself.⁵²

POSITION IN ENGLAND

In England and Wales, consideration of a child's wishes is the first criteria listed in the welfare checklist of the Children Act 1989 (hereinafter referred to as CA 1989).⁵³ Nevertheless, it does not mean that the court must at all times consider it first in contrast to other criteria when making decisions pertaining to the best interests of the child. The checklist does not ascribe a weight to any particular aspect listed in it. It is a non-exhaustive list created to assist the court in ascertaining the child's welfare.

Under the said provision, the court is required to ascertain the wishes and feelings of the child concerned in light of his age and understanding. It was argued that the term to 'ascertain the wishes and feelings of the child' is much wider than the relevant article⁵⁴ of the UNCRC, which is only confined to 'views of the child.'⁵⁵ It further argues that the provision implies that the court may also consider the feelings of very young children as they have discernable feelings even if they cannot yet express their view.⁵⁶ This is especially true in cases of domestic violence. In *Re G (a child) (domestic violence: direct contact)*,⁵⁷ the father had been responsible for the death of the child's mother. He sought contact with the child while he was in prison but was refused by the court. The judge noted that generally a three year old child could not exercise any option; however, in this case the view of such a child was exceptionally accepted by the court as the child was traumatised by the events that occurred, and suffered from nightmares.

⁵² Normi Abdul Malek, , "Malaysian Law of Custody: Comparative Study with Islamic, English and Scottish Laws," (PhD diss, Glasgow Caledonian University, 1997), at 25.

⁵³ See section 1(3)(a) of the CA 1989.

⁵⁴ See Article 12 of the UNCRC.

⁵⁵ Nigel Lowe & Gillian Douglass, *Bromley's Family Law*, 9th Ed. (London: Butterworth, 1998) at 465.

⁵⁶ *Ibid.*

⁵⁷ [2001] 2 F.C.R. 134, Fam. Div.

Thus, the order for contact must be refused. It seems that judges are more willing to consider the wishes and feelings of young children if the case is extremely exceptional which may jeopardise the future interests of the child. Judges normally give more weight to the wishes of older children as "they often have an appreciation of their own situation which is worthy of consideration by the adults, particularly the courts."⁵⁸

The CA 1989 does not prescribe any standard procedure in ascertaining the wishes of the child. Judges may either interview the child in private (although it is questionable how far this is likely to produce reliable information) or rely on the report made by the welfare officer. In private law proceedings, such as in custody disputes, the report may be provided by an appointed children and family reporter.⁵⁹ Although welfare reports serve a crucial function in providing the court an independent assessment of the facts and finding out the wishes and feelings of the child, they are not available in all contested cases. This is based on the fact that the English Law Commission did not recommend the court to be under the duty to order a report in every case, because this would cause unnecessary delays in some cases and would strain limited sources.⁶⁰

The attitude of the courts in giving weight to children's wishes varies, in part reflecting the age of the child, level of maturity to express such wishes; whether or not such wishes are a result of influence of either parent or that the wishes are contrary to the child's long-term interests. In *Re M (Contact: Welfare Test)*,⁶¹ two children aged seven and eight had lived with their father for over five years following the separation of their parents. Contact with their mother broke down but a few months later she sought a contact order. The children were given

⁵⁸ Per Butler Sloss J. in *Re P (A Minor) (Education)* [1992] 1FLR 316, CA, at 321.

⁵⁹ Section 7(1) of the CA 1989 states that whenever a court is considering any question with respect to a child under the CA 1989, it may ask an "officer of the service or a local authority to report 'on such matters relating to the welfare of that child as are required to be dealt with in the report.'"

⁶⁰ *Law Commission Report on Guardianship & Custody*, No. 172, (TSO) 1988, Vol. 14, Professional Books, London, 1988.

⁶¹ [1995] 1 F.L.R. 274, C.A.

the opportunity to express their wishes. Both the lower court and the Appeal Court rejected the mother's claims since the children refused to have contact with her. The lower court judge also noted that ordering contact against their wishes would be harmful to their interests.

Sometimes the court may not necessarily follow the child's wishes as it is against his or her long term interests. In *Re M (Family Proceedings: Affidavits)*,⁶² a twelve year old girl wished to stay with her father, but was refused by the court on the basis that it was contrary to her long-term interest. The decision was based on the welfare report stating that the girl's long term interest would be better governed by her remaining with her mother. A similar conclusion was made in *Re M (Child's Upbringing)*,⁶³ where the Court of Appeal ordered immediate return of a ten-year-old child, against his wishes, to his birth parents in South Africa on the basis that it is in his best interests to be brought up by his natural parents, and by the need to preserve his cultural heritage as a Zulu child. In this case, it seems that the preservation of the child's origin is viewed by the court as the child's long term interests.

POSITION IN AUSTRALIA

The situation in Australia is similar to the practice in the United Kingdom. Under the Family Law Act 1975 (Act No. 53 as amended)⁶⁴ (hereinafter referred to as FLA), the court is to consider any wishes expressed by the child, based on the child's maturity or level of understanding.⁶⁵ The consideration of the child's view is however restricted to parenting orders only⁶⁶ following the restriction on the application of the paramount of best interests principle to these orders. In addition, the FLA clearly stipulates that the court may not force any child to express his or her

⁶² [1995] 2 F.L.R. 100, C.A.

⁶³ [1996] 2 F.L.R. 441, C.A.

⁶⁴ The latest amendment of the Act was made in 2006 by the Family Law Amendment (Shared Parental Responsibility) Act. See Geoff Monahan & Lisa Young, *Family Law in Australia*, (n.p: Butterworth Lexis Nexis, 6th edn., 2006) at 232.

⁶⁵ See section 60CC(3)(a) of the FLA.

⁶⁶ See section 60CD(1) of the FLA.

views.⁶⁷ This provision is seen as a protection to the child's right in giving his or her own views without being subjected to any unnecessary influence from the court or parents.

As observed in some cases, the wishes of children are not decisive. Nonetheless, the court must give appropriate and careful consideration to their expressed wishes. Any departure from considering the child's wishes would require the court to establish valid reasons for doing so. For example, in *Harrison and Woolard*,⁶⁸ an appeal was allowed on the ground that the trial judge had given insufficient weight to the wishes of the children, aged seven and eight. The Appeal Court held that the wishes of children are important and the proper and realistic weight should be attached to any wishes expressed by children. The judgement in this case is a strong indication of the significant importance being attached to children's wishes, subject always to the overriding consideration of the paramount of welfare principle.

The principle enunciated in the above case was adopted in *R and R: Children's Wishes*,⁶⁹ *ZN v YH and Children Representative*⁷⁰ and *Bolitho v Cohen*.⁷¹ Nevertheless, in *R and R: Children's Wishes*, there was an attempt to argue that the principles in *Harrison's* case required a judge to act on a child's validly held wishes, but this was rejected though it was confirmed that good reasons should be advanced for not doing so.

In ascertaining the wishes of the child, the FLA provides that the judge may either interview the particular child personally⁷² or have regard to views of children contained in reports given by an appointed family consultant⁷³ or have regard to the children's views which was obtained through an independent lawyer representing them.⁷⁴

⁶⁷ See section 60CE of the FLA.

⁶⁸ (1995) 18 Fam. LR 788.

⁶⁹ (2000) 25 Fam. LR 712.

⁷⁰ (2002) 29 Fam LR 20.

⁷¹ (2005) 33 Fam. LR 471.

⁷² See Section 60 CD(2) of the FLA.

⁷³ See section 62G(2) and (3A) of the FLA. 'Family consultants' are child counsellors or consultants or welfare officers who are required to ascertain the child's views and include the views in the report.

⁷⁴ Paragraph 68LA(5)(b) requires the independent children's lawyer for the child to ensure that the child's views are fully put before the court.

Nevertheless, it was argued that the practice of interviews by judges have been discouraged by the Family Court since the enactment of the former FLA, because the judges have no special skill or training in conducting interviews and the child may feel intimidated.⁷⁵ In practice, the use of reports by family consultants and child representatives or independent lawyers is the most frequently used method of ascertaining the child's wishes,⁷⁶ particularly after the formation of a counselling service as part of the Family Court since 1976 and the establishment of Children Cases Programme in 2006.⁷⁷

CONCLUSION

The child's right to be heard in custody proceedings is emerging as a function of the child's entitlement to basic human rights including respect, dignity and his or her gradual progression towards autonomy. Additionally, without the child's perspective, judges may have little ability to understand the practical or emotional impacts on a child of a given custody or access order. In considering the child's view, no stipulated age can be prescribed to determine the appropriate age of maturity to express an independent opinion. What is important is the level of understanding of the children about their general and future interests in the custody decision; whether their wish is in their best interests. Unlike England and Australia, the

⁷⁵ CJ Richard Chisholm in *ZN v YH and Children Representative* (2002) 29 Fam LR 20. See also Geoff Monahan & Lisa Young, n. 64, at 232.

⁷⁶ See for example in *R and R: Children's Wishes* (2000) 25 Fam. LR 712, the court relied on the interview report made by the court's counsellor and in *Bolitho v Cohen* (2005) 33 Fam. LR 471, the children were interviewed by an independent child expert.

⁷⁷ The Children Cases Programme is a new less-adversarial way of conducting parenting cases where the concentration is on the children's needs and interests, rather than the parents' disputes and issues. The child's view will be ascertained by the child's representative who is an independent lawyer representing the child and the person will advise the court of the child's stated position. See Diana Bryant, "The Role of the Family Court in Promoting Child-Centred Practice," *AJFL* 20 (2006): 30-31.

process of obtaining children's views in Malaysia largely depends on the legislative *in camera* interviews. Thus, it is hoped that Malaysia will be able to adopt other various processes that have been implemented by other countries in ensuring that children's full participation in custody proceedings will undoubtedly serve their best interests.