

## **Application of Shared Parenting in Malaysia: Appraising the Australian Experience**

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### **ABSTRACT**

Internationally, shared parenting has been highlighted and agreed to be the best method in protecting the welfare of the child. The religion of Islam also promotes the concept of shared parenting to ensure that the welfare of the child is well protected. In Malaysia, legislation on child custody emphasises that the welfare of the child shall be given paramount consideration but there are no provisions on shared parenting and specific guidelines on its application. An amendment was made to the laws to include a provision on equal parental rights but it does not directly relate to the principle of shared parenting. The vagueness of the law and the lack of proper guidelines in relation to shared parenting open the doors for the courts to render inconsistent decisions in determining custodial rights, and this often results in decisions in favour of sole custody. The absence of specific laws on shared parenting has also caused difficulties for parents in cooperating for the sake of their children. They tend to stress on their conflicts and fight for their rights rather than focus on the welfare of the children. This paper seeks to discuss the current position of shared parenting after marital separation in Malaysia. As Malaysia practises a dual legal system, this paper will also examine the suitability of applying the shared parenting principle in both systems. A brief comparative review will also be made of Australian law and policies, which are more advanced on the subject of shared parenting.

*Keywords:* Child custody, welfare of the child, shared parenting, Malaysian law, Australian law

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### **INTRODUCTION**

Historically, the father has the highest authority over his family as he is the breadwinner of the family and his property will be inherited by his children. His wife

comes into inheritance under the concept of unity, where in the event of separation, the wife cannot claim anything and the ties between her and the children are loosened as she has no legal standing anymore, thereby breaking the concept of unity. So, her role is less important and less appreciated. It can be seen that the father is obliged to maintain, protect and educate children. Roman culture is even worse as the father is given absolute decisive power over the family, even over their life and death (Moloney, 2009).

Then, in the late 1990s, maternal behaviour was considered paramount in child development and fathers were often thought to have small significance in parenting as children across the world spent most of their time with their mothers. Some argued that fathers contributed little to children's development except for their economic support. (Sotomayor-Peterson, Cabeza De Baca, Figueredo, & Smith-Castro, 2013) and others believed that fathers were not genetically fit for parenting. Fathers then started to get involved in getting custody of their children as they believed that they could raise their children on their own (Dyer, Day, & Brigham, 2014).

Essentially, shared parenting is the purposeful practice of two parents sharing equally in the domain of child raising, housework, breadwinning and time for themselves. When both parents are fully competent in all four domains, they will find themselves in a harmonious situation without having to inflict negative effects on the children (Vachon & Vachon, 2010). Shared parenting is a kind of arrangement

made by parents that can also be called as and associated with joint physical custody, joint legal custody, time sharing and shared residence (Roslina, 2010). Some people associate shared parenting with equal shared parental responsibility and shared care.

However, shared parenting is different in terms of visitation right. In sole custody cases, visitation right is always given to one parent. In most cases, the court will award the non-resident parent reasonable visitation right and the resident parent must always keep the non-resident parent updated on the progress and development of the children (Sunthari, 2012) but in reality, the resident parent tends to abuse this power by interfering with the visitation right awarded to the non-resident parent. Constant interference creates tension and frustration for the non-resident parent, often resulting in lack of contact with the children (Sano, Richards, & Zvonkovic, 2008). Interference can be in terms of disallowing the children from seeing the non-resident parent, offering or an inappropriate visitation schedule, among others.

Shared parenting arrangement is viewed as a good alternative for the children in the event of divorce because it encourages children to know that both parents are actively involved and share responsibility in their upbringing (Zaleha Kamaruddin, 2011). Children's right to know and love both parents is protected under the shared custody system but not under the 'sole custody and visitation' system. Therefore, children adjust much better to their parents' separation under the shared custody system. Many

countries have opted the shared parenting system; hence, judges and legislators should move quickly to encourage this option in the interest of children, non-custodial parents, grandparents and custodial parents (Spruijt & Duindam, 2008)

### **Position of Shared Parenting under International Law**

Internationally, many organisations and societies are aware of the importance of protecting the welfare of the child and the principle of 'the best interests of the child' has been recognised as a significant part in matters pertaining to children. The Convention on the Rights of the Child 1989 is the first legally binding international instrument to ensure that the world recognises that children have human rights. Malaysia ratified this Convention in 1995. Article 3 stresses that the welfare of the child must be a primary consideration in all cases concerning children. Article 18 clearly emphasises the importance of both parents as being equally responsible for the upbringing of their children (Azizah, 2011).

In addition, the South Asian Association for Regional Cooperation (SAARC) Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia is established as a medium to facilitate and help in the development and protection of the full potential of South Asian children with understanding of all relevant rights, duties and responsibilities. Article 3 of the said Convention affirms that the Convention should be referred to as a guiding force by

the state parties relating to child welfare and that they should uphold 'the best interests of the child' as an important principle.

Furthermore, the first international interdisciplinary organisation of divorce scholars and family practitioners, the International Council on Shared Parenting, has come to a consensus that sole custody does not really uphold the principle of the best interest of the child. Instead, shared parenting is the best arrangement for the development of the child. The amount of shared parenting time considered as the best is a minimum of one third the time with each parent up to equal (50-50) parenting time. Thus, shared parenting encompasses parental responsibilities as well as parental rights over the children.

Another instance of international recognition on shared parenting is the African Charter on The Rights and Welfare of The Child. The unique factors of the African socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflict, exploitation and hunger make people realise that African children need to be protected and they need to live in a healthy surrounding to ensure sound development of their mental and physical well-being. Article 4 of the Charter provides that the best interests of the child shall be the primary consideration in all actions concerning the child undertaken by any person or authority. In addition, in all judicial and administrative proceedings, children shall be given rights to express their views and the authority shall take their views into consideration.

### **Position of Shared Parenting under Islamic Law**

Generally in Islam, the concept of shared parenting is illustrated in the Quran in *surah At-Talaq* verse 6, where Allah says, "Take mutual counsel together, according to what is just and reasonable." Islam advises parents to cooperate and come to mutual agreement on what is best for their children. Islam will support whatever decisions they make if those decisions benefit the children (Fatma & Sayyid, 2001). However, in the event of divorce, children often bear the most painful consequences. Islamic law takes their needs into account and ensures that they are cared for (Huda, 2013). In the Quran (*Al-Baqarah*: 233), Allah advises the husband and wife to consult each other in a fair manner regarding their children's future after divorce.

Although Islamic law does not directly mention shared parenting or equal parental responsibility, it can be understood that the parents must have a good agreement between themselves concerning the children's well-being. This principle was long established by jurists almost 900 years ago. The ultimate purpose of *hadhanah* (custody) is to ensure that the welfare of the child is protected.

### **Malaysia's Perspective on Shared Parenting**

Malaysia practises a dual legal system of family laws, in which civil law governs non-Muslims while *Sharia* law governs Muslims. The laws that govern the guardianship and custody of children for non-Muslims are the

Guardianship of Infant Act 1961 (GIA 1976) and the Law Reform (Marriage & Divorce) Act 1976 (LRA 1976). These statutes are based on English law, while common law cases are also frequently referred to by judges. On the other hand, laws that govern Muslims are the Islamic Family Law Enactment of the States and Islamic Family Law (Federal Territories) Act 1984 (IFLA). An amendment was made to the GIA 1961 in 1998 to include a provision to provide equal parental rights to a child's custody, upbringing and administration of property. However, it only refers to "parental rights" and not "parental responsibility" (Roslina, 2010). Therefore, it appears that parents have more rights than responsibilities over their children (Sunthari, 2012).

Although courts grant joint custody to parents and order parents to be equally responsible for their children, it can be seen that physical custody is given to one parent and in most cases, it ends up with the non-custodial parent only enjoying rights of visitation but without opportunity to make decisions for the children. For instance, in *Mohandass a/l Viran v Annuradha a/p Turasamy* [2013] MLJU 78, the Civil Court granted joint custody to the parents and ordered them to be equally responsible for the child's expenses, which included education, health and her other needs, but the judgement did not seem to cater for the protection of the welfare of the child as a whole because the "custody, care and control" was given to the mother. It seemed that the mother would have greater attachment to the child compared to the

father. This is similar to the case of *Jennifer Patricia Thomas v Calvin Martin Victoria David* [2005] 7 CLJ 133, in which the Civil Court granted joint guardianship to both parents but the daily custody, care and control of the children remained with the mother.

As for Muslims, IFLA 1984 and the Islamic Family Law Enactments of the States do not have any provisions on shared parenting. The laws are silent on the concept of equal shared parenting or shared parental responsibility but they have placed the principle of welfare or best interests of the child as the central theme of child custody arrangements. Despite this, the laws generally retain the traditional pattern of granting sole custody in which the parent who is considered better and more fit in the upbringing of the child will be awarded the custody of the child. Usually, the mother is presumed to be the best person entitled to the custody of the child, particularly if the child is still an infant (Normi, 2001).

In *Sharia* courts, the judges are inclined to grant sole custody as there are not many joint custody cases being tried. However, although some judges do decide for joint custody, there is no further explanation as to why courts grant the order and how they assess the merits of joint custody. In *Hasanah bt Abdullah v Ali bin Muda* (1999) 2 JH, the *Sharia* Court ordered the parental agreement to be altered, besides reducing the amount of contact with the father as the court viewed that the child's well-being would be affected if the child's place of residence were frequently changed.

In the case of *Noor Kamar bt Mohd Noor v Mohd Rizal bin Zainal* (Case no. 14700-028-0145-2013, 2013, September 2, Unreported), the *Sharia* Court ordered that custody be given to the mother while the father was awarded visitation rights only. It is common for the courts to give one parent the right for custody and the other parent visitation rights only as the courts and the parties involved do not want to encounter any further complications later on.

However, in certain cases, the court grants joint custody to parents but this judgement is rarely rendered. Mostly, this judgement is taken in cases where the parents are cooperative and able to come to an agreement for the benefit of the children as in the case of *Siti Nabilla bt Ismail v Mohd Faisal Bin Wahid @ Mohamad* (Case no. 14200-028-0326-2012, 2012, April 23, Unreported), when the *Sharia* Court did not hesitate to grant joint custody as both parents were in mutual agreement as to the arrangement of the children's lives and the parents were not in a high-conflict relationship.

The above cases show the inconsistency of decisions, be it in the civil court or *Sharia* court, due to the absence of proper laws and guidelines on shared parenting or joint custody. Lack of uniformity in practice by the courts in dealing with family and children's matters as well as lack of detailed explanation on joint custody somehow affects the child in custody disputes. This lack occurs in both courts but in the civil court, the judges furnish an explanation on the joint custody order, but in the *Sharia*

court, the order is issued mostly without any reasons given for the judgement. In addition, cultural sensitivity is believed to be the reason for the difficulty in solving problems relating to the best interest of the child (Rojanah & Najibah, 2011).

Civil and *Sharia* courts in Malaysia normally prefer sole-custody arrangements instead of joint-custody arrangements. Thus, under sole custody, the courts normally award the residence of the child and parental responsibility and care for the child after divorce to the mother and visitation rights to the father. Furthermore, both civil and *Sharia* laws indicate that the party awarded residence will have the final say on the education and upbringing of the child.

Civil and *Sharia* laws essentially provide that the interests or the welfare of the child shall be of paramount consideration and not based on the interests of the disputing parties (Normi, 2001). Shared parenting is not a very common concept in Malaysia, where laws emphasise more on sole custody. Nevertheless, sole custody will lead to problems such as reducing contact between the child and the non-custodial parent, non-fulfilment of child support obligations and denial of contact between the child and the non-custodial parent (Zaleha Kamaruddin, 2011).

### **Australian Perspective on Shared Parenting**

In Australia, there was a significant amendment to the *Family Law Act 1975* and as a result, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*

came into the picture. The amendment encourages separated parents, if safe to do so, to continue to take a significant role in their children's lives, in which parents cooperate and agree on parenting arrangements outside the legal system (Fehlberg, Millward, & Campo, 2009).

Under Australia's Family Law Amendment (Shared Parental Responsibility) Act 2006, the court begins with the principle of equal division of custody. Although the parents do not live together, they still want a relationship with their children and share legal custody (Smyth, Chisholm, Rodgers, & Son, 2014). The presumption of shared parenting may be rebutted by evidence if the court is satisfied that it would not be in the best interests of the child for the parents to have equal shared parental responsibility for the child (Skelton, 2012).

It can be seen that after the amendment, the courts are ready and keen to support the concept of shared parenting; for instance in *Spain v Spain* [2007] FamCA 883, the court granted an order of equal shared responsibility as it viewed that it would be in the best interests of the child. This is in spite of the fact that there was high conflict between the parents regarding the prior parenting arrangements. In *Waring & Boswell* [2007] FamCA 597, the court granted equal shared responsibility with the parents and considered that spending equal amount of time with each parent is reasonably practical and could serve the child's best interests because the father lived in reasonable proximity with the mother who had cared for the child since their separation.



The Family Court judge or federal magistrate should presume that it is in the best interests of the child for the child's parents to have 'equal shared parental responsibility' except where there are 'reasonable' grounds to indicate a history of family violence or child abuse. This requires the court to consider whether shared parenting is reasonable to be practised (Bagshaw, 2008).

Although the parents do not live together, they still want a relationship with their children and share legal custody (Smyth, Chisholm, Rodgers, & Son, 2014). Shared parenting following separation is recommended rather than a court action being needed for contact between children and either parent to be maintained. Consideration could be given to developing a satisfactory form of a legal default position whereby child-parent contact continues to be shared unless there is valid reason for the contrary being ordered (Bruch, 2002).

## CONCLUSION

Shared parenting is found to work best when parents are cooperative, child-focussed and flexible, have reached agreement without legal assistance and have exercised their responsibilities jointly and co-operatively before their separation, in addition to taking an active caregiving role.

Children's welfare is well-protected if the parents are in minimal conflict and have good cooperation when it comes to matters concerning their children. Policy makers should take serious action in handling issues on parenting arrangement after divorce by

having a proper parenting plan so that the parents' responsibility comes first instead of their rights on the children.

It is apparent that Malaysian legislation has no provisions on shared parenting, particularly on equal parental responsibility. They only govern matters concerning custody of the child, of which most of the provisions refer to parental rights over the children. It is observed that, in order for Malaysia to acquire a comprehensive law, local laws must be improved by setting a standardised law to govern this matter, comparable to the position in Australia. Therefore, there is a need to review and improve the provisions in the existing law and any loopholes in the law must be filled as soon as possible.

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