DEFINING THE WELFARE OF THE CHILD IN CONTESTED CUSTODY CASES UNDER MALAYSIAN LAW*

It is commonplace that the standard for determining custody decisions in most jurisdictions is that of "the welfare of the child" or "the best interests of the child." But too often it seems that welfare as a concept is an empty vessel into which the judge pours, however unconsciously, his own interpretations, prejudices, and personal experiences. Despite attempts to define welfare the concept remains elusive, and dissatisfaction with the legal standard remains a perennial problem. Efforts in providing content to the concept have recently been concentrated on interdisciplinary collaboration between child psychologists and lawyers. The purpose of this article is to consider whether such an approach could aid the Malaysian courts reaching decisions in custody cases, and the extent to which the courts already interpret welfare in line with the precepts laid down by the psychologists.

The Guardianship of Infants Act 1961 lays down the standard for determining custody cases in Peninsular Malaysia. Section 11 requires that the Court or Judge exercising powers to determine custody:

> "shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be."

Sabah law contains an idential provision, and the law of both jurisdictions will be discussed as Malaysian law.[1] Singapore[1a]

*I am grateful to Professor Ahmad Ibrahim, Dean of the Faculty of Law University of Malaya for writing an addendum to this article (see page 61). The addendum deals with a number of decisions in the Syariah Courts in Malaysia. See also his article "Custody of Muslim Infants" in [1977] JMCL 19.

[1] North Borneo Guardianship of Infants Ordinance, (Cap. 54).

[1a] The Guardianship of Infants Act, (Cap. 22 of the Revised Edition, 1970).

and Sarawak,[2] on the other hand, use the wording of the English legislation, the Guardianship of Minors Act 1971, which is a consolidation of earlier legislation and provides that welfare is to be regarded as the "first and paramount consideration" in the determination of child custody disputes.[3] The use of these words in English statute law goes back to 1925,[4] so there are a large number of precedent cases on which the Singapore courts may draw on the grounds that the statutes are *in pari materiae.*

The Malaysian courts also have looked to English precedent for guidance in the interpretation of section 11 of the Guardianship of Infants Act 1961. But are they correct in so doing? Two reasons for looking to English law and practice can be adduced. Nevertheless, it is submitted that the English cases have no authority in the interpretation of section 11 and that the different wording of the two Acts is crucial to the judicial determination of welfare of the child in either jurisdiction.

The first reason the Malaysian courts give for looking to English decisions in custody cases is contained in section 27 of the Civil Law Act 1956 (which re-enacted section 6(1) of the Civil Law Enactment 1937), and provides:

> "In all cases relating to the custody and control of infants the law to be administered shall be the same as would have

[2]Guardianship of Infants Ordinance (Cap. 93), (Sarawak).

[3]The Guardianship of Minors Act 1971 (England and Wales) repealed the Guardianship of Infants Acts 1886 and 1925 and consolidated their provisions into one Act. It made no changes in the substantive law. Section 1 provides:

"Where in any proceedings before any court . . .

(a) the custody or upbringing of a minor ; or

(b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof.

is in question, the court in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

[4]The Guardianship of Infants Act 1925 gave statutory effect to the rule that in any dispute relating to a child that the court must regard its welfare as the first and paramount consideration. However, equity had intervened earlier in *R. v. Gyngall* [1893] 2 Q.B. 232 to mitigate the father's absolute right to custody in the interests of the welfare of the child.

> been administered in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by written law."

However, the enactment of the Guardianship of Infants Act in 1961 renders obsolete the direct application of "like cases in England", provision now having been made by the written law of Malaysia for custody and control of legitimate infants.[4a] Reliance on the Civil Law Act in reasoning creates judicial error.[5] Thus the role of English cases must be limited to providing assistance in the interpretation of statutes *in pari materiae*. This is the second reason for basing decisions on custody in Malaysian law on English precedent.

The Malaysian courts do not appear to attach any importance to the different wording of the 1961 Act, as compared to the English legislation.[6] Yet the two statutes can hardly be said to be *in pari materiae*. For the Malaysian court or judge is limited by the language of section 11 to taking account of two matters only: the welfare of the child, which is primary, and the wishes of the parents, which are secondary. The language used in section 11 does not permit other matters to be taken into account. Thus the court's discretion is limited, although it may reach its own conclusions on what constitutes welfare. English courts, on the other hand, in interpreting the words "first and paramount consideration" have held that this means that welfare is not the sole consideration, and that other considerations may be taken into account apart from the child's welfare. Here it does seem that the different language contained in the two Acts makes a material difference in their interpretation. There-

[4a] In *Re Balasingam & Paravathy, Infants* [1970] 2 M.L.J. 74, it was held by the Kuala Lumpur High Court that the Guardianship of Infants Act does not apply to illegitimate children. Therefore, in such cases English law in force in 1956 will apply.

[5] This error was made in *Kok Yoong Heong* v. *Choong Thean Sang*, [1976] 1 M.L.J. 292; and in *Chuah Thye Peng & Anor* v. *Kuan Huan Oong*, [1978] 2 M.L.J. 217.

[6] The difference in language was referred to by Ong Hock Sim, F.J. in his dissenting opinion in *Loh Kon Fah* v. *Lee Moy Lan*, [1976] 2 M.L.J. 199 at p. 203. But ironically, this opinion was based on two English precedents which have no authority in the interpretation of section 11 of the Guardianship of Infants Act 1961, since they clearly relate to the interpretation of the different English Act.

fore, those Malaysian cases in which "other considerations", outside the welfare of the child and the wishes of the parents, have been borne in mind in arriving at a custody decision have been wrongly decided. This point will be elaborated in the course of discussion below.[7]

THE MALAYSIAN AND THE ENGLISH CASES COMPARED

Discretion is conferred on the decision-maker by the use of the word "welfare" in both the Malaysian and the English legislation. But a form of words such as "paramount consideration" which permits the taking account of other considerations than welfare appears to confer a wider discretion on the English judge than that conferred on the Malaysian judge who is limited to the child's welfare and the parent's wishes. Yet it is interesting to note that the English courts have not taken great advantage of this power to look at other considerations, and only two such have been established. These are the conduct of the parties, and orders of courts outside the jurisdiction. The question of conduct provides a good example of the two possible approaches. In *Re L., (infants),* the English Court of Appeal gave care and control of two girls aged six and four years to their father, taking the view that the mother had broken up the home by going to live with another man, and thus causing the contest over custody to arise. Lord Denning, M.R. stated that although "as a general rule it is better for little girls to be brought up by their mother," simple justice between the parties demanded that the father should have custody. "Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked."[9] Thus conduct was

[7] An example of a case in which "other consideration" than welfare and the wishes of the child have been taken into account is, *Chuah Thye Peng & Anor. v. Kuan Huah Oong,* [1978] 2 M.L.J. 217. In *J. v. C.* [1970] A.C. 688 views were expressed in the House of Lords, at 697 and at 713–4, that all other factors are to be considered only in order to determine welfare.

[8] [1962] 3 All E.R. 1, C.A.

[9] *Ibid.*, at p. 4. In *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 M.L.J. 51, the Singapore Court of Appeal looked to the conduct of the parents as a factor to be taken into consideration.

weighed against welfare, and was not subordinated to it. Megarry, J. in *Re F. (an infant)*[10] applied the earlier decision of the Court of Appeal, and formulated the process of determining welfare as follows:

> "The welfare of the ward is to be the pre-eminent or superior consideration; but that does not mean that I should leave out of account the conduct of the parties . . . the court should consider and weigh all the circumstances that are of any relevance. Quite apart from authority, the word 'first' in the section implies that there are other circumstances that are to be considered in this process of consideration and weighing."[11]

Despite this formulation, care and control was awarded to the mother who was responsible for the breakdown of the marriage. Lately however, there has been a tendency for the English courts to attempt to confine questions of behaviour to ascertaining the parenting abilities of the parties. On this approach justice between the parties is irrelevant, and conduct as an issue only arises in relation to the determination of welfare.[12] However, the authority of these cases is doubtful, as the views are directly in conflict with the *ratio decidendi* of *Re L.*[13]

In Malaysian custody cases the relevance of the conduct of the parties must be confined to the determination of welfare, and to the regard of the court for the wishes of the parents. It may be that the wishes of a parent who is blameless in the breakdown of the marriage ought to be placed higher than the wishes of the parent who is at fault. But no such decision has yet been made. Conduct was confined to welfare by Raja Azlan

[10] [1969] 2 All E.R. 766.

[11] *Ibid.*, at pp. 767–768.

[12] In *Re D.*, [1973] Fam. 179, at p. 199, Bagnall, J. regarded the question of conduct as solely relevant to the child's welfare, and in *H.* v. *H.* and C., [1969] 1 All E.R. 262 at p. 263, Salmon, L.J., in the Court of Appeal said that it was of no consequence which parent was responsible for the breakdown of the marriage.

[13] [1962] 3 All E.R. 1, C.A. But see *S* v. *S* [1976] 6 Family Law 148.

Shah, F.J. in *Teh Eng Kim* v. *Yew Peng Siong*[14] where he stated:

> "criticisms of the conduct of parents because they transgressed conventional moral code also have no place in custody proceedings except in as far as they reflect upon the parent's fitness to take charge of the children."[15]

This seems to be the correct approach and the views expressed by Arulanandom, J. in *Marina Nabulandran* v. *Appiah Nabulandran & Anor.*[16] appear to be consonant with this approach:

> "Counsel for the petitioner urged on me that a guilty party should not be shown any consideration at all. This may have been valid in the dark ages when adulterers were even stoned and adulteresses put to death. In the enlightened years of today this court does not hold that a spouse who commits a matrimonial offence whether the spouse is male of female forfeits all his legal, civil and human rights. A father has as much right to custody of a child as the mother, subject to consideration for the welfare of the child. Spouses who commit matrimonial offences expose themselves to divorce proceedings and there it ends and should end."[17]

DISCRETION

Discretion occurs "whenever the effective limits of the (decision maker's) power leave him free to make a choice among possible courses of action or inaction."[18] This choice,

[14] [1977] 1 M.L.J. 234.

[15] *Ibid.*, at p. 239.

[16] [1976] 1 M.L.J. 137. The judge's decision on custody was reversed on appeal, but no written judgement was given.

[17] *Ibid.*, at p. 138.

[18] Culp Davis,K., *Discretionary Justice, A Preliminary Inquiry*, 1971.

and the freedom it entails for the judge, is a source of uneasiness for lawyers. One reason for suspicion of discretion is the unpredictability of the decision. Where a decision can be justified by a precise rule then there is not only predictability but also acceptance of the decision by the parties. Discretion, on the other hand, may have the appearance of arbitrariness. However, the justification for discretion is that in some areas of the law, especially where individual human problems are being dealt with, there must be flexibility in providing individualised justice. As Wexler observes, in certain legal fields "like punishment, child custody, prison, education, medical care, disability, insurance, welfare, matrimonial problems, etc. . . . one cannot define the cases covered by the rules carefully enough to anticipate the variety of cases that will arise."[19]

Given that there are advantages to conferring discretion on the decision-maker in certain areas of the law, then how is discretion to be controlled? Freedom and flexibility must not become arbitrary power. The principal method of control developed by the law is that of review on appeal. This prevents discretion from being absolute and is meant to ensure justice to the parties. In cases of child custody it is clear that the judge has considerable discretion in defining the welfare of the child in Malaysian law, but this is limited by appellate review. Non-reviewability is not an ingredient of discretion.

In recent years the Federal Court has considered its powers to review the decision in custody cases on two occasions. In *Loh Kon Fah* v. *Lee Moy Lan*,[20] Gill, C.J. considered all the factors on which the trial judge had based his decision as to the best interests and welfare of the children and concluded:

> "Speaking for myself, it was impossible for me to say that the learned judge had either given weight to irrelevant or unproved matters or omitted to take into account matters that were relevant. Nor was I in a position to say that the

[19] Wexler, S., "Discretion: The Unacknowledged Side of the Law," (1975), 25 Univ. of Toronto L.J. 120 at p. 133.

[20] [1976] 2 M.L.J. 199.

decision of the learned judge was improper, unjust or wrong."[21]

A close reading of the judgement of the then Chief Justice reveals that he was conscious of the wide discretionary powers that trial courts have in matters concerning custody, and that whilst he recognised that review courts have the power to reverse the decision either where the judge has gone wrong in principle.[22] or where the relevant consideration are incorrectly weighed,[23] nevertheless the appeal courts are reluctant to interfere.[24]

This matter was also clarified by Raja Azlan Shah, F.J. in *Teh Eng Kim* v. *Yew Peng Siong,*[25] where he stated:

"The position of an appellate court is quite clear. It is not entitled to interfere unless satisfied that the learned judge had clearly acted on wrong principles, e.g. if he had acted under any misapprehension of fact in the exercise of his discretion by either giving weight to irrelevant or unproved matter or omitting to take into consideration matters which were relevant. The possibility, or even the probability that it would have come to a different conclusion on the same

[21] *Ibid.*, at p. 202.

[22] See *Evans* v. *Bartlam* [1937] A.C. 473 at p. 486 where Lord Wright stated:

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within, his jurisdiction unless the court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine a new the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

[23] See *Blunt* v. *Blunt* [1943] A.C. 517 at p. 526; *Ward* v. *James* [1966] 1 Q.B. 273, at p. 293; *Re O. (Infants)* [1971] 1 Ch. 748, at p. 755; Ahmad Ibrahim "Custody Orders – Power of Appellate Courts to Interfere with Discretion of Trial Judge," [1976] 1 M.L.J. lxx.

[24] See *Re F.* [1976] 1 All E.R. 417, at 434.

[25] [1977] 1 M.L.J. 234.

> evidence is insufficient per se to warrant interference. Giving to some factors lesser weight than the appellant's arguments demanded is also not a sufficient consideration for interference."[26]

Thus the appeal court may not simply substitute its judgement for that of the trial court as this is not control, but merely a further exercise of discretion. There must be some wrongful reasoning by the judge in exercising discretion before interference at appellate level; and the interference will take place reluctantly. However cloudy the language of reviewing courts in describing their powers, it is clear that the breadth of the trial judge's discretion is recognised. But this is not to suggest that the judge may consider matters not laid down in statute, or read into it language which is not there.

Specification of criteria to which regard must be had in reaching a decision will also impose a constraint on the decision-maker.[26a] As already discussed, section 11 of the Guardianship of Infants Act specifies welfare as the primary consideration and the parents' wishes as the secondary consideration. No other matters are relevant. The problem is that no criteria for determining welfare are laid down. Thus the choice of criteria and the evaluation thereof remains at the discretion of the judge.

A further area of discretion open to the decision-maker under Guardianship of Infants Act is the choice of orders to be made. Custody may be awarded to one parent, with care and control to the other. This is known as a split order.[27] Alternatively, custody, care and control may be awarded to one parent only. And finally, both parents may receive custody,

[26] *Ibid.*, at p. 239.

[26a] The Divorce Ordinance 1952, which applies in Peninsular Malaysia, gives absolute discretion to the divorce court dissolving a marriage to "make such orders as it thinks fit with respect to the custody . . . of the children of the marriage" (S. 36(1)). However, even in divorce cases the courts look to the welfare provisions of the Guardianship of Infants Act 1961.

[27] See the Singapore case *Tey Leng Yeow v. Tan Poh Hing & Anor.* [1973] 2 M.L.J. 53 where custody was awarded to the father, and care and control to the mother.

with care and control to one. This is known as joint custody.[28] In deciding which order to grant the judge must follow the provisions on welfare, as laid down in section 11. Thus, there is discretion in ascertaining welfare, and additional discretion in choosing the order to be made.

A NEW FORMULATION OF THE WELFARE TEST?

There has been much debate in the legal literature concerning the advantages and disadvantages of legal standards which give broad discretionary powers.[29] Writers unhappy with the vagueness of the welfare test, or with the way the courts have handled it, advocate a return to the rule based approach to custody. The old common-law rules, which gave total and exclusive rights to the father of the legitimate child, did have the advantage of certainty and clarity. But too high a price can be paid for predictability. Nevertheless, the advocates of a rule based system argue that the pendulum has swung too far in the direction of discretion. Is there an alternative approach which combines the concern for the individual which is safeguarded by discretion, with the clarity and predictability of rules? The *discretion* v. *rules* debate polarises the issue contained in the controversy. A new way of seeing custody problems has been put forward by an interdisciplinary team containing a lawyer, a child psychoanalyst, and a child psychiatrist. This is contained in the seminal work entitled *Beyond the Best Interests of the Child* by J. Goldstein, A. Freud and A. Solnit.[30]

[28] On appeal to the Federal Court in *Teh Eng Kim* v. *Yew Peng Siong*, [1977] 1 M.L.J., 234 the appellant/father varied his original attitude and conceded that care and control be given to the respondent/mother as decided by the High Court. He requested that custody or joint custody be awarded to him, but this was rejected by the Federal Court as being inappropriate to a situation where the parents are living in different jurisdictions. The appellant relied on *Jussa* v. *Jussa* [1972] 2 All E.R. 600, where an order for joint custody was made.

[29] See Adler, M. and Bradley, J., *Justice, Discretion and Poverty* (1975).

[30] The Free Press, New York, 1973. A further volume entitled *Before the Best Interests of the Child* was published in 1979.

The impact of the ideas contained in *Beyond the Best Interest of the Child* can by measured by reference to the number of cases in which the American courts have cited it in giving judgement in contested custody cases.[31] Despite its American origins the book has had effect on the laws in a number of jurisdictions.[32] One reviewer referred to the book as "the most significant piece of legal writing on the subject of family law that I have ever seen."[33] It is hard to find academic articles now published in the field of child custody which do not discuss the authors' views, even if only to disagree with them.[34] What then are the ideas contained in this work, and what would be their impact on Malaysian law if accepted by the lawmakers? The authors start with a criticism of the "best interests of the child" standard for resolving custody disputes on the grounds that too often the child's interests are subordinated to those of the adults who are competing for custody. In formulating their approach to custody problems the authors are unashmedly partisan, and the child's perspective dominates. A fresh view emerges and all claims based on parental rights, or even on simple justice to individuals, are subordinated to the child's needs. Central to this committment to the child's side is the belief that the child's development depends upon the continuity and character of the relationship with the adult perceived by the child as parent. It is this perception of parent/child relationship, rather than the fact of biological parenthood, that is the basis of the child's attachment to an adult. The authors emphasise that a child's emotional attachment to an adult is based on day-to-day love and attention, and that the

[31] See e.g. *Torrance* v. *Torrance*, 1 F.L.R. 2456 (1975); *Filler* v. *Filler*, 19 N.W. 2d. 96 (1974). Twenty-eight cases are listed by Crouch as containing references to the book. See Crouch, R.E., "An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child," (1979) Family Law Quarterly, Vol. XIII, 49.

[32] See the Report of The British Columbia Royal Commission on Family and Children's Law (Berger Commission); and the report by Justice on Parental Rights and Duties in Custody Suits (1975).

[33] Aaron, R.I., (1973) Utah L. Rev. 871.

[34] The reception of the book has not been entirely uncritical; see the article by Crouch, *supra*, note 31.

person who provides for the child's need will become the "psychological parent". Once such a relationship has been formed it ought to be maintained, if at all possible.[35]

The authors put forward guidelines for the resolution of custody disputes to which the law-maker or the decision-maker must adhere. These do not remove discretion entirely from the judge, but limit it. The first guideline is that decisions concerning the child's future must safeguard the need for continuity of relationships. In particular, where a relationship with a psychological parent has been established there is danger in destroying that relationship by the imposition of a disruptive relationship from outside. The effects of lack of continuity are documented as ranging from distress, anxiety, and lack of trust of adults, to delinquency and criminality.[36] The second guideline emphasises that children have a different sense of time from adults. Therefore delays or uncertainties must be minimised in order to enable the child to make a quick adjustment to any unavoidable change.[37] The third guideline centres on what the authors see as the law's incapacity to deal with human relationships in the long term. There are obvious limitations on a court's practical power to control parental behaviour outside the courtroom. Law cannot make the unwilling give love. Life is uncertain, the future is unpredictable, so the decision-maker must recognise this and do the best he can for the child in the immediate future.[38]

It might be argued that such an obviously American and psychology-based outlook has no place in Malaysian society where religion and the extended family play an important role in daily life. But it will be shown that in contested cases arising under the Guardianship of Infants Act 1961 the judiciary has shown itself sensitive to similar concerns to those proposed in

[35] Goldstein, Freud and Solnit, *Beyond The Best Interests of the Child*, (1973), pp. 17–21, (hereinafter referred to as *Beyond*).

[36] *Ibid.*, pp. 31–34.

[37] *Ibid.*, pp. 40–49.

[38] *Ibid.*, pp. 49–52.

Beyond the Best Interests of the Child. Matters to which the courts have looked in determining welfare under section 11 can be summarised as follows: continuity of care;[39] the young child's need of a mother's love;[40] character and behaviour of the parents;[41] age and sex of the child;[42] custom;[43] religion;[44] the alternative environments offered to the child;[45] the child's own wishes.[46] Analysis of the decided cases from the standpoint offered by the authors shows that Malaysian courts are aware of the dangers of disrupting a child's relationships with loved persons and with a familiar environment.

[39] *Loh Kon Fah* v. *Lee Moy Lan* [1976] 2 M.L.J. 199;
Teh Eng Kim v. *Yew Peng Siong* [1977] 1 MLJ. 234;
Masam v. *Salina Saropa & Anor* [1974] 2 M.L.J. 59, (Sarawak);
Arumugam s/o Seenivasagam v. *Sinnamah* (1974) M.L.J. 130.

[40] This is sometimes known as the tender years presumption, as it is based on an assumption that the mother is the best person to look after a child under the age of seven years. See *Myriam* v. *Mohamed Ariff* [1971] 1 M.L.J. 265;
Kok Yoong Heong v. *Choong Thean Sang* [1976] 1 M.L.J. 292;
Loh Kon Fah v. *Lee Moh Lan,* supra, note 39;
Teh Eng Kim v. *Yew Peng Siong,* supra, note 39;
Helen Ho Quee Neo v. *Lim Pui Heng* [1974] 2 M.L.J. 51, (Singapore).

[41] *Marina Nabulandran* v. *Appiah Nabulandran & Anor* [1976] 1 M.L.J. 137. See the Singapore case *Helen Ho Quee Neo* v. *Lim Pui Heng* [1974] 2 M.L.J. 51.

[42] *Yong May Inn* v. *Sia Kuan Seng* [1971] 1 M.L.J. 280. See The Singapore case *Sim Hong Boon* v. *Lois Joan Sim* [1973] 1 M.L.J. 1.

[43] *Sp. Ponniah Pillay* v. *Sethamarai d/o Vellasamy* [1954] M.L.J. 175.

[44] In *Chuah Thye Peng Anor* v. *Kuan Huah Oong* [1978] 2 M.L.J. 217 religion is taken as a separate consideration from welfare.

[45] *Re Satpal Singh (an infant)* [1958] 24. M.L.J. 283; *Wong Chen Poh* v. *Lo Yu Kyau* [1970] 2 M.L.J. 57.

[46] *Myriam* v. *Mohamed Arif,* note 40 supra;
Teh Eng Kim v. *Yew Peng Siong,* note 39 supra;
Arumugam s/o Seenivasagam v. *Sinnamah,* note 39 supra.
In *Yong May Inn* v. *Sia Kuan Seng,* note 40 supra, and in the Singapore case *Re Miskin Rowter* [1963] M.L.J. 341, the wishes of the children involved were disregarded. In *Kok Yoong Heng* v. *Choong Thean Sang,* supra note 40, at p. 294. Arulanandom, J. said "The these cases the court is not bound by the views of minors because of their tender years they are influenced by people around them."

THE GUIDELINES APPLIED

The desirability of providing for continuity of relationships has been emphasised by the Malaysian courts in a number of cases. In *Loh Kon Fah* v. *Lee Moy Lan*[47] the parents of three children aged between eight and eleven years were living separately; and the father, who was living in Ipoh, applied to the High Court for custody of the children. The mother and the children had been living in Singapore for the previous five years by agreement between the spouses. Hashim Yeop A. Sani, J. was unwilling to disturb the children, as the mother had made it clear that she would not return to her husband under present circumstances. He therefore vested custody in the mother through application of the welfare principle, but left guardianship in the father.

On appeal the Federal Court confirmed this decision by majority. Gill, C.J., cited with approval the judge's view that it was in the best interest of the infants that they should remain with their mother:

> " . . . the infants should not be deprived of the love and devotion of their natural mother if the mother has been shown capable of giving them."[48]

In his dissenting opinion Ong Hock Sim, F.J., took the view that a good mother will maintain a joint home for her children with both of their parents. So the mother's conduct was not blameless, and that ought to be taken into consideration. And he further emphasised that the court must consider not only "the disruptive aspect involved in separating the children from the mother who has been caring for them since their birth", but that "the long term interests of the children must also be taken into account."[49] This dissent was based on two English cases,

[47] [1976] 2 M.L.J. 199 (F.C.); 88 (H.C.).

[48] *Ibid.*, at p. 201.

[49] *Ibid.*, at p. 204.

Re L.[50] and *Re F.*,[51] which, as discussed earlier, have no authority in interpretation of section 11 of the Guardianship of Infants Act 1961.

From the standpoint of the authors of *Beyond the Best Interests of the Child* there can be no doubt that the Federal Court was correct in dismissing the appeal. The authors specifically deny that it is possible to take the long term view in these decisions, given the uncertainties of life and the unpredictability of the future.[52] And we can see that both the High Court and the Federal Court operated on a concept similar to that of "psychological parent" although termed "the natural mother."

Psychological parenthood – although not so called – obviously weighed heavily with Abdul Hamid, J. in giving his decision in the Kuala Lumpur High Court in *Myriam* v. *Mohamed Ariff*.[53] Describing the male infant's joy on seeing his mother, the applicant, in judge's chambers he said:

> "I do not think words alone are adequate to describe the expression of love and affection that his eyes seemed to convey when he greeted the applicant, particularly judging from the manner he sat upon the applicant's lap with one arm around her neck. To my mind it would not be in the interests and welfare of this infant that he should be denied of the natural mother's love, care and affection."[54]

In giving custody of this child to his mother the judge was applying the welfare test, which is also applicable under Islamic Law. The Judge's reasoning has been criticised as giving primacy to civil law over Islamic Law,[55] but it seems that the result would have been the same under either system.

[50] [1962] 3 All E.R. 1.

[51] [1969] 2 All E.R. 766.

[52] *Beyond*, pp. 49 & 50.

[53] [1971] 1 M.L.J. 265.

[54] *Ibid.*, at p. 270.

[55] See Mehrun Siraj, "Current Legislation in Peninsular Malaysia", [1975] 1 M.L.J. xciii.

In *Teh Eng Kim* v. *Yew Peng Siong*[56] the emotional attachment of the children to their mother was the major reason why Arulanandom, J. in the High Court in Penang gave custody, care and control to her on her application after divorce. This was despite the fact that the mother was emigrating to Australia, as the judge said that "from an emotional and psychological point of view the court was of the opinion that they would be far happier and better off with their mother, be it they were living in Australia or in Malaysia."[57] On appeal, the Federal Court upheld the judgement and rejected the father's application that custody or joint custody be given to him, with care and control remaining with the mother. This type of split order is possible, but on this occasion was considered inappropriate. Raja Azlan Shah, F.J., stated:

> "The position as I see it is to disregard entirely any concept of parental claim. As the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim. The father's claim to make major decisions with regard to his children's future and education enters into consideration as one of the factors in considering their welfare, but not as dominating factor if it is in conflict with their welfare."[58]

Both the High Court and the Federal Court placed emphasis on the youngest child's emotional need of his mother, taking the view that a five-year old is too young to be separated from the mother. But if we apply the concept of psychological parenthood it will not necessarily be the mother to whom the child is attached, but to the person who performs the role which we most commonly call "mothering".

The unsettling effects of change of custody on the infant boy who was the subject of an appeal to the High Court in Kuching in *Masam* v. *Salina Saropa and Anor.*,[59] was the major

[56] [1977] 1 M.L.J. 237 (F.C.); 234 (H.C.).

[57] *Ibid.*, p. 236.

[58] *Ibid.*, at p. 239.

[59] [1974] 2 M.L.J. 59.

reason for the refusal of a custody order to the biological mother. Nine days after the infant's birth the mother gave him into the care of the foster parents, and he had been with them for over two years before the case first came before the magistrate on the mother's application. B.T.H. Lee, J. in the High Court considered that "if the infant were taken away from the foster parents after such a length of time the result might be that he would develop a permanent emotional scar." The foster parents had "lavished loving care and affection on the infant" and whilst the possibility of disturbance "ought not to be regarded as a complete bar to any change,"[60] it was a circumstance to be considered. The court expressed sympathy for the mother but reiterated the magistrate's view that it was the welfare of the infant that was in question, not the welfare of the parties.

The cases discussed above are those of which the authors of *Beyond the Best Interests of the Child* would approve. But what of other cases in which the courts have seen fit to disturb the continuity of care of a child? In *Sim Hong Boon* v. *Lois Joan Sim*[61] the Singapore appellate court gave custody of a male child to the petitioner father, despite the fact that the child had been living for two-and-a-half years previously with his mother in Australia. Wee Chong Jin, C.J. stated:

> "It is said that as the paramount consideration is the welfare of the child it would not be in the child's welfare for him after a lapse of 2½ years from March 1969 till now and during which years the child has become accustomed to a way of life different from a way of life here, to uproot him and separate from him his mother to take up life in totally different surroundings and circumstances. While that is a strong factor which the court must consider, it is equally clear, we think, that in the case of a male infant, at any rate a consideration of the fact that a mother is in a better position to bring up a child is different from the case of a

[60] *Ibid.*, at p. 60.

[61] [1973] 1 M.L.J. 1.

> female infant. In any event it is not the immediate readjustment that must necessarily have to take place but in our view throughout the entire period until that child becomes capable of looking after himself, in other words becomes an adult, that ought to be considered."[62]

In this case the father had not lived with his son from the time the child was fifteen months. By the time the case was heard on appeal the father will have been a complete stranger to the child. Admittedly this was due to the fact that the mother remained in Australia after going there on holiday, she being an Australian citizen, and the parties having married there. However, it is doubtful whether the infant will have been able to understand the court's reasons for taking him away from the only parent he knew. This raises the question of the behaviour of the parents and, in particular, of child snatching, which is not adequately confronted in the book, and which will be discussed later.

In *Tey Leng Yeow* v. *Tan Poh Hing & Anor*[63] the Singapore High Court reviewed its previous custody order in relation to a boy of eight, custody having been granted to the father on divorce. The mother had left the father before the child was born, and the boy was aged six before he even met his father. On review Winslow, J. said that he would not have given custody to the father had he been aware of the mother's views, but that she did not enter an appearance because she had misunderstood the potition when she had decided not to contest the divorce. He went on to say:

> "The father's attitude seemed to me to be prompted by a sense of proprietary rights over the son rather than by any bond of love or affection. I was certainly more impressed by the boy's need for his mother. He was anxious to see his mother whom he had never seen since his father took him over."[64]

[62] *Ibid.*, at p. 2.

[63] [1973] 2 M.L.J. 53.

[64] *Ibid.*, at p. 54.

Care and control was given to the mother with custody to the father, and the Court of Appeal dismissed the appeal and cross appeal. From the child's viewpoint the outcome of this case was eventually happy, but he had to endure some months of emotional and educational disturbance before the court put the matter right.

Re Miskin Rowter[65] is a case in which it is particularly hard to understand the attitude of the Singapore High Court to the question of custody, unless the matter is considered solely from the standpoint of proprietary rights of parents. There a ten-year-old child was transferred from the only parents he had ever known to the natural mother, despite his expressed wish to stay with his foster parents. Ah Tah, J. observed that "having regard to the fact that he had been brought up by the respondent and his wife since he was about 16 days old, I thought it natural that he should give the answers which he did," on being questioned by the judge as to his preference.[66] According to the authors of *Beyond the Best Interests of the Child* this is the kind of disturbance which can lead to depression, emotional scarring, lack of trust in relationships, juvenile delinquency and even criminal behavious on the part of the child as he grows up.[67]

The infant in *Chuah Thye Peng & Anor v. Kuan Huah Oong*[68] was only one year old when a change of his custody was ordered by the High Court in Penang. So there may be no lasting effects from the disturbance. However, it was the second change of custody in five months, and thus the dangers attendant to it were greater. The facts were that the biological parents were killed in an air crash, and that they had previously been living with the child's maternal grandmother in the house in which the child had been born. The child, who was then aged seven months, was left in the care of the maternal grandmother in his

[65] [1963] M.L.J. 341.

[66] *Ibid.*, at 432.

[67] *Beyond*, pp. 32 – 34.

[68] [1978] 2 M.L.J. 217.

normal home. The paternal grandparents applied for custody almost immediately, but it took five months for the case to be disposed of. Gunn Chit Tuan, J. considered the argument that the change of custody would adversely affect the child, but said that welfare was only one of the factors to be considered, and that although special weight must be given to it, that this does not mean that it is the only consideration. His view was that since the child was normal, and since there was no medical evidence, he was not prepared to speculate on any possible adverse effects. "As far as I am aware it is not uncommon in this country for babies of young Alexander's age to be given in adoption without any adverse effects after a change of custody."[69] And he later stated that he had come to the conclusion "on the balance of probabilities, that although there might be some transient effects of taking the infant away from the respondent, there would be no long term detriment to his health and welfare in the circumstances of this case."[70]

If the viewpoint of the child, Alexander, in this case is considered then we find that he has undergone two disturbances in the course of his first year of life. The first occurred at seven months, when his parents disappeared from his life. The second occurred at one year, when he was forced to leave the only home he had known. According to the authors of *Beyond the Best Interests of the Child* any change of routine of an infant "leads to food refusals, digestive upsets, sleeping difficulties, and crying." . . . Any move "inevitably brings with it changes in the ways the infant is handled, fed, put to bed, and comforted. Such moves from the familiar to the unfamiliar cause discomfort, distress, and delays in the infant's orientation and adaptation within his surroundings." But the effects of a change of environment are less than those of a change of person taking care of the infant: "When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful. Where continuity

[69] *Ibid.*, at p. 220.

[70] *Ibid.*, at p. 221.

of such relationships is interrupted more than once, . . . the children's emotional attachments become increasingly shallow and indiscriminate. They tend to grow up as persons who lack warmth in thier contacts with fellow beings."[71]

The consideration which swayed the judge in favour of the paternal grandparents were primarily religious. The wishes of the child's father were assumed to be that his son should be brought up in the same religion as himself, the religion shared by the paternal grandparents. The maternal grandmother was of a different faith. Furthermore, Chinese customary law gave precedence to the paternal side in custody cases. Gunn Chit Tuan, J.'s view was that these other factors must also be considered:

> "Although the welfare of the infant is of paramount importance, it does not mean that it is the exclusive and only consideration. The use of the word "primarily" by the legislature in the above quoted section implies that there are other circumstances that are to be considered in the process of consideration and weighing. Special weight must be given to the welfare of the infant but this does not mean that other factors should be left out."[72]

As can be seen from this extract from the judgement, the judge separated welfare from other factors, and welfare seems to have been equated with continuity of care. The idea that other factors, apart from the wishes of the parents, are to be looked at *solely in order to determine welfare* does not appear to have been argued before the judge. And even if the emphasis on religion can be justified as being consonant with the supposed wishes of the father, section 11 mentions both parents, and not merely the father. The residence of the parents with the maternal grandmother, the fact that they left the child with her, both of these are factors from which the wishes of the parents could also be derived. Therefore, it is submitted that this judgement,

[71] *Beyond*, p. 33.

[72] [1978] 2 MLJ. 217, at p. 220.

whether regarded from the standpoint of the authors of *Beyond the Best Interests of the Child,* or from the standpoint of interpretation of section 11 of the Guardianship of Infants Act 1961, is to be regretted.

The two remaining guidelines proposed by *Beyond the Best Interests of the Child* are that all decisions about a child's future and custody should reflect a "child's-sense-of-time," and that such decisions "must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long range predictions." The child's sense of time is explained as follows:

> "Unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctual and emotional needs . . .
>
> Emotionally and intellectually an infant and toddler cannot stretch his waiting time more than a few days without feeling overwhelmed by the absence of parents . . ."[73]

The authors then propose a minimum of delay in custody decisions concerning children — a suggestion that few can fault. For instance, if the law had moved quickly in the English case *J* v. *C* the matter would not have taken five-and-a-half-years before final decision was given in the House of Lords.[74] The dangers of delay are that the child will become attached to those people who are now taking care of him, and so, will be disturbed if moved again. Yet, the delay may not be the fault of those who are attempting to get custody, or to regain it. So, if at all possible, the matter should be treated as urgent.

Certain implications drawn by the authors from this guideline have caused controversy. On adoption, they argue that a child to be adopted should be placed with the adoptive parents immediately after birth, and that the adoption should

[73] *Beyond,* p.40.

[74] *J.* v. *C.* [1970] A.C. 668.

then be final. The reason they give for this is the avoidance of delay; and the justification is that in the case of biological parents, this is what happens. This would mean that there would be no more supervision of adoption than there is of any parent/child relationship. The Malaysian law of adoption permits placement of a child with the adoptive parents immediately after birth.[75] But there is a supervision period of a minimum of three months. This seems sensible, as, however much the authors may wish it otherwise, natural parents are in a different relationship to a child than adoptive parents. Parental consent to adoption can be given at birth, whereas in English law the child must be at least six weeks old when the document was executed.[76] The reason for the English provision is that it is believed that the mother may give consent whilst still suffering from post-natal depression, and that she may later change her mind.[77] Adoption practice, in fact, ensures that the child remains with the mother until six weeks after birth, during which time the mother has time to reflect. It is difficult to assess the merits of the waiting period of six weeks, but there is some criticism of it as placing primacy upon parental rights.[78]

On divorce the authors of *Beyond the Best Interests of the Child* argue in favour of the custody proceedings preceding the divorce hearing. This would have the advantage of avoiding any delays in deciding on the children's future, and of removing the question of custody from the arena of the divorce. There is evidence to indicate that children may be used as bargaining

[75] Adoption Ordinance, 1972 (Peninsular Malaysia).

[76] Adoption Act 1976, S. 16(4), (England and Wales).

[77] Consent is revocable until the adoption order is made by the court: Adoption Act 1976, s.16(3). But under the American Revised Uniform Adoption Act consent may be with drawn only if the court is stisfied tht this is in the child's best interests.

[78] Report of the Departmental Committee on the Adoption of Children (The Houghton Report), Cmnd., (5107), 1972. Research carried out for the Houghton Committee revealed that four out of five mothers would have preferred consent to have been final when first given for the adoption of their babies. See Raynor, L., "Mothers, Children and Adoption", New Society, 16 March 1972. The Children Act 1975, enables a child to be freed for adoption, in an attempt to overcome the uncertainty and possibility of withdrawal of consent.

counters in divorce proceedings, and that the outcome of the divorce dictates the custody resolution.[79] But this is only in the minority of contested cases. Most divorces are resolved by agreement. A recent study by the Oxford Socio-Legal Centre found that of divorces where there were minor children, only 6.9 per cent. were contested, and that in only 0.6 per cent. of the uncontested cases was the child's residence changed.[80] Nevertheless, despite the criticism that the guidelines concentrate too much on litigation and fringe cases, this suggestion is sensible.

The most controversial of the implications of the child's sense-of-time guideline is the proposal that a child be declared eligible for adoption or for a custody order in favour of the psychological parents as soon as "that parent's absence has caused the child to feel no longer wanted by them. It would be that time when the child, having felt hopeless and abandoned, had reached out to establish a new relationship with an adult who is to become or has become his psychological parent."[81] As critics have pointed parents will be reluctant to leave children with grandparents, relatives, friends, or even a paid nurse, if this is the rule. Yet there are occasions, such as death, illness, or accident, where it may be necessary to give a child into the care of such people.

The third guideline, which reflects the authors' view that the law cannot supervise human relationships or predict long-term outcomes of family arrangements, limits the law to immediate decisions. Thus, the law should prefer that families make their own private arrangements for the upbringing of children and limit any state intrusion to interference only when unavoidable. Furthermore, the law should be aware that its predictive ability is limited to choosing from among the available

[79] Mnookin, R.H., "Bargaining in the Shadow of the Law: The Case of Divorce," (1979) Current Legal Problems, 65.

[80] Eakelaar, J. and Clive, E., *Custody After Divorce*, Centre for Socio-Legal Studies, Oxford, (1977). The authors state at p. 67; "Our study confirms that the major factor taken into account by courts in deciding where a child is to live is the avoidance of disturbance of the child's permanant residence."

[81] *Beyond*, p. 48.

adults the one with the best capacity to become the child's psychological parent, bearing in mind that the younger the child and the longer the period of uncertainty, the more likely that the child will be harmed by discontinuity in its relationships.[82]

Since the adults competing for custody of the child cannot agree on what will be in the child's best interests, and cannot be free of their own interest in obtaining custody, they cannot be said to fairly represent the child's interests in the contested case. Therefore the authors propose that the child should have party status in his own right and be represented by counsel whose function it is to determine the least detrimental alternative for his client. This proposal for a child's advocate has received almost universal agreement, but it does require state or bar intervention to satisfy it.[83]

ACCESS

Regulation of access to a child who is the subject of a custody order is at the discretion of the court under section 5 of the Guardianship of Infants Act 1961, but this is subject to the welfare privisions of section 11. In *T. v. T.*[84] the petitioner/mother had been granted a divorce and given custody of the child of the marriage. Access was granted to the respondent/father twice a week. The mother later applied to the court to deny access to the father. Evidence was accepted by the court as showing that access gave rise to emotional conflicts of loyalties for the child and had a deleterious influence on her behaviour. Gill, J. in the Kuala Lumpur High Court stated that the general principle was to grant access to the non-custodial parent, unless it is in the child's best interest to forbid it. He went on to say:

> "The question of access to children whose parents have parted is always a matter which causes the courts a great

[82] Home Office Working Party on Marriage Guidance, 1979.

[83] *Beyond*, pp. 65–67.

[84] [1966] 2 M.L.J. 302.

> deal of anxiety. The cardinal rule is that except in very exceptional cases it would not be right from the point of view of the child to cut him or her off from all access to either of the parents. . . .
>
> The object of allowing access to the father is to see that the child grows up knowing and loving him and not to allow him to share in the custody, care and control which must necessarily remain with the mother."[85]

The judge reduced access to one Sunday morning a month "with a view to avoiding any emotional conflict of loyalties and affection in the mind of the child" and under circumstances which precluded any contact between the parents.

Liberal access is the policy of the Malaysian courts, with lengthy visits by the child to the non-custodial parent in school holidays.[86] The authors of *Beyond the Best Interests of the Child* do not accept that such a policy in necessarily in the child's best interests. They argue that it must be left to the custodial parent to determine if and when the other parent shall see the child. "Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents."[87] This proposal has been attacked by critics as underestimating the importance to the child of maintaining contact with the non-

[85] *ibid.*, at pp. 304–305.

[86] In *Myriam v. Mohamed Ariff* [1971] 1 M.L.J. 265, access was granted for half the school holidays and on one week-end in each month on Saturday and Sunday between 9 a.m. and 6 p.m.

In *Teh Eng Kim v. Yew Peng Siong* [1977] 1 M.L.J. 234, access was given at all times and the petitioner was required to give an undertaking to send the children to visit their father in Malaysia at least once a year during the school holidays.

In *Loh Kon Fah v. Lee Moy Lan* [1976] 2 M.L.J. 199 [F.C.]; 88 (H.C.), unrestricted access at all times was granted to the father.

[87] *Beyond*, p. 40

custodial parent. Others have challenged it as unfair. And it has been pointed out that such a rule might lead to much greater litigation over custody than at present, for the non-custodial parent risks losing the child completely. Added to this is recent evidence which shows that the more amicable the divorce, the better relationship the parents will have afterwards and the easier it is for children to cope with the problem of the break-up of the family.[88] Thus, it seems that to deprive children of contact with one parent is not for their welfare.

THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

Thus far in this article the argument has proceeded on the basis that all cases of custody are governed by the welfare provisions contained in the Guardianship of Infants Act 1961. This will no longer be the case once the Law Reform (Marriage and Divorce) Act 1976, as amended in 1980, comes into force.[89] Thereafter different principles will aply where custody issues arise in the course of matrimonial proceedings. Where a marriage is dissolved by divorce or by nullity suit, the new Act will apply, although the relationship of the two Acts is not yet entirely clear. Obviously the later Act represents current thinking on the continuing problem of allocating custody and it is of interest to compare its approach with that of the earlier Act.

The 1976 Act has opted for a more limited form of discretion accorded to the decision-maker in custody cases, than that accorded by the 1961 Act. It spells out in some detail the powers of the court, the factors to which the court must have regard before reaching a decision, the conditions on which custody may be exercised, and the persons who may be entitled to custody.[90] This enumeration of specific and limited criteria for a decision does assist the control of discretion by appellate review, but it does not necessarily follow that the new provisions are superior to those contained in the 1961 Act.

[88] Dyer C., "The Divorce Debate 1980: Trying to Get Rid of the Bitterness that Remains," The Times, August 6, 1980.

[89] As yet, no date for the coming into force of the Act, as amended, is known.

[90] Law Reform (Marriage and Divorce) Act, 1976, Ss. 88 and 89.

Part Eight of the Act is entitled "Protection of Children", and the object is clearly that of ensuring the least detrimental outcome for children whose parents' marriage is being dissolved. Welfare is the paramount consideration in making a decision on custody on divorce, but "subject to this the court shall have regard" to a variety of factors.[91] These are the wishes of the parent;[92] the wishes of the child, if old enough to express an independent opinion;[93] the rebuttable presumption that "it is for the good of a child below the age of seven years to be with his or her mother", with the qualification that "in deciding whether the presumption applies to the facts of any particular case, the court shall have regard to the undesirablility of disturbing the life of a child by changes of custody",[94] and finally, each child is to be considered separately, its welfare is to be treated independently of the other children of the family, and the court is not bound to place siblings together.[95]

The question that immediately arises is whether factors other than those enumerated above may also be taken into account. The wording of the Act suggests that the answer to this is no. For there would be no point in listing the matters to which the court must have regard, if the legislative intention is to permit other extraneous matters which are not mentioned to be imported into the statute. So, factors such as the age and sex of the child, the character and behaviour of the parents, religion, and custom can only be considered under the welfare test. That is, they can only be taken into account in order to determine what the child's best interests are.

It is not surprising to find that the parents' wishes are to be taken into account before reaching a decision under the provisions of the new Act, as this is specifically mentioned in the 1961 Act. However, the specification of the child's wishes as a

[91] *Ibid.*, S. 88.

[92] *Ibid.*, S. 88(2)(a).

[93] *Ibid.*, S. 88(2)(b).

[94] *Ibid.*, S. 88(3). To compare the position in Islamic Law see the addendum to this article by Professor Ahmad Ibrahim and see also his article "Custody of Muslim Infants" [1977] J.M.C.L. Vol. 4, 19.

[95] *Ibid.*, S. 88(4).

matter to which the court must have regard is unnecessary, since Malaysian case-law indicates that the courts already interview children who are the subject of custody suits.[96] This is generally done as part of the welfare test, although the courts have always made it clear that they are not bound by the child's wishes. The rebuttable presumption in favour of the mother of a child under seven is a new provision. No doubt it is based on the assumption that a young child needs its mother; the courts, as we have seen above, also share this assumption. If the mother is the child's psychological parent the welfare test is sufficient to give custody to her without any necessity for a statutory presumption in her favour. There are cases, perhaps a minority, where children are more attached to the father but the presumption does not allow for these.[97] The wording of this provision does not make clear how the presumption can be rebutted. Is it rebuttable only by consideration of the "undesirability of disturbing the life of a child by changes of custody", which is the only matter mentioned in the statute? Or can it be rebutted by other evidence? If the courts interpret the provision as rebuttable only by considerations of continuity of care, fathers will be at a severe disadvantage. For the presumption will operate as a rule in favour of the mother, provided she has lived continously with the child. The father who desires custody, and who has also lived continously with the child, will be faced with a maternal preference rule, where the child is aged under seven. Furthermore, the continuity of care principle will prevent him from gaining custody at a later date. As argued earlier in this article, it is highly desirable that the principle of continuity of care be recognised and be incorporated into custody rules, but is there any necessity for a rule favouring one parent over the other on the basis of sex? Choice of the most suitable parent for custody was left the discretion of the judge by the 1961 legislation, to be decided on an estimation of the child's welfare. It

[96] Children have been interviewed by the Trial Court judge in the following cases: *Arumugam s/o Seenivasagam* v. *Sinnamah* [1959] M.L.J. 130; *Loh Kon Fah* v. *Lee Moy Lan* [1976] 2 M.L.J. 88; *Teh Eng Kim* v. *Yew Peng Siong* [1977] 1 M.L.J. 234; *Myriam* v. *Mohammed Ariff* [1971] 1 M.L.J. 265; *Yong May Inn* v. *Sia Kuan Seng* [1971] 1 M.L.J. 280.

[97] See "Developments in the Law – the Constitution and the Family", (1980) Harvard Law Review, Vol. 93, p. 1159, at pp. 1333–1338.

is true that the child of tender years was subjected to a presumption in favour of the mother, but this was considered by courts as one factor among many which were to be weighed in determining the welfare of the child. In other jurisdictions where maternal preference is the rule, it is applied as a tie-breaker where the parents are equally suitable for custody in all other respects. The most extreme version of the maternal preference rule is where it can be rebutted only by showing that the mother is unfit to have custody. Under the 1976 Act maternal preference is effectively a rule, but whether the courts will treat the rule as one factor among many in determining welfare, or as a tie-breaker, or as rebuttable only by proof that the mother is unfit, is yet unknown. However, the debate on the advantages and disadvantages of rules as compared to discretion is well illustrated by these alternative possible interpretations.

The 1976 Act takes a much more detailed and rule-orientated approach to the whole area of custody than does the 1961 Act. Detailed provisions lay down the court's powers, those who are eligible for custody, the conditions under which custody may be exercised, and deprivation of custody.[98] Orders for custody may contain limitations of choice of residence, education, or religion of the child.[99] Temporary custody, visitation rights, access rights, and possible prohibition on removing the child from the jurisdiction are all provided for.[100] A parent may be deprived permanently of custody by declaration of unfitness.[101] This provision, if utilised by zealous counsel, will only serve to increase tension and hostility between the parents and is thus contrary to the interests of the children. It may also cause emotional suffering where a child is involved in the hearing of the evidence.[101a]

[98] Law Reform (Marriage and Divorce) Act 1976, Ss. 88, 89, 90.

[99] *Ibid.*, S. 89(2)(a).

[100] *Ibid.*, S. 89(2) (b), (c), (d).

[101] *Ibid.*, S. 90(1). It is not clear how this fits with the maternal preference rule.

[101a] See Leong Wai Kum, "Legislation Comment on Women's Charter (Amendment) Bill 1979", (1979) Mal. L.Rev., Vol. 21, 327 at p. 347 for criticism of the Singapore proposed amendments. The author's strong objection to the unfitness provision resulted in its deletion at Committee stage.

Laying down specific criteria on which discretion is to be exercised, and limiting the powers of the court to specific detailed matters does facilitate control and review by the appellate court.[101b] But there are also perils in elaborating discretionary powers. An example may be taken from the new Act. Section ninety-one provides:

> "When a child is deemed to be legitimate under section 75, the mother shall, in the absence of any agreement or order of court to the contrary, be entitled to custody of the child."

The "child deemed legitimate" is the child of a voidable or of a void marriage, with certain exceptions.[102] The way in which the statute is worded and arranged suggests that custody of children of marriages which are annulled goes automatically to the mother. If this is so then such children are deprived of consideration of their welfare by the court. They are also deprived of the possibility of living with the father, even though their welfare might demand it. Why should the children of annulled marriages be treated differently from other children whose protection is the concern of the Act? An incentive may be created by this provision for a mother to seek annullment of her marriage, rather than divorce, in order to ensure that she obtains custody of the children. But this may not necessarily be in the best interests of the child.

CONCLUSION

The difficulties faced by legislative and judicial decision-makers in defining the welfare of a child should not lead to an abandonment of efforts to resolve the problem in custody cases. King Solomon's solution was to offer a physical division of the child between two claimant mothers. This led the real mother to sacrifice her claim in order to ensure the safety of her child.

[101b] See Ellsworth, P.C. and Levy, R.J., "Legislative Reform of Child Care Adjudication", (1969) Law and Society Rev., Vol. 4, 167 at p. 203.

[102] Children of a void marriage will be illegitimate if, at the time of the solemnisation of the marriage, neither of the parties reasonably believed that the marriage was valid, or where the father was not domiciled in Malaysia at the time of the marriage: Law Reform (Marriage and Divorce) Act 1976, S. 75(2) and (3) as amended by the Law Reform (Marriage and Divorce) (Amendment) Act 1980, S. 21.

Naturally custody was awarded to her. Unfortunately it is not always so easy for the judge or the parties to identify where the child's interests lie. But we can learn something from the wisdom of Solomon, and that is that a parent must be required to sacrifice his or her own interests and desires on behalf of the child.

Two major points emerge from this article: (1) Welfare should be the only consideration of a court concerned with the protection of a child's interests in custody suits, and all other matters should be examined only insofar as they relate to welfare. (2) The legislator must leave to the discretion of the court the determination of welfare; however, certain guidelines should be specified in the legislation. The major guideline must be the principle of continuity of care and the maintenance of established adult/child relationships which are successful and happy. If it is accepted that speed should be the essence of disposal of cases involving children, then the problem of child snatching which may accompany the principle of continuity can be avoided. Rapid dealing with these cases will prevent new continuity from being established. Just as the law moves speedily in the granting of injunctions, so can it act in relation to the welfare of children.

The criticism may be levelled at this article that it overlooks the problem of doing justice to the parties. By placing the child in the forefront of the custody suit a residual problem of unfairness to the parent denied custody because of an inability to maintain continuity of relationship with the child may remain. But the very phrase "justice between the parties" reveals the mistaken emphasis on adult rights, and ignores the fact that the subject of the suit, the child, is not a party. The action for custody should not be viewed as an adversary matter between adult parties. It should be seen as a judicial attempt to provide the best possible future for the child. The child should be recognised as the only important party, and not become a pawn in the proceedings. If this is the case then justice to the child will become the object of the suit.

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Addendum

Under the Islamic law custody is regarded as the right of the child and of the parents, especially of the mother. The child needs someone to look after it and to bring it up and if the child is of tender years the mother is the best person to look after the child. This is based on a tradition in which the Prophet is recorded to have told a mother "you have a better right to take him until you are remarried". Syed Sabik in his Fiqh-us-Sunnah refers to a precedent of a case at Jurga, Egypt on 23rd July 1933 where it was decided "Both the person who has custody and the child who needs custody have rights but the right of the child is stronger then the right of the custodian. If the right of the custodian lapses, the right of the child does not lapse."

The principles have been applied in two cases in the Kelantan Syariah Courts. The couple in those cases were Wan Abdul Aziz bin Wan Ahmad, an engineer, and Siti Aishah binte Abdul Rahman, a headmistress. They had married while studying in Australia in 1965 and had two children, Wan Halimatul Tasma and Wan Kartini. After they returned to Malaysia, there were differences between them and eventually in 1973 they separated. After the separation the younger girl, Wan Kartini stayed with the father in Kota Bharu where she was looked after by her paternal grandmother. The elder child remained with her mother and was looked after by her maternal grandmother. There was a divorce by mutual consent between the parties in 1974.

In the first case (Kelantan Syariah Court Civil Case No. 4 of 1974)[1] the mother, Siti Aishah claimed custody of the younger daughter, Wan Anita Kartini who was then four years old. It appeared that at that stage the mother was still a divorcee but the husband had remarried again. The Kathi gave custody of the child to the mother, holding that she was entitled and fit to look after the child. On appeal to the Board of Appeal however it was held that the order of the Kathi should be set aside and

[1] Kelantan Syariah Court Civil Appeal No. 1 of 1975; 1 Jernal Hukum 47

that the father should continue to have custody of the child. In its judgment the Board said "According to the evidence it is clear that Wan Anita Kartini began to live under the care and custody of her father Wan Abdul Aziz and her grandmother Hajjah Wan Zabidah from the time she was aged 2 years and 3 months and it was only after she had lived for over a year and a half that the mother took steps to claim custody and as at this date (7.6.65) Wan Anita Kartini had stayed with Hajjah Wan Zabidah, the mother of Wan Abdul Aziz for over two and a half years, that is a period in which Wan Anita Kartini has got used to and to love her grandmother. Because of this the Appeal Board feels that it would seriously effect her feelings if she were separated from her grandmother. The basis and aim of custody is the welfare of the child who is to be looked after and this is the basic right of the child. This right must be paramount to the right of the person who claims the custody. – In this case there is no evidence to show that the welfare of the child has been affected by her staying under the care of Hajjah Wan Zabidah and the control of her father, Wan Abdul Aziz".

In the second case (Kelantan Syariah Court Civil Case No. 41 of 1975)[2] the father Wan Abdul Aziz claimed custody of his daughter Wan Halimatul Tasma, then aged 9 years. By this time it appeared that the mother, Siti Aishah had also re-married. The Kathi in this case refused the application. He relied on the precedent of and on the authorities cited in the earlier case and held that it was to the welfare of the child to remain with her mother and her maternal grandmother. A further ground relied on in this case was that the girl herself chose to live with her mother and grandmother. The father appealed to the Board of Appeal but his appeal was dismissed.

In the case of *Wan Khadijah* v. *Ismail*[3] the mother claimed custody of her five children whose ages ranged from 7 to 14 years. At the hearing the Kathi asked the children to chose with whom they would like to live and they chose to live with the father. The Kathi therefore dismissed the claim of the mother and the mother's appeal to the Board of Appeal was also dismissed.

[2] Kelantan Syariah Court Civil Appeal No. 3 of 1977; 1 Jernal Hukum 50

[3] Kelantan Syariah Court Civil Appeal No. 4 of 1975; 1 Jernal Hukum 53

In the case of *Ahmad* v. *Aishah*[4] the parties had three children aged 10 months, 2 years and 4 years at the time of the divorce. It appeared that after the divorce in 1975 the two younger children remained with the mother while the eldest child remained with the father. The father had remarried again and the second wife had given birth to a child. In this case the mother claimed custody of the eldest child and she succeeded in the Kathi's court. The father appealed to the Board of Appeal, which dismissed the appeal. In its judgment the Board distinguished the earlier case of *Siti Aishah* v. *Wan Abdul Aziz*.[5] In that case they pointed out that the girl was staying with her father and her paternal grandmother, who has under the Islamic Law a right to custody of the child. In this case however the child was looked after by the step-mother and the Board held that it was to the interest of the child and for her welfare that she should be looked after by her mother rather then by her step-mother, who has no right of custody over the child.

In the case of *Harun* v. *Che Gayah*,[6] the parties were divorced in 1970. They had a female child who was left in the custody of the mother. Subsequently the mother remarried. When the child had reached school age the father registered her in a school in Kota Bharu and took her away from the custody of the mother. Subsequently the mother went to the school and took the girl away. The father claimed custody of the child in order as he said that she could continue her education in Kota Bharu. The Kathi rejected his application on the ground that the girl had stayed since her childhood with the mother and it would affect her welfare if she were removed from her. The father appealed to the Board of Review which while dismissing the appeal specifically stated that they did so because she would be in the care of her maternal grandmother, who under the Islamic Law has the right to the custody of the child after the mother.

In the Kedah case of *Rosna* v. *Mohamed Nor*[7] it appeared that after the death of the father of the female child, his uncle

[4] Kelantan Syariah Court Civil Appeal No. 3 of 1976; 1 Jernal Hukum 55

[5] See note (1) above.

[6] Kelantan Syariah Court Civil Appeal No. 3 of 1978; 1 Jernal Hukum 66

[7] Kedah Syariah Court Civil Appeal No. 1 of 1974; 1 Jernal Hukum 42

came to the house to take her away, alleging that the father had appointed him the trustee and guardian of the child. The mother claimed custody of the child and the Kathi gave custody to her, as the mother had a better right to the custody. The father's appeal to the Board of Appeal was dismissed.

It would seem from the above cases that the decisions in the Syariah Courts in Malaysia do not deviate very much from the guidelines referred to by the authors of *Beyond the Best Interests of the Child".*

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RECENT AMENDMENTS TO THE EGYPTIAN FAMILY LAW

A new law, Law No. 44 of 1979, has been enacted in Egypt to make amendments to the existing family law. The new law has amended the earlier laws, Law No. 25 of 1920 and Law No. 25 of 1929. The translation of the former laws (as amended by the new law) is given in the Appendix.

The new law in the preamble refers to the Constitution, to Laws 25 of 1920 and 25 of 1929, to Law No. 78 of 1931 (relating to the organization of the courts), to Law No. 131 of 1968 (relating to the Civil Code) and to Law No. 49 of 1977 (relating to the law of landlord and tenant).

In the explanatory note introducing the amendment the Minister for Social Welfare, Dr. Amal Othman, said:

> "The family is the basis of society and society is composed of a number of families with ties with one another. A society will become strong or weak depending on the strength or weakness of the families within it. The Holy Quran lays emphasis on the strength of the family based on the principle of love *(mawaddah)* among its members. The Holy Quran teaches us that all mankind originated from the same source."

In Surah al-Hujarah it is stated:

> "O mankind! We created you from a single pair of a male and a female and made you into nations and tribes, that you may know each other. Verily the most honoured of you in the sight of Allah is he who is the most righteous of you." (49:13).

This verse shows that marriage is the basis of relationship in the family.

We find also that the relationship through marriage is given a place of importance in the Islamic Law. There are many verses