



All rights reserved
XXXXXXXXXX
Printed in the United States of America

Copyright © 2015 American Scientific Publishers
Advanced Science Letters
Vol.

THE EFFECTS OF CONVERSION TO ISLAM OF A NON- MUSLIM SPOUSE ON THE CUSTODY OF MINOR CHILDREN- THOUGHTS AND TRENDS FROM A MALAYSIA PERSPECTIVE

Heama Latha Nair ¹ ,Gan Ching Chuan ²

^{1 2}University Malaya, Kuala Lumpur

As a result of globalization and the fact that we are living in a pluralistic society, religious conversion from one faith to another may happen for many reasons; the most common being for the sake of marriage. However, when there is a breakdown in the marriage, as a consequence of the religious conversion of a spouse to another faith, which subsequently subjects the parties to different legal systems and jurisdiction, the issue in respect of custody of minor children can become problematic and complicated. In Malaysia, interfaith custody battle between a non-Muslim and a Muslim spouse has become a predominant issue in recent times. Separate legal systems and different jurisdiction governing the respective parties as a result of the religious conversion of a spouse to Islam, has made the issue of custody of minor children very challenging and distressing, not only for the respective parties, but the minor children who are torn between the parents. This paper aims to highlight to what extent the welfare and best interest of the child is considered by the Courts in awarding custody to the respective parents in an interfaith custody dispute by scrutinising past decided cases against the latest landmark decision by the Federal Court of Malaya in resolving this pertinent interfaith custody dispute amongst the parties.

Keywords: Conversion, Custody, Interfaith, Legal System.

¹PhD Candidate, University Malaya, Kuala Lumpur (heamalatha.narayanannair@taylos.edu.my)

² Professor of Law, University Malaya, Kuala Lumpur (gancc@um.edu.my)

1. INTRODUCTION

Malaysia is well known for its pluralistic society as it is made up of a multi-racial community practicing diverse religions and cultures. The legal system in Malaysia is considered unique as there are two parallel legal systems one governing the Muslims and the other for non-Muslims. The Muslims are regulated by Islamic Laws and subjected to Syariah Courts jurisdiction whereas, non-Muslims are governed by Civil laws administered by the Civil Courts respectively. The dual legal system works well when the legal system within its respective private laws are clearly demarcated. However, the laws are blurred when there is an overlap between Islamic laws and Civil laws without a definitive solution as to which law should prevail. Of late, the conversion to Islam by a non-Muslim spouse has resulted in an upsurge of bitter custody battle between the Muslim and non-Muslim spouses in Malaysia. It is noteworthy, that conversion to Islam by a non-Muslim spouse not only changes his/her religious observances but results in a total change in the law to which the convert is subjected to and the jurisdiction of the court that will enforce the law in relation to his/her family matters. This paper aims to analyse the interfaith custody dispute as a result of conversion of a parent to Islam and to gauge to what extent the best interest and welfare of the child is considered paramount by the courts in awarding custody to the respective parent. The paper will also highlight the landmark decision by the Federal Court of Malaya in the case *Viran a/l Nagapan (Izwan bin Abdullah) v. Deepa a/p Subramaniam*, (2016)¹ in trying to resolve interfaith custody dispute by analysing to what extent the judgment has resolved or compromised the issue in relation to interfaith custody of minor children. In conclusion some recommendation to plug the gap and suggestions for further research would be advocated.

2. CUSTODY UNDER CIVIL LAW

The law governing custody in respect of non-Muslim children in Malaysia is contained in the (Law Reform (Marriage and Divorce) Act of 1976) ('LRA') and (The Guardianship of Infants Act of 1961) ('GIA'). Neither the 'GIA' nor the 'LRA' has defined the word 'custody'. The (Interpretation Act of 1967) (IA) too, is of no assistance in this regard. The closest reference to the term custody is provided in Section 89 (1) of the 'LRA', which states that, 'the person given custody is entitled to decide on all question that relates to the upbringing and education of the child.' In *Sivajothi a/p Suppiah v. Kumathasan a/l Chelliah* (No. 2)(2002)², the courts used the phrase 'custody, care and control' and not the word 'custody' purely to show that custody denotes more than care and control and that care and control is merely a fundamental element of custody. Hence, it is submitted that custody encompasses all matters in relation to the upbringing inclusive of education, care and control of a child.

In determining the issue of custody, the courts first and paramount consideration is the welfare of the child.³ Decided cases are also in consonant with this requirement. In addition to the above, the courts have considered matters such as the conduct of the parties⁴, their financial and social status, the sex and age of the child⁵, the wishes of the child as far as they can be determined depending on the age of the child⁶, the confidential reports which a social welfare officer may put up⁷ and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. These factors were outlined and consider at great length in the case of *Mahabir Prasad v. Mahabir Prasad*, (1982).⁸ In addition, there is also difficulty when the child expresses his or her wish to be with both parents. In such a situation, the main consideration would be the overall welfare of the child in determining the right of one parent over the other. Nevertheless, if the child's preference is in line with the overall best interest of the child, the duty of the judge in coming to a decision would be made very much easier.⁹ Apart from considering the wishes of the child, statutory provisions do provide that the wishes of the parents in custody cases are equally important.¹⁰ The question, however, arises as to how far the wishes of the parents will be followed by the court. In *Teh Eng Kim v. Yew Peng Siong*, (1977)¹¹ the court considered the welfare of the children to be paramount and that it should prevail over parental claim if they are in conflict with the welfare of the child. Thus, it can be concluded that wishes of the parents most of the time will not be that significant unless it can be shown that those wishes are in line with the interests of the child.

3. CUSTODY OF CHILDREN UNDER ISLAMIC LAW

Custody or better known as '*Hadanah*' under Islamic law originates from the root verb '*hadana*', which denotes the caring, nursing, raising and protection of children who are considered still dependent¹². Islamic law recognizes '*hadanah*' as the right of the mother and her female ancestors through women, in order of proximity. In default of a mother and her female ancestors, through women, the '*hadanah*' goes to the father's mother and her female ancestors through women, and subsequently to the grandfather's mother and her female ancestors through women (Majid 1999).¹³ A Muslim mother to a Muslim minor child is allowed custody for the purposes of rearing the child by default until the child reaches the age of discernment or also known as '*mumaiyiz*'. The period of '*hadanah*' applies to a child below the age of seven for boys and nine for girls. However, it may be extended by the court on the application by the '*hadinah*' (the person who has custody) to nine year for boys and eleven years for girls respectively.¹⁴ After termination of the right of '*hadinah*', the custody devolves upon the father, and after the child reaches '*mumaiyiz*', the child may choose which

of his parents he wishes to stay unless the court orders otherwise¹⁵ subject to certain conditions provided they are not insane, a non-Muslim or of notorious conduct and provided the mother has not remarried.

In *Nooranita bte Kamaruddin v. Faeiz bin Yeop Ahmad*, (2004)¹⁶, the court took into consideration the fact that the mother had remarried, and granted custody to the father. The mother then appealed the decision. As the child had by this time reached the age of discernment or 'mumaiyiz', the child's views as to her preference of parents she wished to stay could be taken into consideration. However, as the child was unable to make a choice, the duty fell on the court to decide for her. The court ruled that the right of the child over whom custody is claimed must be given preference over the right of the person claiming custody. Further, the purpose of custody is for the interest and welfare of the child and not for the interest or welfare of the parties contending for custody. The court subsequently, dismissed the mother's application for custody but granted her access. Interestingly, in *Faridah Hanim Omar v. Abd Latiff Ashaari*, (2007)¹⁷ the mother was given custody of the children aged 12, 14 and 19 years respectively although the children had reached the age of discernment. This was because the father had consented to the said arrangement without any protest.

In determining the issue of custody, the paramount consideration for the court would be the welfare of the child and subject to that consideration, the Court shall be guided by the wishes of the parents of the child and the wishes of the child, where the child is able to express an independent opinion.¹⁸ Further, there is also a rebuttable presumption that it is for the good of the child during his or her infancy to be with his or her mother. In deciding whether the presumption applies to the facts of a particular case, the court would have regard to the undesirability of disturbing the status quo of the child by the changes in custody.¹⁹ The Shafii School of thoughts which has been adopted in the (Islamic Family Law Federal Territories Act of 1984) ('IFLFT'), restricts the right of 'hadanah' to Muslims. Hence, the provision on custody is applicable to Muslim families, where the child and parents are all Muslims.²⁰ According to Kuek, the Shafi'i and Hanbali school of thought have laid down strict rules that the custodian must be a Muslim as a non-Muslim custodian may influence the child to denounce Islam by his or her teaching and this is a great detriment in Islam (Kuek, 2012).²¹

4. EFFECTS OF CONVERSION TO ISLAM BY A NON-MUSLIM SPOUSE ON CUSTODY OF MINOR CHILDREN

Custody of minor children have been the most controversial issue in relation to the conversion to Islam by a non-Muslim spouse. In a normal custody dispute between two parties both married either under the Civil law or

Islamic law respectively, the judge would have to consider the welfare and best interest of the child against the suitability of one parent over the other. However, in conversion to Islam by a non-Muslim spouse, the issue of custody gets complicated. This is because the non-Muslim spouse and Muslim spouse are subjected to different laws and different courts. Judicial decisions in the following cases demonstrate the unsatisfactory position of the law as reflected in the bitter custody battles in cases such as *Indira Gandhi v. K. Patmanathan (Mohammad Ridzuan Abdullah)*, (2015)²², *Shamala v. Sathiaselvan* (2004)²³, *Genga Devi Chelliah v. Santanam Damodaram*, (2001)²⁴ where both the Syariah Court and High Court have granted custody of the minor children to the Muslim and non-Muslim parties respectively. The difficulty faced by the parties is to ascertain which court order should be enforced as the decision of the courts are at odds. The Civil High Courts have generally been reluctant to quash an order obtained ex parte by a convert spouse from the Syariah Court as the said order is considered an order made by a court of competent jurisdiction.²⁵ Further, High Court decisions are not binding but only persuasive authority, so the views of the courts may differ with varied reasons.

The Islamic law provision on custody of minor children according to the Shafi'i school of thought, states that, custody cannot be given to an insane, a non-Muslim, or the child's mother, if she remarries a non-muhram of the child, (unless to a person related to the child within the prohibited degrees). Therefore, it is pertinent to note that the non-Muslim spouse has no right whatsoever to custody of minor children under Islamic law. However, she would not be deprived of the right to visit the child (Abdullah, 2004).²⁶ According to Siraj,²⁷ although the Syariah Court is empowered to hear ex-parte orders in respect of custody of minor children and make interim orders, it ought not to entertain applications when one party is a non-Muslim (Siraj, 1987). This is because the non-Muslim is unable to challenge and set aside the ex-parte order as the Syariah Court has no jurisdiction over non-Muslims.²⁸ This predicament has resulted in a tug of war between the non-Muslim and Muslim spouses in Malaysia in relation to custody of minor children without a definitive solution until very recently.

5. RECENT DEVELOPMENT IN THE LAW

The Federal Court in a recent landmark decision in *S. Deepa vs N. Viran (Irwan Abdullah)*, (2016)²⁹ in resolving the issue of interfaith custody dispute in respect of two minor children unilaterally converted to Islam by the Muslim convert parent, has put the issue of jurisdiction to rest. The Federal Court ruled that, 'the civil courts are solely empowered to dissolve civil marriages and deal with the custody, care and control of children born from such union.' This was a long awaited decision which has finally plugged the gap in the law that couples married under civil law cannot extinguish their marital responsibilities upon

conversion to Islam and all issues incidental to marriage must be resolved by the Civil Courts. Although, the decision is much applauded, it still raises grave concerns.

Firstly, the custody of the two minor children was split between the non-Muslim and Muslim parent. This decision was made after interviewing the two children, a girl aged 11 years and a boy aged 8 years respectively in chambers. The court considered the welfare of the children, the individual child's wishes to be with one parent as opposed to the other and the undesirability of disturbing the current custody arrangement of the children before ruling on the split-custody of the children. Is this decision to separate the siblings in the best interest of the children? Most cases seem to suggest that it is in the best interests not to separate them from one another.³⁰

Secondly, the non-Muslim mother i.e. a Hindu, was granted custody of the daughter who is a Muslim without attaching any orders as to the child's upbringing. It is noteworthy that propagation of non-Islamic religion amongst Muslims can be a grave offence in Malaysia.³¹ In addition, as the subject matter in respect of Islam falls within the jurisdiction of the Syariah Court, the non-Muslim mother may have an uphill task at hand in pursuing a declaration annulling the conversion *vis a vis* the certificate of conversion for the 11 year old child.

Thirdly, both the minor children by reason of the unilateral conversion to Islam by the Muslim father are now Muslims. With due respect, the Court has failed to address this crucial issue whether the unilateral conversion of the minor children is constitutional.

Fourthly, the Court did not consider the irresponsible and violent behavior of the Muslim convert parent³² in granting the custody of the boy to the Muslim father. The non-Muslim wife had lodged 7 police reports from 2007 until 2012 for acts of domestic violence against her and an interim protection order was subsequently granted against the husband in August 2013. The High Court took this factor into consideration when granting custody of both the children to the non-Muslim wife. It is interesting to note that other jurisdiction namely the United States, has taken domestic violence seriously and it is considered one of the factors in deciding custody issues and whether it is in the best interest of the child to be with the violent parent.³³

Therefore, although the issue with regard to respect of jurisdiction of the court is settled, there are still loose ends in the judgment which would need further fine tuning.

6. CONCLUSION AND RECOMMENDATION

In conclusion, it is noteworthy from the discussion above that both the Civil Court and Syariah Court consider the welfare of the child as paramount and the mother as a better custodian compared to the father in relation to custody of minor children. However, when one spouse is a non-Muslim and the other a Muslim, the issue of custody is complex as indicated above. Earlier cases seem to suggest that the custody orders from both the Civil High

Court and the Syariah Court are equally enforceable. This has left the issue of custody of minor children in a dilemma. The recent landmark decision in case has now ruled that Civil Courts have the absolute jurisdiction to hear all cases in relation to conversion to Islam by a non-Muslim spouse and to address all matters incidental to marriage which includes custody of minor children. The decision of the Federal Court although commendable, has not plugged all the loose ends as there are still issues for scrutiny and further clarification and determination by the Court.

It is submitted with due respect that the Federal Court has failed to consider whether the split custody order would be in the best interest of the children and the respective custodian in the long run. An alternative approach would be to grant an interim custody order pending a confidential social welfare officer's report to gauge the suitability of the split custody order and the adaptability of the children to the respective custodian. In custody cases, the social welfare officer's report can be considered by the court in deciding the suitability of one parent over the other. Nevertheless, it is acknowledged that the courts are not bound by the welfare officer's advice³⁴ and it is subject to case by case basis. Nonetheless, considering *Deepa's* case involves inter-faith custodians', a Muslim and non-Muslim parent where the children are both Muslims, and the fact that Syariah law does not permit a non-Muslim to have custody of a Muslim child, the welfare officer's report is considered crucial in ascertaining the suitability of the custody arrangement and to gauge whether the best interest of the child is protected.

In addition, the Federal Court has failed to address the effect of the unilateral conversion of the minor children to Islam when ruling on the issue of custody. The father, as the custodian of the boy, would face no problems in respect of religious upbringing of the boy, as he is a Muslim. However, the non-Muslim mother, a Hindu by religion, would have an arduous task in nurturing the Muslim girl who by reason of the unilateral conversion to Islam by the father is now a Muslim. As Syariah law clearly prohibits a non-Muslim from having custody of a Muslim child, it is unclear how this predicament with regards the religious upbringing of the Muslim child would be effected without interference from the Islamic religious bodies. Hence, with due respect it is submitted that the Court's failure to rule on the position of the unilateral conversion of the minor children and attaching proper orders in respect of the custodianship of the non-Muslim parent has created uncertainty in the law. It is acknowledged by the researcher that this issue was not raised in the current appeal. However, as the split custody order does raise some inter-faith religious concerns, the Federal Court should have taken this golden opportunity to address this issue for purposes of clarity and streamlining the law in relation to unilateral conversion to Islam of minor children.

Another concern is the interviewing process of the minor children in chambers. It is submitted that it can be a

daunting experience for a minor child/children being in chambers before a panel of five male judges as in the present case who are complete strangers to the child, trying to illicit the child's wishes and preference of one parent over the other. This approach although is common practice in divorce and custody proceedings, should be done with caution. It is suggested that a couple of staggered interviews be conducted by the judges and trained welfare officers during the course of the trial to ascertain the wishes of the child/children. In the present case, the Federal Court conducted only one interview with the children and subsequently ruled on the split custody after considering the wishes of the child. It is submitted that staggered interviews would illicit the true wishes of the child hence, protecting the best interest of the child which is considered paramount.

Further, it is also recommended that the composition of judges hearing the appeal be reviewed. As the subject matter before the Federal Court involves an interfaith and

interjurisdictional dispute with regards custody of minor children, it is submitted with due respect that the panel of judges should be of a mixed racial composition and not Muslims only as was in the present case. This would not only reflect a fair trial but also boost the public perception and confidence in the judiciary resulting in a better acceptance of the unanimous decision.

Finally, although the jurisdictional conflict in relation to custody of minor children when a non-Muslim spouse converts to Islam is resolved, it is humbly submitted that until and unless the concerns raised are tackled, the best interest of the child are not protected. Hence, further research would need to be undertaken to propose a more viable procedure in resolving interfaith custody issues to safeguard the best interest of the child which is considered paramount.

REFERENCES

- ¹ Viran a/l Nagapan v Deepa a/p Subramaniam (1 MLJ 585) (Federal Court of Malaya, 2016).
- ² [2002] 2 MLJ 645.
- ³ Section 88(2) Law Reform (Marriage and Divorce) Act, 1976.
- ⁴ Re KO (an infant) (1 MLJ 494) High Court of Malaya, 1990- where adultery was considered by the court.
- ⁵ Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 states, "There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother ..."
- ⁶ Viran a/l Nagapan v Deepa a/p Subramaniam (1 MLJ 585) Federal Court of Malaya, 2016.
- ⁷ Tan Chong Pay v Tan Swee Boon (4 CLJ 625) High Court of Malaya, 1997 -where the court accepted guidance from the welfare officer's confidential report.
- ⁸ [1982] 1 MLJ 189.
- ⁹ Abdul Malek, N. (2011). Factors determining welfare of the child in Malaysian civil law of custody: an analysis of decided cases. *Jurnal Undang-undang dan Masyarakat*, 15, 169-178.
- ¹⁰ Sections 11 Guardianship of Infant Act of 1961 and 88(2) of the Law Reform (Marriage and Divorce) Act of 1976.
- ¹¹ [1977] 1 MLJ 234.
- ¹² Zahraa, M., & Malek, N. A. The Concept of Custody in Islamic Law"(1998).*Arab LQ*, 13, 155-156.
- ¹³ Majid, M. K. (1999). *Family law in Malaysia*. Malaysian Law Journal Sdn. Bhd.. (Malayan Law Journal, 1999) referring to Minhaj-et-Talibin, a manual of Muhammadan Law according to the School of Shafi'i at p 391-392.
- ¹⁴ Section 84(1) Islamic Family Law Federal Territories Act 303.
- ¹⁵ Section 84(2) Islamic Family Law Federal Territories Act 1984.
- ¹⁶ [2004] 2 MLJ cxxiv.
- ¹⁷ Faridah Hanim Omar v. Abd Latiff Ashaari (1 CLJ (Sya), page 433-453, Syariah High Court decided 2007.
- ¹⁸ Section 86(2) IFLFT Act 1984.
- ¹⁹ Section 86(3) Islamic Family Law (Federal Territories) Act 1984 & Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976.
- ²⁰ Section 82 (a) Islamic Family Law (Federal Territories) Act 1984.
- ²¹ Ying, K. C., & Siang, T. E. (2012). Unilateral Conversions of a Child's Religion and Parental Rights in Malaysia. *SACLJ*, 24, 92.
- ²² [2015] 7 MLJ 153.
- ²³ [2004] 5 AMR 75.
- ²⁴ [2001] 2 CLJ 359.
- ²⁵ Nor Kursiah bte Baharuddin Shahril bin Lamin & Anor [1997] 1 MLJ 537.
- ²⁶ Abdullah, N. C. (2004). *Conversion to Islam: Effect on Status of Marriages and Ancillary Reliefs*. International Law Book Services.
- ²⁷ Mehrun Siraj. (1987). Muslim Marriage and Divorce. Conference Proceedings University of Malaya.
- ²⁸ Article 121(1A) of the Federal Constitution of Malaysia which states that, "the Civil High Court has no jurisdiction in matters under the jurisdiction of Syariah Court".
- ²⁹ Federal Court Decision vide Civil Appeal No: 02 (f)-5-01-2015 & 02(f)-6-01-2015 on 10th February 2016 reported in The New Straits Times on 11th February 2016 p4.
- ³⁰ Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah (6 MLJ 48); High Court of Malaya, 2000); Adams v Adams (FLR 768) (Court of Appeal, 1984).
- ³¹ Part II of the Control And Restriction (The propagation of Non-Islamic Religions Amongst Muslims) (Negeri Sembilan) Enactment 1991, also Clause 5 (1) which talks about subjecting a Muslim under the age of 18 years to influences of a non-Islamic religion.
- ³² Viran a/l Nagapan v Deepa a/p Subramaniam (1 MLJ 585) (Federal Court of Malaya, 2016).
- ³³ Goh Su Li. (2016). Federal Court Judgment of S Deepa: Domestic Violence & Child Custody. The Malay Mail Online. <http://www.themalaymailonline.com/what-you-think/article/federal-court-judgment-of-s-deepa-domestic-violence-child-custody-goh-siu-li>. Accessed on 15th February 2016.
- ³⁴ Section 100 of the Family Law (Marriage and Divorce) Act 1976.