

Guideline for Judicial Conversation with Children in Court

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ABSTRACT

This article considers the relationship between judicial conceptions of paramountcy principle and the participatory rights of Malaysian children in custody dispute. The scope of this article is extended to the coverage of Article 12 of the Convention on the Rights of the Child (the Convention) but limited to family justice. The methodology is legal, library-based research focusing mainly on primary and secondary sources and international jurisprudence. The findings indicate a need for reforms in certain areas such as in developing a standard judicial procedure in monitoring the court's adherence to the Convention's provision, in empowering the professionals with relevant expertise in dealing with vulnerable parties, and in promoting the variant method of obtaining the views of the children rather than merely in-camera judicial interview.

Keywords: Child right, child participation, family justice, judicial conversation

INTRODUCTION

Family relationships nowadays are prone to be evanescent than they are historical. It is alarming to see the increase of a total 171,252 divorce cases within 2014 until

July 2016 in Malaysia thus reflecting the vulnerability of our family institution (Bakar, 2017). It is apparent that a child is the one most affected by the breakdown of a parental relationship. Thus, a research about the rights of children, and the best way to support and listen to children involved in family litigation between separating parents will generate wide-ranging legal and social advantages.

Family justice is not like any other laws because the issue in question concerns a breakdown in the smallest unit in the society.

ARTICLE INFO

Article history:

Received: 10 September 2018

Accepted: 18 June 2019

Published: 23 July 2019

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In any event, prior to the introduction of 'best interest' concept, the focus should be on the children's welfare over the disputing parents, as mandated in all legislation concerning child care proceedings in Malaysia. In one case, Raja Azlan Shah FJ (as he then was) in the case of *Teh Eng Kim v Yew Peng Siong* [1977] 1MLJ 234 reaffirmed that the paramount consideration in deciding custody dispute was the welfare of the children and neither parent had a prior right over the children. Hence, it is a vital principle that decisions relating to parental responsibilities should be child-centered. Not only is the child's welfare must be considered, but the court is also obligated, so far as practicable, to consider the child's age in expressing an independent opinion in matters affecting their lives.

Providing such an opportunity to the children has invited discourses on its merits and pitfalls (Sutherland, 2012; Warshak, 2003). Children are regarded as human beings who possess preferences and feelings which must be respected. The emerging rights provided children with a locus standi at their standing as a right-bearer (E. K. M. Tisdall, 2015; Wyness, 2014, p. 65) in a judicial hearing. The role of the professionals is thereafter crucial in translating children's voices into the realistic and right decision (Caffrey, 2013; Lansdown, Jimerson, & Shahroozi, 2014; Ross, 2013; Tyler, 2011). Current discourse on reconceptualising childhood has promoted various debates especially on suitable avenue in hearing care proceeding (O'Mahony, Burns, Parkes, & Shore, 2016), the advanced theoretical

agenda for children's rights research (Arce, 2015), concept of vulnerability in shaping childhood (Andresen, 2014), ethical issues (Mlyniec, 1995), the development of participation measurement scale (Charles & Haines, 2014), and the conceptualisation of children as active agents with their developmental right (Peleg, 2013).

Advocating Child Participatory Right for the Best Interest of the Children

In 1989, world leaders unanimously determined that children needed distinct convention to protect children's interest. The United Nations Convention on the Rights of the Child (the Convention) offers significant development by making children as the holders of rights based on appropriate guidance given by their guardians. The Convention, which Malaysia ratified on February 17, 1995 with some reservations, has openly upheld the two principles i.e. Article 3 and Article 12. Article 3(1) of the Convention states that – In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3 is the umbrella provision in the Convention which must be applied to the classified "4Ps"- Prevention, Protection, Provision and Participation provisional rights as guaranteed by the Convention (Bainham & Gilmore, 2013). In contrast, Archard and Skivenes (2009) argued that these commitments ought to be thought as having equal force and standing, not least

since the Convention views all of its Articles as having the same binding power upon States by resorting to the gist in Article 2.1 of the Convention. Due to global acceptance of the Convention, many countries adopted the principle of the best interests of the child in their legislation pertaining to custody dispute (De Cruz, 2010). This leads to a flexible process whereby the principle demands decision makers to seek the best outcome for the children concerned, but that this has to be weighed against other interests (Eekelaar, 2015).

Meanwhile, Article 12 of the Convention provides the fundamental principle that emphasizes children's rights to participate, which reads,

Article 12.1: State parties shall guarantee that children, who are capable of forming their own opinion, have the right to convey such opinion freely in all matters involving themselves, and their opinion is given due attention in accordance with their age and maturity.

Article 12.2: For this purpose, children shall be given the opportunity specifically to be heard in any judicial and administrative proceedings, whether directly, or through an appropriate representative or body, by a method consistent with the procedural rules in accordance with the laws of the state.

This provision basically provides children with the right to be consulted in any matter affecting their lives. Their views must be given solemn consideration in deciding any dispute in the event of parental separation. Archard (2015) claimed that,

“what is important is not just that one can speak (rather than be silenced) but that one is heard (rather than ignored)” (p. 119).

It is suggested that both articles should be read conjunctively in ensuring the welfare of the child (Ahmad et al., 2017). Article 12 is noteworthy to be seen much more than only a right of the child to be heard but to some extent to be viewed as a process rather than a static, one-off event (Herbots & Put, 2015). It is now broadly used to describe ongoing processes, which may include information-sharing and holding dialogues between children and adults based on mutual respect. By means of such activities, children can learn how their views and those of adults are considered and thus may shape the outcome of such processes (Committee on the Rights of the Child, 2009).

Moreover, Herbots and Put (2015) proposed defining the notion of participation as a framework whereby the questions of why, where, who and how to participate was conceptually illustrated as participation disc. Dillon, Greenop, and Hills (2015) reaffirmed that participation was not a question of whether children participate or not, but how their participation in judicial processes could be maximised without significantly compromising their welfare. This systematic procedure for the involvement of thoughtful decisions about how the children themselves should be involved will indubitably advance us towards a more child-centered family law (Chisholm, 1999).

Many findings uphold children's participation by advocating support to their socio-emotional development and judicial values. Children also enjoy

various important benefits that include the rise of self-esteem, the strengthening of responsibility, and their positive ability to socialize and enjoy continuous family relationships. Listening to children in several circumstances also guides the court to form better decisions and prepare the children to be involved in the civil society (Cashmore & Parkinson, 2009; Halpenny, Greene, & Hogan, 2008; Sutherland, 2014). An example of best practice in this regard could be resort to New Zealand's legislation, i.e. Section 6 of the Care of Children Act 2004, which states that a child must be given reasonable opportunities to express views on matters affecting the child. The court must entertain any views of the child, irrespective of his or her age, in presiding any disputes affecting him/her. The views are not determinative but rather provide significant value for judges' consideration in instant cases (Taylor, Fitzgerald, Morag, Graham, & Bajpai, 2012).

Child Participation in Family Proceeding in Malaysia

The Malaysian judicial system for family proceedings is unique since the division of jurisdiction is provided in detail in Schedule 9 of the Federal Constitution. All jurisdictions involving personal laws for Muslims are subject to state laws. This shows that there are two separate family laws for Muslims and non-Muslims in Malaysia. In the civil legal framework, the hearing of family civil litigation is usually done in the Civil Division of the High Court which also has hearing jurisdiction

over other civil cases. However, in 2002, the Family Division of the High Court was established in Kuala Lumpur and Shah Alam with detailed exclusive hearing jurisdiction over post-divorce cases.

Current practices show how Malaysian courts value the children's wishes in determining custody cases as contained in several legislations, such as section 88 of the Law Reform (Marriage and Divorce) Act 1976 (the LRA) and section 86 of the Islamic Family Law (Federal Territory) Act 1984 (the IFLA). Section 88 (1) of the LRA, which is in *pari materia* with section 86 of the IFLA 1984, provides the following:

- (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.
- (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard—
 - (a) to the wishes of the parents of the child; and
 - (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

Another important legislation pertaining to the guardianship of infants is the Guardianship of Infants Act 1961 (Act

351). The only considerable wishes in ascertaining children's welfare as provided in Act 351 are limited to parent's or parents' wishes as section 11 provides:

The Court or a Judge, in exercising the powers conferred by this Act, 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.

Nevertheless, the recognition of the wishes of a child was evidenced initially in Malaysia (Awal, 2012, p. 219) when the Federal Court took an advanced approach in reading Act 351. The court in *Kanalingam v Kanagarajah* [1982] CLJ (Rep) 143 released a girl from all restraint and acknowledged her right to choose her partner to live with instead of staying with her father. Notably, the current trend of Malaysian judicial civil and Syariah practices favour a direct approach to getting children's views compared to resorting and relying on an expert's opinion in deciding child custody.

For example, in the case of *M Saraswathi Devi a/p K Govind v Keith Ian Monteiro* [2006] 1 CLJ 303, the court had interviewed a child for about 45 minutes after being requested by the counsels to determine the merits of the custody variation order and later changed the previous judgment and awarded the order of child custody to the father. The ruling was made on the account the welfare of the child as the paramount consideration, in line with section 88(2)(b) of the LRA, especially the wishes of the child of 14 years of age who impressed the

court as having the intelligence and capacity of expressing an independent opinion in the said dispute.

In the recent case of *Viran a/l Nagapan (Izwan) v Deepa a/p Subramaniam* [2016] 1 MLJ 585, the court ruled that the determination as to whether a child could express an independent opinion depended greatly on the circumstances peculiar to the facts of the case and the impartial assessment of the judge on the circumstances. In this case, the judge reportedly called both children of 8 and 11 years of age into his chamber and interviewed each of them because the judge was convinced that both children were found to be mature enough to express their independent opinions and therefore stated their decisions about with whom they preferred to stay. The outcome turned out that the daughter decided to stay with the mother and the son with the father. Consequently, the court handed its ruling as per wishes along with considering some other legal factors.

The High court judge in *Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai & Anor* [2014] 9 MLJ awarded the custody of 14 and 11-year-old children to the mother after interviewing both kids with the paternal grandmother in her chamber for almost one and a half hour. The older boy expressed to the court of his wish to stay with the father but the court, after looking into the long term of his best interest, decided otherwise because the mother could play a meaningful parental role regarding his academic progress compared to current status quo. The decision was also to ensure

that both siblings were raised together under one roof. The order granting care, control, and custody of the two children to the mother was predicated on the children's best interests, which was of paramount consideration.

Additional specific factors are also relevant in so far as they pertain to the child's welfare. The court is frequently influenced not only by the advice of a child psychologist or a psychiatrist but almost inevitably by their own beliefs of how a child is brought up. It is a settled principle that an appellate court should not interfere with the trial judge's conclusions on material facts unless it is satisfied that he was plainly wrong. This principle is highlighted by the Court of Appeal in *Low Swee Siong v Tan Siew Siew and other appeals* [2013] 3 MLJ 247 in which the court opined that insufficient attention or regard was given to the wishes of the 11-year-old child in this case as the judicial commissioner was not able to interview Bi-Anne in the first place due to some technical problems. Approving the child's known wishes and views, the court granted custody order against the mother after taking into consideration a strong attachment between Bi-Anne with her father and aunt. The mother's application to take the child out of jurisdiction was incompatible with the child's best interests and welfare, which was the paramount consideration.

In the event the court is of the opinion that the presiding matter is of contentious issue regarding custody, the court shall, whenever it is practicable, take the advice

of any professional who is trained or experienced in child welfare but such advice shall not be binding as provided in section 104 of the IFLA and section 100 of the LRA. The case of *Jayakumar a/l Karuppanan & Anor v Jeyakumar Krishnan* [2006] 4 MLJ 484 was the example where the learned judge considered the expert witness's statement in awarding the right of custody to the maternal grandparents and aunt who had established a strong and healthy emotional bond with the child concerned.

On a further note, in section 88(3) of the LRA, there is a presumption that a child under the age of seven years is best left in the care of the mother. The situation is similar in the Shariah court whereby the presumption is applicable for children under seven for boys and nine for girls. In other words, the father needs to prove that he is the better caretaker in gaining custody of the child. Though the legislation prescribed so, the judge has wide discretionary power in summoning the child to his chamber if the case necessitates before pronouncing judgment over custody disputes.

From the above discussion, the most consistent pattern of giving weight to children's opinion is when their wishes coincide with what the court believes is best for the children, along with the age of the children. For example, the court held in *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189- "In order to decide the welfare of a child as of paramount importance it was necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his/her wishes as far as they could

be ascertained depending on the age of the child, the confidential reports of a social welfare officer 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 the other”.

In a similar juncture, a judge in *M Saraswathi Devi a/p K Govind v Keith Ian Monteiro* [2006] 3 MLJ 88 stated, “In light of the facts and circumstances of this case, and after taking into account the welfare of the child as the paramount consideration, in line with a construction which is consistent with s 88(2)(b), especially the wishes of the child of 14 years of age who impressed me as having the intelligence and capacity of expressing an independent opinion, I am of the view that the custody order should be varied in favor of the father.” Therefore, it is submitted that the most influential method of taking cognisance of children’s wishes in Malaysia is through judicial interviewing. Sawyer (2006) reaffirmed that children would only gain their legal personality by being integrated unconditionally in the legal culture, which was through direct consultation with the judge in matters concerning their well-being.

However, Menon and Tan, the prominent family law practitioners, were of the view that judicial approach on children’s interviewing might inflict harm to the children because judges were not psychological and counselling experts for children (Azizan, 2011). This view is supported by a research done by the Child Rights Coalition Malaysia (Gabungan, 2012) that found many professional

groups working with children confronted with limited basic knowledge about the Convention and its provisions. Gabungan’s finding is, in fact, worrisome looking at the fact that the responsible authority has inattentively embraced the Convention’s inspiration into the relevant professional institutions. On top of that, the discretionary power enforced by each judge is varying as judges with different backgrounds and exposure towards childhood issues are definitely prejudiced to having different practices in handling children in court. This situation is an indication of the urgency of professional empowerment agenda (Bell, 2016, p. 1) and national awareness campaign in advocating children’s rights within national boundaries.

Guideline for Judicial Conversation with Children: Discussion and Recommendation

There is little uniformity in how children’s voices are heard in family justice internationally. One possible explanation is that each jurisdiction differs in its culture and attitude toward children’s rights (Fernando, 2014; Woodhouse, 2014). Debate is expected to continue in all jurisdictions showing either support (Rachel Birnbaum & Bala, 2010; Savoury, 2013) or rejection (Byrnes, 2011) of judicial interviewing, also with regard to engaging other professionals advice (Ulvik, 2015) and views of the child reports (Birnbaum, 2017) in managing custody assessment. Given these reasons, this article offers a general guideline as to what should be observed in a

judicial interview which can be extended to professional communication with children, particularly in conceptualising article 12 in their forthcoming setting.

An extensive amount of literature offers advice with regard to interviewing children (Parkinson & Cashmore, 2007; Powell & Lancaster, 2003; Saywitz et al., 2010; Turoy-Smith & Powell, 2016) whereby it is recognised that the purpose and timing of the interview will influence how it is done. The Committee on the Rights of the Child (2009, para 134) articulates nine “basic requirements for the implementation of the right of the child to be heard” in its general comment on Article 12. The participative processes must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable.

The above participative processes have been compressed into four separate factors which promise the successful implementation of Article 12. The factors are space, voice, audience, and influence (Lundy, 2007). The first two factors correspond to the first right embodied in article 12, i.e. the right to express a view, whereas the last two factors respond to the right to have the view given due weight. Therefore, a comprehensive guideline of child participation should embrace all the four factors in ensuring that the best interest of children is not violated.

The current guideline for family law practice (Thong, 2011) in Malaysia has yet to be amended and enriched with the inclusion of the abovementioned factors.

The important agenda as regards to space is the provision of opportunity for judicial communication with children both in litigation and mediation spheres (Chisholm, 1999). In order to help children voice out their views in court, several measures must be undertaken, among which are by providing the children with a special place to be interviewed and by using an assistive technology that would ease the communication of their views to the judges or welfare professionals.

In ensuring that a child’s views are given weight, the elements of audience and influence must be construed by guaranteeing that the child is speaking to the right quorum. These may include skilful judges who have undergone continuous training in dealing with children (Siraj, 2012), conversant judges in both knowledges of syariah and civil law (Ahmad, Awal, & Samuri, 2016) and specialist professionals who can help the court to grasp a comprehensive picture of the matter.

Furthermore, the court is empowered to seek a report from a welfare officer if the case requires. In *RE KO (AN INFANT)* [1990] 1 MLJ 494, some of the more obvious points on which welfare officers would be expected to investigate and make their assessment include, inter alia, as follows: (1) the proposed arrangements for the care of the child; (2) the relationship between the child and the proposed caretaker or competing caretakers; (3) the wishes and feelings of the child; (4) the respective merits of the parents; (5) whether access to a particular person is desirable, and if so, the amount of access.

It is also worth to consider foreign practice which advocates observation of contact by an expert while a welfare officer or child protector is conducting his interview with the family members in the preparation of the proposed custodial arrangement. Such practice is argued as vital despite all other methods including judicial meeting with the parents and child (Tyler, 2011). The assessment is aimed at providing the court with a reliable yardstick of parenting capacity, which is based on the attachment theory. In a nutshell, the conversation with children is considered a success if the professionals can value children's lived experience and provide the necessary support to enable them to have their voices heard (Fitzmaurice, 2017).

The important provisions that have been worthily inserted in the proposed guidelines for a judicial conversation with children in family justice in Malaysia could be summarised in Table 1 (Bala et al., 2013). Apparently with regard to judicial conversation, several recommendations have been made which include: (1) the purpose of the guideline for the judges in meeting the children; (2) the adoption prerequisite; (3) the responsibility of lawyers; (4) the recording and confidentiality of the meeting; (5) the quorum; and (6) the responsibility of judges. The explicit practice of the alike guideline could be resorted to New Zealand which has their New Zealand's Judges Guidelines- Decisions with children, 2007 and England and Wales Guidelines for Judges Meeting Children who are subjects to Family Proceedings, 2010.

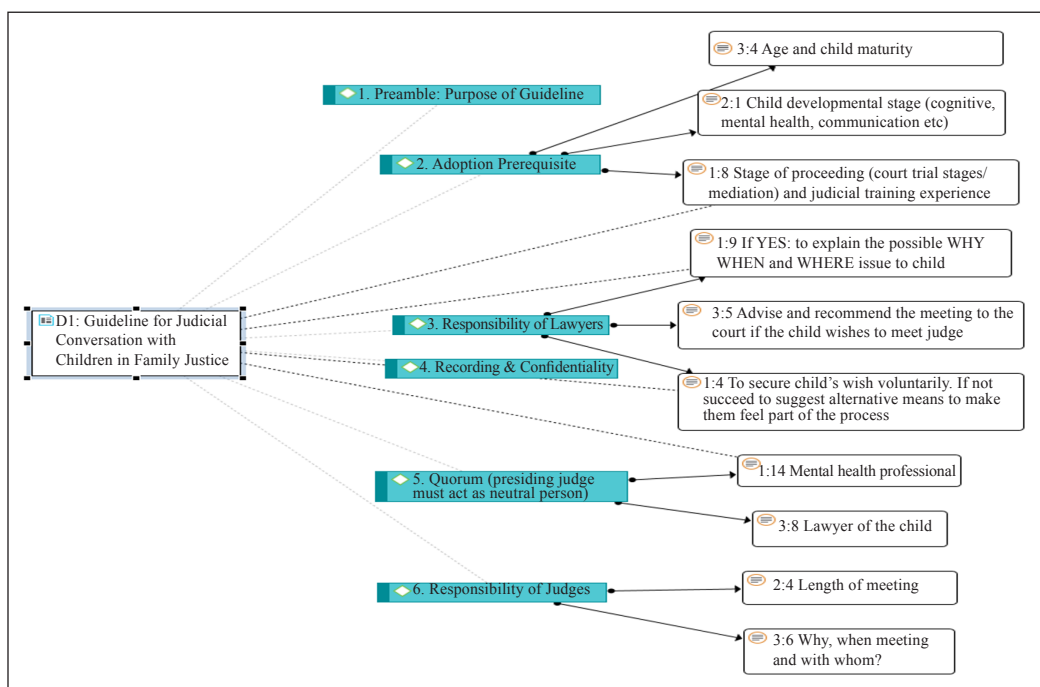


Figure 1. Proposed guideline for judicial conversation with children in family justice

CONCLUSION

This article concludes that while children's best interest gains protection by being institutionalised, their participation are weakened by not being perceived as social and relevant. Rationally, as consistency and autonomy are privileged, the weight given to children's views is somewhat lessened by concerns of them being manipulated or devastated in the process. Courts and their decisions may be based on the best interest of children, child-focused, centering on children's welfare, but the courts are not child-inclusive at their disposal (Tisdall, 2016)

On a further note, it is still debatable as to whether it is a good practice to merely decide which of the parents should be given custody based on a personal interview of the child by the judge. It could be unfair to rely the decision based on one or two interviews while it could affect the future of one child in the long run. It is imperative to highlight uniformity in the practice by the courts which deal with family matters. To ascertain on the uniformity, those six provisions have been incorporated into a standard guideline for judicial conversation with children in family justice in Malaysia as in the chart above.

In the event child refuses personal contact with judges, there are other possible means to acknowledge their wishes which among others include: (1) engaging professional advice; (2) viewing child's report from the welfare officers; and (3) observation of contact with the child's family by the expert. However, these practices are

still subjected to Malaysian procedural law. It is important to note that a judge is not an expert or expertise or professionals with regard to psychological of children or vulnerable parties to a custody battle. It is stressed in the guideline that a judge is to acquire relevant knowledge and expertise in dealing with children's psychological and mental health by undergoing special training.

All views offered by any child are deemed as significantly imperative. In the implementation of article 12 of the Convention, the challenge is to enforce the notion of child-empowering over opportunity-restricting towards children. While this measure cannot be universally guaranteed, one way is to ensure that the children are told how their views can influence the family justice decision. In Malaysia particularly, the role of court officers is considered vital in recognising children's right and acting upon it with full commitment to promise us a better nation.

ACKNOWLEDGEMENT

This work was supported by Ministry of Higher Education under Grant Code: USIM/FRGS/FSU/32/51014.

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