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LEGAL INSIGHT



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Custody Disputes in Malaysia: What Courts Consider in the Best Interests of the Child

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Abstract

Imagine a 6-year-old child caught in a tug-of-war between two loving parents, both claiming they know what's best. ***Who makes the decision, and by what standard?***

Custody disputes in Malaysia are more than just legal proceedings, they are deeply personal conflicts that significantly affect family relationships and the welfare of children involved. At the centre of these disputes lies the principle of the **“best interests of the child”**, which serves as the guiding standard for judicial determinations.

This article examines the legal framework governing custody decisions in Malaysia, highlights **the factors that courts consider in evaluating what constitutes the child's best interests and discusses emerging international trends, including the movement toward shared parenting arrangements.**



Defining Custody in Malaysian Law

Custody refers to the legal right and responsibility of a parent (or other suitable person) to make decisions regarding the child's care, education, daily routines and general upbringing. In Malaysia, custody is generally classified into **two main types**: -

- Legal custody, which refers to the rights of a parent to make important decisions about the child's life, such as education, healthcare, and religion.
- Physical custody, which determines which parent the child will live with daily.

When Can Custody Be Sought?



Custody applications may be made at **any stage, even before divorce proceedings commence.** Unlike maintenance claims, there is no requirement to wait for the dissolution of marriage. A parent may seek custody during separation, while awaiting divorce, or after the divorce has been finalized.



The Governing Legal Framework

Child custody in Malaysia is governed primarily by **two pieces** of legislation:

- **Guardianship of Infants Act 1961 (“GIA 1961”):** **Section 11** stipulates that in all matters relating to the custody and upbringing of a child, the child’s welfare must be the paramount consideration^[1];
- **Law Reform (Marriage and Divorce) Act 1976 (“LRA 1976”):** governs custody, guardianship, and access for non-Muslim parents upon divorce or separation. **Section 88** empowers the court to grant custody to either parent or, in exceptional cases, to another suitable person, with discretion to make alternative arrangements where necessary to protect the child’s welfare.^[2]

Together, these statutes empower the courts to make child-centric decisions and emphasize the need to ensure a safe, stable, and nurturing environment for the child.

[1] Section 11 Guardianship of Infants Act 1961 1961

[2] Law Reform (Marriage and Divorce) Act 1976

What Factors Do Malaysian Courts Consider When Deciding Custody?

The courts adopt a child-centered approach guided by the principle of the best interests of the child. In evaluating custody arrangements, the **courts typically consider** the following factors:

- The emotional, physical and moral welfare of the child, both short- and long-term;
- The financial stability and caregiving capacity of each parent;
- The child's preferences, particularly where the child is older and capable of expressing independent views;
- The quality of the parent-child relationship and each parent's willingness to facilitate and encourage a continuing relationship with the other parent.

Understanding the “Best Interests of the Child”

The “**best interests**” standard serves as the court’s north star when adjudicating custody disputes. It represents a holistic inquiry into the child’s emotional, psychological, physical, and moral well-being.^[3] **Several factors guide the court’s assessment: -**



1. Welfare as the Overriding Principle

In **Mahabir Prasad v Mahabir Prasad**, the Federal Court held that the “first and paramount consideration” means the child’s welfare must override all other claims. The court must consider every relevant fact, including the child’s relationship with each parent, potential risks, and each parent’s capacity to provide care and stability.^[4]

Similarly, in **L v S**, the court held that welfare encompasses more than financial comfort, giving equal weight to emotional and moral development.^[5]

[3] Law Office of Amber M. Rodriguez, ‘How Does the Court Determine the Best Interests of the Child?’ (2025) <<https://amrodriguezlaw.com/blog/how-does-the-court-determine-the-best-interests-of-the-child/>> accessed 2 August 2025

[4] [1982] 1 MLJ 189

[5] [2002] 7 MLJ 584

2. Parental Wishes

Section 88(2) LRA 1976 requires the court to consider the wishes of the parents. However, cases such as **Viran Nagapan v Deepa Subramaniam** and **Teh Eng Kim v Yew Peng Siong** make it clear that parental preferences are secondary to the child's best interests. Only where welfare considerations are evenly balanced do parental wishes carry more weight.^[6]

3. The Child's Wishes

Where appropriate, the court may take into account the child's views. In **Dang Choi Ping v Lim Eng Kok**, the court interviewed children aged 4½ and 5½ to assess their preferences. The significance of a child's wishes depends on the child's maturity, age, and the surrounding circumstances. The significance of a child's wishes depends on the child's maturity, age and the surrounding circumstances.^[7]

4. Children Under the Age of 7

There is a rebuttable presumption that a child under seven is best placed with the mother.^[8] However, this presumption is not absolute. The court will consider ***whether such placement aligns with the child's welfare*** and ***whether altering the child's living arrangements would cause undue disruption***. Each case is assessed on its own merits.

[6] [2016] 1 MLJ 585, [1977] 1 MLJ 234

[7] [2012] 6 MLJ 401; [2012] MLJU 346; [2012] 1 LNS 332; [2012] AMEJ 0098

[8] Section 88 of the Law Reform (Marriage and Divorce) Act 1976

Interpreting 'Best Interests': A Flexible Yet Unpredictable Standard?

Although the “best interests of the child” is the guiding principle, its open-ended nature allows for a wide range of interpretations. ***What constitutes emotional or moral welfare*** may vary between judges, leading to inconsistent outcomes in similar cases. The absence of standardised criteria, such as formal assessment tools or structured judicial guidelines, means the outcome often depends on the presiding judge’s subjective views. This flexibility is a strength—but also a risk to predictability and fairness.

Listening to Children: Should Their Views Be Central to Best Interests?

While Malaysian courts possess discretion to consider a child's views in custody proceedings, there is currently neither a statutory obligation to do so nor a consistent framework to guide such inquiry. This discretionary approach stands in contrast to international standards under **Article 12 of the United Nations Convention on the Rights of the Child**, which recognises the child's right to be heard in matters affecting them. The marginalisation of the child's voice risks rendering the "best interests" standard adult-centric and potentially reductive.

Embedding meaningful child participation within custody adjudication, whether through legislated mechanisms or the involvement of trained welfare officers, would enhance procedural fairness and ensure that judicial outcomes more accurately reflect the lived realities and developmental needs of the child.

In my view, institutionalising the child's voice must transcend symbolic recognition, it must become a functional reality within Malaysian courts. The absence of statutory guidelines currently leaves too much to judicial discretion, which may result in inconsistent outcomes. To align more closely with the **UNCRC** and principles of practical fairness, Malaysia should consider introducing formal mechanisms such as court-appointed child consultants or mandatory child interviews (subject to the child's age and maturity), to align more closely with both the UNCRC and practical fairness.



A Way Forward: Legislating Shared Parenting in Malaysia

Globally, **shared parenting** has emerged as a preferred post-divorce arrangement that promotes the child's long-term well-being. However, Malaysian law currently lacks an express statutory framework recognising shared parenting or joint parental responsibility.

Despite this, Malaysian courts have on occasion exercised discretion to grant joint custody, particularly where both parents demonstrate cooperation and where such arrangements align with the child's best interests.^[9]

[9] Assistant Prof. Dr. Roslina Che Soh, 'Shared Parenting as an Interpretation of the Best Interests of the Child in Custody Disputes: What Malaysia May Learn from Australian Experience' (IIUM)

<http://irep.iium.edu.my/3133/1/Shared_Parenting_as_an_Interpretation_of_the_Best_Interests_of_the_Child_in_Custody_Disputes.pdf>
accessed 2 August 2025

Comparative Insight: The Australian Experience



Australia's Family Law Amendment (Shared Parental Responsibility) Act 2006 introduced a rebuttable presumption of equal shared parental responsibility. This principle promotes the active involvement of both parents in key decisions concerning the child's life—even after separation.^[10]

Australian courts are required to consider:

- Whether equal or substantial time with both parents serves the child's best interests; and
- Whether such an arrangement is reasonably practicable, considering proximity, communication, and cooperation between parents.

Why Malaysia Should Consider Reform

Introducing legislative provisions for shared parenting could bring Malaysia closer to international best practices. Such reform would: -

- Align with the **United Nations Convention on the Rights of the Child (UNCRC)**^[11];
- Encourage co-parenting and reduce adversarial litigation;
- Recognize the equal and continuing roles of both parents post-divorce; and
- Provide clearer guidance to courts, lawyers, and families navigating custody disputes.

Legislating shared parenting—perhaps through a statutory presumption similar to Australia’s—would send a powerful message: parenthood endures beyond marriage, and children thrive when both parents remain actively engaged.^[12]

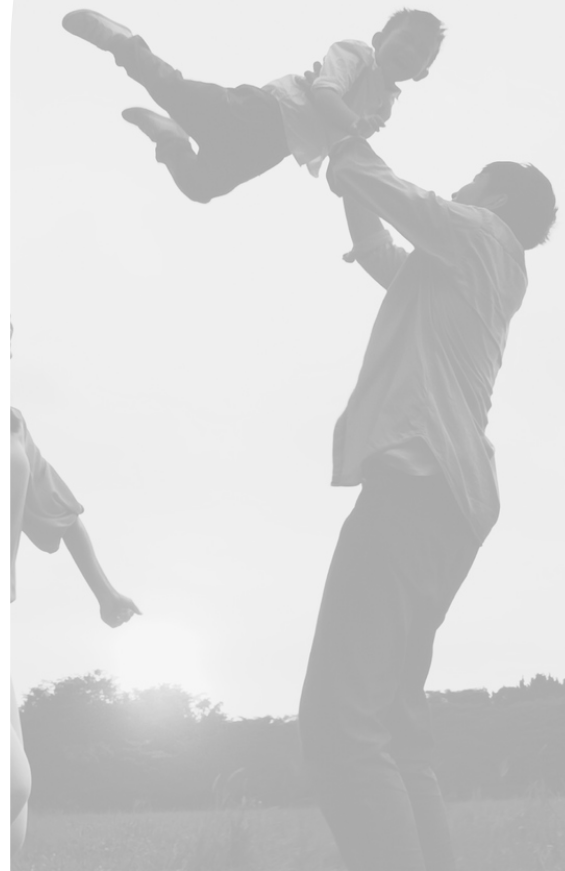
From a practitioner’s perspective, statutory recognition of shared parenting could significantly reduce litigation hostility and improve post-divorce parental cooperation. However, it is equally important that any legislative change is supported by social infrastructure—such as co-parenting education, family mediation services, and judicial training—to ensure shared parenting serves as a benefit, not a burden, to the child.

[11] Article 18 of the UNCRC

[12] Roslina Che Soh, ‘Shared Parenting As An Interpretation Of The Best Interest Of The Child In Custody Disputes: An Overview Of The Practice In Malaysia’ (IIUM, 2011) <https://www.aensiweb.com/old/jasr/jasr/2011/2405-2410.pdf>> accessed 2 August 2025

Practical Considerations and Limitations

While shared parenting promotes equal parental involvement, it is not universally applicable. In high-conflict cases, or where there is evidence of domestic violence, coercive control, or neglect, shared parenting may not serve the child's best interests. Any statutory presumption must therefore remain rebuttable, enabling **judges to exercise discretion and prioritise the child's safety and well-being.**^[13]



Ultimately, the preservation of a child's best interests cannot be achieved through legal principles alone. Judges, lawyers, and policymakers must critically engage with the realities of children's lived experiences, and move beyond one-size-fits-all approaches. Legal reform, to be truly effective, must be accompanied by structural, procedural and cultural shifts that prioritise the child as an individual with rights, rather than merely the subject of dispute.

[13] Ibid



Conclusion

Custody disputes remain among the most sensitive and complex matters adjudicated by Malaysian courts. As family structures evolve and parenting roles become more dynamic, the legal framework governing custody must also adapt to reflect these realities.

While current laws rightly **prioritize the welfare of the child**, the incorporation of a statutory framework for shared parenting would enhance consistency, reduce conflict, and support more balanced, child-focused outcomes. **In ensuring that children remain connected to both parents, Malaysia can take an important step forward in advancing the best interests of the child.**



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