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Grandparents' Rights And Obligations Under Malaysian Family Law: Conceptual And Legal Perspectives

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ABSTRACT

Grandparents are generally involved in child upbringing and nurturing. For some, babysitting their grandchildren is a full-time duty since the parents are away at work. Nonetheless, the law concerning the rights and responsibilities of grandparents is somewhat complicated. When a marriage breaks down, the grandparents' rights are equally impacted. This article explores the significant role of the grandparents and the extent of their acknowledgement by courts in determining child custody rights in Malaysia. This study employs a qualitative method focusing on library research on case analysis involving Malaysia's child custody and divorce cases. This study finds that grandparents play a pivotal role in children's upbringing; hence courts should take a more pertinent approach in determining the welfare and interests of children in custody battles and divorce cases.

Keywords

child custody, grandparents, family law, divorce, the welfare of children

Introduction

The primary responsibility to care for children typically falls on the parents. Parents are considered role models as they play essential roles in the children's development and upbringing. However, some marriages end with a divorce, leaving one partner to raise the children. In difficult times like this, the single parent usually seeks the assistance of the grandparents to care for the children. A growing number of grandparents are involved in childrearing in the event of divorce or separation. As a result, grandparents need to sacrifice their leisure time and livelihood even though they do not expect to care for children at a later stage of their lives. Parents' imprisonment, early demise, and health issues were cited among the main reasons for grandparents taking care of their grandchildren (Saxena & Brotherson, 2013).

Grandparents provide a safe haven for the grandchildren to stay in and instil academic knowledge, good discipline and moral values in the absence of the parents. In addition to providing a safe and secure environment for the grandchildren, grandparents often offer children a more comprehensive range of knowledge and experiences they have encountered as parents (Joy, 2013). However, in so doing, the grandparents also suffer from emotional and financial damage due to the demanding tasks of childrearing in old age (Martin et al., 2021). Kondos et al. (1997) also highlight that caring for grandchildren is a significant source of stress among senior citizens. This indicates the advantages and disadvantages when grandparents take care of their grandchildren.

This article explores and examines the rights and obligations of grandparents in raising children in the event of divorce or family breakdown. This article highlights the judicial approach in Malaysia concerning the role of grandparents in contributing to the children's well-being and welfare when the husband and wife are involved in a dispute over child custody. The findings of this paper suggest that courts should acknowledge the importance of grandparents in the family unit, especially in supporting single parents who struggle with the effect of divorce or separation and balancing the family and work life. A comprehensive policy and guidelines should be formulated to recognise the role of the grandparents in nurturing their grandchildren under Malaysian family law. A child-grandparent relationship should also be considered in determining the ideal arrangement and best interests of the children following a divorce or family breakdown.

Literature Review

There is extensive literature available on the issue of grandparents' rights and roles from social and sociological perspectives. The significance and presence of grandparents in a child's life are beyond doubt. At the same time, the battle against custody disputes in a divorce between the parents may appear depressing and painful for the children. Still, the regular presence of grandparents in their

grandchildren's lives undeniably impacts the well-being of the children. The available literature is undeniably extensive and detailed. Most studies have focused on the grandparents' duty and role in their grandchildren's well-being. According to Ochiltree (2006), grandmothers usually play an essential role in caring for their grandchildren, particularly babies and toddlers. This writing focused on the complicity and association of grandparents as a helping hand towards parents. The discussion on the role of grandparents' rights during divorce and separation has not been extensively elaborated.

A study on the significance of grandparents' roles found that family bonds and the value of grandparents rearing their grandchildren are still vital today (Hayslip et al., 2017). This study indicated an ongoing emphasis on family relationships and the strength of grandparents raising grandchildren, which is very much pertinent even today. This study focuses only on the social perspective and research of grand families' care towards grandchildren. According to Dolbin-MacNab and Yancura (2018), grandparents frequently act as their grandchildren's surrogate parents in times of family crisis. The article mentions family crises, but it does not discuss the rights and obligations of grandparents taken into account by the courts and frequently asked to offer additional comfort, support, and continuity for their child/parent and the grandchildren.

Grandparents can give unwavering love and support to their grandchildren. According to Blundon (2013), grandparents can serve in various capacities, including mentor, historian, loving companion, and child-care provider. The extent of their involvement varies from one household to another. This study focuses on the various roles of grandparents. However, it does not address the assistance provided by grandparents following a separation while the family tries to adjust to the new situation.

In a custody dispute, grandparents' rights are typically restricted, except for a few situations when the child's parents have passed away or have been deemed unfit to care. As a result, grandparents' rights are not equal to those of the parents. According to Stanton (1998), grandparents are becoming increasingly involved in third-party custody battles with the parents of their grandkids when it comes time to question the parent's suitability for custody. This article mainly focused on the custody battles between grandparents and parents and how to fairly weigh the parent's inherent rights and the child's best interests. It was not debated whether or not courts should acknowledge the importance of a grandparent's role in the upbringing and supervision of their grandchildren.

It is well-known that raising children is most successful when parents work to keep their marriage together (Anderson, 2014). Children's adjustment during the divorce process is frequently significantly shaped by parental conflict and friction, whether before or after the divorce (Cao et al., 2022). Most of the time, grandparents who go through a divorce stay engaged in their grandchildren's lives, though there can be some changes after the divorce process (Even-Zohar, 2022). The study, which is the article's focus, emphasises the value of good parenting and

grandparenting in every household.

From this literature review, this article aims to investigate the need to emphasise the rights and functions of grandparents as determined by the court in divorce and custody battle cases. The ultimate goal of the law of child custody is the welfare and best interests of the child. This study also investigates how the best arrangement for the child can be achieved when a marriage is terminated. The court should consider the relationship between the child and the grandparents and the paramount consideration of the child-parent relationship.

Methodology

This study uses primary and secondary materials that address child custody to conduct a doctrinal analysis. The comparative analysis contrasts the relevant laws from both Muslim and non-Muslim viewpoints. This research also analyses current legal precedents, relevant cases, and reliable sources (Kharel, 2018). Analysis of the effects of legal mechanisms on the social system is the goal of law study using doctrinal research methodologies (Pradeep, 2019). This article explores Malaysian court cases regarding grandparents and custody and visitation issues. This legal research relies on primary and secondary materials, including Malaysian statutes and court cases addressing child custody in divorce disputes.

Results And Discussion

The Legal Framework

Under Malaysian family law, the custody rights of children are vested in the parents instead of the grandparents. The Law Reform (Marriage and Divorce) Act 1976 ("the LRA 1976") is the primary legislation that governs marriage, divorce, maintenance, division of matrimonial assets, and child custody for non-Muslims. Under section 88(1) of the LRA 1976, the High Court is empowered to order a child to be placed in the custody of either parent. In exceptional circumstances, child custody may be granted to any other relative or suitable person if the parents are deemed unfit to care for the child.

As such, the law only places custody to any other relative of the child only in certain exceptional circumstances. Relatives can only step in if a parent cannot care for their child. Debele (2007) opined that as much as the courts prefer to maintain biological ties, the courts have considered the child's best interests and given non-parents the proper care for the child.

Furthermore, the courts prioritise the child's welfare when determining which parent should have custody of the child. According to section 88(2) of the LRA 1976, the paramount consideration in determining child custody rests on the parents' wishes. If the child is mature enough to express his autonomous opinion, his wishes must also be considered. Generally, a parent who does not have custody will still be allowed visitation rights under section 89(2)(c) of the

LRA 1976, where the court can make such an arrangement as it thinks fit and reasonable. The court may also arrange the time for the visitation according to section 89(2)(d) of the LRA 1976.

Another relevant legislation that governs children in Malaysia is the Guardianship of Infants Act 1961 ("the GIA 1961"). Section 3 of the GIA 1961 states that the guardian who has custody of the child must provide for his maintenance, health, and education. Section 5 of the GIA 1961 gives both father and mother equal guardianship rights. Similar to the approach in the LRA 1976, section 11 of the GIA 1961 also requires the court to give primary consideration to the welfare and best interests of the child before deciding on guardianship rights.

The legal regime on child custody and guardianship rights in Malaysia emphasises the children's best interests. This can be achieved by looking into the parent's and child's wishes if the child is old enough to form an independent opinion (Randawar et al., 2018). The views of other relatives, such as grandparents, have not been mandated under the written law. When grandparents seek custody of the child, the court must balance the parents' rights with the child's best interests. Grandparents who intend to get custody of the child will need to present a compelling and entrancing case, which is daunting for the grandparents.

Reported Cases

Several cases have been sighted on the issue of grandparents' involvement in either seeking custody or having regard for the presence of grandparents in determining the caring and well-being of the child in divorce cases. For instance, in *Chuah Thye Peng & Anor v Kaun Huah Oong (1978) 2 MLJ 217*, the paternal grandparents applied for the custody of a seven-month-old infant. Both of the infant's parents were killed in an air crash, and the infant was left with the maternal grandmother before the fatal accident. The grandparents contended that they were entitled to child custody under the GIA 1961 as they were Buddhists, and the infant's father was also Buddhist. On the other hand, the maternal grandmother was a Methodist, although her husband was a Buddhist.

Although the infant's welfare is of the utmost importance, the court determined that it is not the only factor to be considered in this case. The phrase "primarily" in section 11 of the GIA 1961 suggests more factors must be considered while assessing the situation. The court agreed that both grandparents were of good moral character and antecedents; hence there was not much that differentiated the two households, except for the Chinese customary law. Ultimately, the court granted custody rights to the paternal grandparents subject to liberal access rights given to the maternal grandparents at reasonable times. This case indicates that despite considering the child's welfare as the uppermost essential factor, other factors are equally considered as requisite in determining the child's future happiness and sense of security.

Another case that involves the application of custody rights by grandparents is *Thavamani Deve a/p Govindasamy v N. Sugumuran a/l Neelmehan (1996) 4 MLJ 195*. In this case, the child's mother and paternal grandmother made the application for

custody of a two-year-old child. The first defendant was the child's father, while the second defendant was the child's grandmother. When the child was about two months old, the mother left for Taiping, leaving the child in the care and custody of the father.

The court denied the custody order to the mother and granted her reasonable access to her child. The court observed that the term parent under the GIA 1961 refers to the natural father or mother, and the Act makes no reference to or recognises any other form of relationship. Hence, grandparents, uncles, and aunts have no special claim or rights as natural parents. However, the blood relationship may be grounds for consideration in weighing applications against persons less closely related or unrelated.

The court, in this case, also observed that a father is just as much a parent as the mother when it comes to taking into account their wishes. The usual perception that a young infant is better off with their mother than their father is merely a supposition and not necessarily a deciding factor. The primary consideration, which is the child's welfare, must be taken into account along with all other relevant factors. It is the mother's responsibility to demonstrate that she can significantly advance the child's welfare, justify a change in custody, and mitigate the disruption resulting from the child's being placed in a new environment under a custody order, especially if the child is young and impressionable.

In her application, the mother failed to prove that giving her custody would better ensure the child's welfare. The application is therefore rejected, with the additional order that the mother is granted appropriate access to her infant. The grandmother is additionally ordered to be named as an additional guardian, which the court believes will better protect the child's welfare given that the father now has guardianship and, thus, custody of the child. The right of the grandmother to request child custody while the child's biological father is present has been recognised in this case. Legal custody battles may involve the grandmother, who has adopted a parenting role for the grandson.

In *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah (2000) 6 MLJ 48*, there was a custody battle between the ex-husband and wife. In this case, the wife was professionally educated and could care for the three daughters. On the other hand, the husband did not care for the children himself but instead relied on his 72-year-old mother to care for them. She had medical issues and needed a full-time maid to look after her. Besides, the court also considered that granting custody rights to the father was not safe because his two brothers were also staying with him, and one of them was a drunkard. This case suggests that as much as the courts consider the grandparent's role in caring for and looking after the child, it is vital to ensure that children are placed in a stable and secure environment. Parents who rely on the support of their elderly parents to care for their children must ensure that the environment and placement of the children with their grandparents are inherently safe and not destructive for the children.

In *B Ravandran S/O Balan v Maliga D/O Mani Pillai [1996] 2 MLJ 150*, the court considered the role of the grandmother before making the custody order. There were

four children aged nine, eight, one year and 11 months, and eight months, respectively. The father sought custody over the two eldest children and contended that his mother (the children's grandmother) could look after them. Besides, his unmarried niece could also care for the children. The court observed that the father was a busy entrepreneur and could not spend sufficient time with the children. Besides, it would be unreasonable to expect the unmarried niece to care for the children indefinitely as she could get married in the future and need to care for her own children. The court also doubted the grandmother's ability to care for the children due to her old age. The court also highlighted that the grandmother never mentioned that she was prepared to take up the duty to care for the children. As such, the court ultimately granted custody rights to the mother while the father was given reasonable access to visit the children. The court expressed that no love and care from an unmarried niece or grandmother would be the same as the natural mother.

In determining the grandparent's role in caring for the children, courts often consider the attentive care and love of grandparents. Showering a child with excessive gifts can sometimes be deemed to affect children's values, expectations and behaviour. This was seen in the case of *Chan Bee Yen v Yap Chee Kong [1989] 1 MLJ 370*. Here, the father applied to set aside the custody order of the infant child that was granted to the mother. He contended that the child had been very happy all along staying in the matrimonial home along with the child's grandparents and that the wife would not be able to provide the child with a proper house to live in. The court was of the view that the paternal grandparents of the infant really loved the infant as they claimed and showered the infant with as much love as a grandparent could.

However, more probably than not, they could have very often given in to the whims and fancies of the child to the extent of spoiling the child, as could be seen in all the photographs shown in court, including the fact that the infant was either the only grandson of the husband's parents or the only one staying with them. This excessive attention and show of affection would not equip them very well for the infant for later adult life, although the grandparents were very well-meaning and kind towards the infant. Thus, the court dismissed the father's application for custody. Hence, this case seems to highlight that although the father had the help of his loving parents to care for his child, the court opined that the overindulging love and care of the grandparents might likely affect the social development and behaviour of the child in the future.

Courts have always prioritised parental rights over the grandparents'. For instance, in *Helen Ho Quee Neo v Lim Pui Heng [1974] 2 MLJ 51*, the court reversed the order for the child's custody, which was initially given to the father. The court ordered that the mother should have custody, care, control over the child, and responsibility for upbringing. The court was satisfied that the mother had always been willing to bring up the child herself but that the father frustrated her wishes and insisted that the child be brought up by his own mother (grandmother). In *Melissa Marie Albert v Malcolm Fernandez and another appeal [2019] 2 MLJ 290*,

the Court of Appeal overturned the decision of the High Court that dismissed the mother's application to have sole custody right over her five-year-old son. On appeal, the Court of Appeal granted her sole custody right after it was satisfied that the father was a busy litigation lawyer and had his 76-year-old-mother and a maid to take care of the five-year-old boy. The court held that no love from a grandmother and maid could replace the motherly care of the biological mother. In these two cases, the courts were inclined to give custody rights to mothers instead of grandparents.

On the contrary, in *Thanaletchimy a/p Batamallai v Vijaya Kumar a/ Kassinathan* [2018] 4 MLJ 557, the High Court initially ordered the child to be cared for by the paternal grandmother instead of the father. The child was under her care since birth and was only cared by the biological mother for a short period. On appeal by the biological mother, the Court of Appeal set aside the High Court's decision and gave her custody rights. The Court of Appeal was of the opinion that the mother was the best caregiver for the child since he was only two years and ten months at that time and had medical issues. Although the child was well-cared for by the paternal grandmother, it did not outweigh and lessen the biological mother's rights for his care and custody.

In most cases, courts are more inclined to grant custody rights over children of tender age to the mothers. This is due to the rebuttable presumption under section 88(3) of the LRA 1976 that a child of the tender age of seven and below should be cared for by the mother unless there is evidence to the contrary. In *K Shanta Kumari v Vijavan* [1986] 2 MLJ 216 at p 218, Wan Yahya J (as he then was) said:

"Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else."

The courts still lean more in favour of giving the child's biological parents custody even though there may be grandparents who could care for, love, and nurture the child on an equal basis with the parents. In *Tan Sew Yok v Ng Keng Huat* (1989) 3 MLJ 381, the father, a salesperson, was forced to leave the child in the care of a friend while he relied on his mother's \$1,000 monthly rental income. In light of this situation, it is apparent that the court implies that the parent who depends on the other parties to provide responsibility and care is not regarded by the courts as a competent person to have custody of the child. This is in comparison to the other parent, who is independent of the other parties and can provide the child with responsibility and care.

Conclusion And Recommendations

Every parent's fundamental decision in a divorce proceeding is their ability to choose who gets to raise their children. If there is a separation or divorce between the parents, the courts often view that the child's future and welfare are best served by staying

with either biological parent. Courts always emphasise the necessity of recognising and supporting the role of the primary carer in any custody dispute while simultaneously emphasising that the court shall consider the child's welfare in the first instance.

A grandparent must present a solid case to win custody of a grandchild to overcome an uphill battle for custody of the grandchild. The reported cases illustrate how grandparents can play an essential role in helping single parent raise and care for their grandchildren. In many cultures, grandparents provide for their grandchildren (Pulgaron et al., 2016). Hadfield (2014) concurs that more grandparents are rearing their grandchildren in families without a biological parent. According to Blundon (2013), grandparents can serve in various capacities, including mentor, historian, loving companion, and child-care provider, and the extent of their involvement varies from family to household. The courts always favour placing the child with either parent in a custody dispute. It is uncommon for grandparents or other close relatives to be granted custody. Grandparents frequently provide significant personal sacrifices for their grandkids and children, serving as a vital source of support for them (Timonen et al., 2009).

In divorce or separation cases, there is frequently no loss of contact or severing of ties between grandparents and grandchildren because separated or divorced parents may need assistance from both grandparents in caring for their children when needed. Courts are also likely to single out family caregivers for the grandchildren's required child care and assistance. In any family dispute, the care and upbringing of the grandchildren become crucially vital when considering the rights and responsibilities of grandparents under family law. The grandparents' involvement seems to stabilise and anchor the grandchildren's lives. However, this fundamental right and function of a grandparent will never take precedence over a child's best interests or a biological parent's right.

The article illustrates that when deciding on the welfare of children of divorced parents, the court does take the presence of grandparents into account. It is also evident that the grandparents' attendance is crucial to assist their divorced children in caring for the grandchildren. The court is vigilant and emphasises giving custody to the child's parent by focusing on the child's welfare and the preferences of the child's parents, even if grandparents can considerably contribute to the well-being of the child when parents divorce one another. The court will typically award custody based on the best interests and welfare of the children, even if a parent demonstrates that they have other parents who can help with child care and upkeep. A parent's trump card in court proceedings may be the support of the other parent to care for the children after divorce, but this does not guarantee success.

It is common for parents who have the support of their grandparents for child-care arrangements to present it in court. As such, the court should consider the pivotal role of the grandparents, who can provide care and look after the child in the absence of the working divorce parent. Unlike stranger caregivers, there is always a built-in trust and peace of mind for a parent to leave the children with their grandparents. As a matter of fact, in every custody case, the court should probe into the fact presence

of grandparents who can contribute to assisting the divorced parent in the child-care arrangement. A standard guideline should be made on the pivotal role of grandparents in determining parental orders in custody cases.

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195

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