
AN OVERVIEW OF PARENTAL ALIENATION ON CHILD CUSTODY AND ḤADANAH CASES

TINJAUAN TERHADAP PENGASINGAN IBU BAPA (PARENTAL ALIENATION) DALAM KES HAK PENJAGAAN ANAK DAN ḤADĀNĀH

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ABSTRACT

Parental alienation (PA) can be defined as a mental condition involving the rejection from a child towards one parent under custody matter. Parental alienation has been discussed widely by international scholars however this matter seems less known in Malaysian society. The purpose of this study is to understand the extent of discussion regarding parental alienation on determining the right of custody in court in Malaysia and to identify whether it is a crime along with its consequences on children involved. Various discussions on parental alienation have led to different opinions and views. Some argued that parental alienation is one of the forms of child abuse reasoning the act tends to be committed by a party who wants to dominate his right using the child to oppose another party. Nonetheless, in Malaysia, this issue has not been discussed in detail hence this study mostly manages to refer to writings from the United States and other countries. The methodology used is qualitative where it focuses on library-based research and related provisions from statutes, cases regarding child custody from both civil court and Syariah court and selected materials from books, journals, articles. The findings indicate parental alienation is not an offence in Malaysia and there is no specific law regarding parental alienation. Although parental alienation cannot be considered as a crime, the court has recognized the existence of it and one party can take a legal action against another party under civil litigation separately. Therefore, through this writing, it is hoped to provide an enlightenment on the issue of parental alienation in child custody and ḥadānāh cases.

Keywords: *Parental Alienation, Custody of Child, Hadhanah, Family Justice*

ABSTRAK

Pengasingan ibu bapa (parental alienation, PA) boleh ditakrifkan sebagai satu keadaan mental yang melibatkan penolakan oleh seorang anak terhadap salah seorang ibu bapa dalam isu hak penjagaan. Walaupun konsep parental alienation telah dibincangkan secara meluas oleh sarjana antarabangsa, isu ini masih kurang dikenal pasti dalam konteks masyarakat Malaysia. Tujuan kajian ini adalah untuk memahami sejauh mana perbincangan mengenai parental alienation dalam menentukan hak penjagaan di mahkamah di Malaysia, serta mengenal pasti sama ada ia merupakan suatu jenayah dan implikasinya terhadap kanak-kanak yang terlibat. Pelbagai perbincangan berkaitan parental alienation telah membawa kepada perbezaan pandangan. Sesetengah pihak berhujah bahawa parental alienation merupakan salah satu bentuk penderaan kanak-kanak, memandangkan tindakan tersebut lazimnya dilakukan oleh pihak yang ingin mendominasi haknya dengan menggunakan anak untuk menentang pihak yang lain. Namun begitu, di Malaysia, isu ini masih belum dibincangkan secara terperinci, menyebabkan kajian ini banyak merujuk kepada penulisan dari Amerika Syarikat dan negara-negara lain. Metodologi kajian ini adalah kualitatif, berfokuskan kajian perpustakaan dan peruntukan yang berkaitan dalam statut, kes-kes hak penjagaan anak dari Mahkamah Sivil dan Mahkamah Syariah, serta bahan-bahan terpilih daripada buku, jurnal dan artikel. Dapatan kajian menunjukkan bahawa parental alienation bukan merupakan satu kesalahan jenayah di Malaysia dan tiada undang-undang khusus mengenainya. Walaupun ia tidak dianggap sebagai jenayah, mahkamah mengiktiraf kewujudannya dan mana-mana pihak boleh mengambil tindakan undang-undang secara litigasi sivil terhadap pihak yang satu lagi. Oleh itu, melalui penulisan ini diharapkan dapat memberikan pencerahan mengenai isu parental alienation dalam kes hak penjagaan anak dan hadānah.

Kata kunci: *Pengasingan ibu bapa, hak penjagaan anak, hadānah, keadilan kekeluargaan*

Introduction

Malaysia practises dual legal system especially in matters relating to matrimonial disputes. Non-Muslim marriages is under the jurisdiction of the civil court while right to hadānah for the Muslim is heard in the Syariah court. Muslims' marriages are regulated by to the Islamic Family Law (Federal Territories) Act 1984 and any other related provisions such as enactment under respective state, while non-Muslims are subject to the Malaysian Law Reform (Marriage and Divorce) Act 1976. The court then will consider from various aspect on who is entitled to obtain the right of custody upon a child on such circumstances. For instance, after divorce of spouse between a man and woman. More importantly the court will take consideration on the child interest whether his or her mother or father or neither of them that will be given the right of custody.

However, what will happen if the child were manipulated during the period of negotiation before the right of custody given to one of the parents? This research will discuss on parental alienation which is defined as a form of child abuse where manipulation by psychology leads to the rejection of another parent. Looking at divorce cases involving the issue of custody of children after the divorce, they will go through a process of negotiation either mediation in civil court or sulh in Syariah court. According to the statistics of the number of divorces registered during March 2020 until August 2021, a total of 66,440 cases involving Muslim couples were recorded. Meanwhile for non-Muslim couples a total of 10,346 cases were recorded throughout Malaysia (Berita Harian, 2021, n.p). The pandemic of Covid-19 has been a challenge and affect not only the economy but harmonious family relationships. In the event of divorce is the spouses will usually have a quarrel on the issue of custody of their children.

When it comes to custody of a child, the court will consider from many aspects as the situation of each case is different to one and another, but the court paramount consideration will always the welfare a of the child. Apparently in Malaysia, the court prefer sole custody where it seems to be the best interest for the child. Sole custody given to one of the parents after the divorce take place and another parent will be allowed the right of visitation under circumstances reckon by the court. Hence, the justifications and views of the parties in protection of the welfare and rights of the child are very important for the court to decide who is qualified to be the rightful custodian (Daleleer Kaur Randawar, 2018, p. 260).

In Malaysia, parental alienation may be a term that sounds foreign to society. Nonetheless, it may be an occurrence of parental alienation for a family specifically, parents who are involved in a divorce, child

custody, or ḥaḍānah are also discussed before the court after the divorce of husband and wife took place. Referring to The Star newspaper written by Yuen Meikeng and Christina Chin said that after divorce takes place, conflicts may arise regarding the child custody issue where one party condemns each other, and it tends to lead to parental alienation. Sadly, there is no particular law capable of giving enlightenment on parental alienation. They added in some situations, the issue of parental alienation may stir up, for instance, the case of Cheng Chau Yang who is Malaysian along with her son, has been barred from leaving China after her ex-husband, a Chinese national, request an order of travel banned from the Shanghai court. Furthermore, they added in other situations where abuse is also one of the matters that often associated with parental alienation including sexual abuse where the child was coached to believe the parent has abuse them. However, the court does not take this issue into account unless the circumstances indicates any harm and one party can prove there was an abusive act related to parental alienation that affect the child and threatened the alienated parent's rights.

Parental alienation involved an act of manipulating psychologically from one of the parents towards the child where the child tends to reject the other parent. In a point of view, it has given a negative impact on the alienated parent and the child involved. As a result of the action of parental alienation has led to the existence of parental alienation syndrome. Moreover, to determine who is entitled to be the rightful guardian in custody of a child, it is up to the discretion of the court. Each case is different, and the court will look at various aspects especially the welfare of the child. In addition, the rights of children also need to be taken care of and preserved including basic needs such as shelter and the right to good education.

Hadanah and Parental Alienation

Child custody in Islam known as ḥaḍānah. For child custody's claim, the parties will be asked to go through a consultation session called mediation (for civil courts) and sulh (for Shariah courts). It is one of the initiatives taken to reduce the period of trial proceedings in court. If the parties can reach an amicable agreement then there is no need to go through a full trial in court. However, if the parties involved cannot reach any agreement between them either through mediation or sulh, then the case will be heard in court.

Diagram 1. shows the statistic of ḥaḍānah cases in Malaysia.

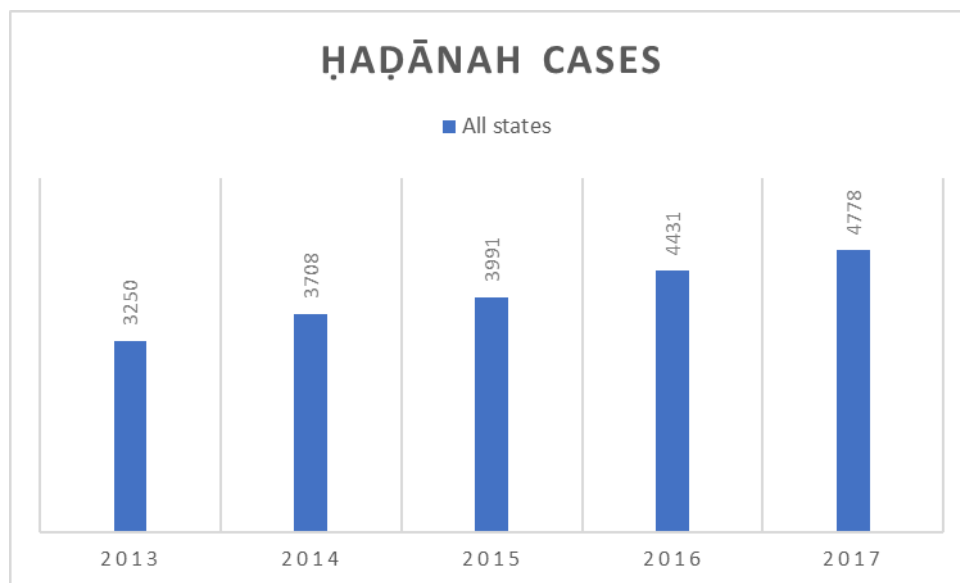


Diagram 1 shows the total of ḥaḍānah cases in Malaysia as registered under Jabatan Kehakiman Syariah Malaysia (JKSM). According to the Diagram 1, the number of ḥaḍānah cases registered in Shariah courts increased from 2013 until 2017. As a result of the increase in the number of divorce cases, ḥaḍānah cases also increased according to the respective states.

In 2013, ḥadānah cases were recorded as many as 3250 nationwide, then in 2014 the cases increased to 3708 and in 2015 the cases increased to 3991. Further, in 2016 the cases increased to 4431 and in 2017 showed a total of 4778 ḥadānah cases registered in all Shariah courts in Malaysia. This diagram shows the increasing trend of registered ḥadānah cases. There is no recorded statistic regarding registered cases of parental alienation. Details explanation regarding ḥadānah and parental alienation will be discussed on the next paragraph.

Definition of Hadanah and Parental Alienation

Kamus Dewan Bahasa Dan Pustaka states that ḥadānah comes from Arabic word (الحضانة) which means nourish; keep; educating and arranging the affairs of children who have not attain the age of mumayyiz after the occurrence of divorce. In terms of terminology, Islamic scholars come up with various understanding along with reasoning. The Hanafi school defines ḥadānah as an effort to educate a child under his or her care, a person who is given the right of custody. Meanwhile, the Syafie school said ḥadānah is the act of educating a person who is incapable to manage himself with what is beneficial to the person and protecting the person from anything harmful even though the person is an adult such as providing basic needs including foods and shelter (Muhajir, 2017, p. 166).

Sayyid Sabiq (1980) said ḥadānah is the care of young children, boys or girls who have grown up but not yet mumayyiz, there is no obligation on him, protect him, from something that hurts or damages him, educating him physically, spiritually and mentally so that in the future he is able to take care of himself and bear his responsibilities (Terjemahan Fiqh Sunnah, Mohammad Thalib, p. 173). And when the child has attained the age of mumayyiz where he can make a decision for himself, the child can choose between his mother or father to live with until he can live by his own.

In Arabic, a child namely al-sighar (الصغار) which comes from word saghir (صغير) means small; the opposite of big. Ala al-Din (1998) in Kitab Kasyf Alasrar An Usul Fakhru'l Islam Albazdawi defines child as a person who is not yet attained the ability to think and differentiate between good and bad (pp. 324-325). As we can see, the definition of child in Islam more to explain between a child who has yet become baligh and mumayyiz.

According to Islamic scholars, mother is the most entitled to obtain the right of custody of the child. Scholars have classified who is qualified to take care of a child starting from biological mother, mother to mother (grandmother from mother side), biological father, mother to father (grandmother from father side) and the next in line. This opinion supported by a hadith of the Prophet Muhammad ﷺ.

Narrated by Abdullah ibn Amr: a woman said: O Messenger of Allah, my womb is a place for my son, my breasts, the water from it, my lap is a place for him. But still the father divorced me and then wants to take my son from me. The Messenger of Allah then said: you are more entitled to him as long as you do not marry. (Sunan Abi Dawud 2276)

Based on hadith above, the mother is the foremost to obtain right of custody. It is important to understand the term of child according to Islam. This matter also stated under section 81 of the Islamic Family Law (Federal territories) Act 1984. The requirements of a person to acquire the right of ḥadānah according to section 82 of the Islamic Family Law (Federal Territories) Act 1984 are she is Muslim; of sound mind; at the age that qualifies her to bestow the child the care, love and affection that the child may need; she is of good conduct from the standpoint of Islamic morality and; she lives in a place where the child may not undergo any risk morally and physically. In Islamic law, a child is a person who is not attained baligh. For boys, they are considered baligh if they had an adult dream while for girls, they are considered as baligh when their menstruation cycle begins (Noor Aziah Mohd Awal, 2012, p. 217).

Section 2 of the Child Act 2001 defines the term of “child” as a person under the age of eighteen years and in relation to criminal proceedings, is a person who has attained the age of responsibility under section 82 of the Penal Code. Section 2 of the Guardianship of Infants Act 1961 defines the Muslim child as a person under the age of eighteen and non-Muslim child is a person under the age of twenty-one.

Ḥaḍānah matter is included under Part VII Guardianship (Ḥaḍānah or Custody of Children) section 81 until 105 of the Islamic Family Law (Federal Territories) Act 1984. Meanwhile, child custody for non-Muslim provisions can be seen in section 87 until 101 of the Law Reform (Marriage and Divorce) Act 1976.

The use of the term parental alienation and parental alienation syndrome differs according to the views of some health professionals and researchers. According to Duhaime's Law Dictionary, parental alienation based on legal definition means "a form of emotional abuse where a custodial parent belittles or slanders the other parent in front of the child." Parental alienation is a mental condition of the child where he or she allies with alienating parent to reject a relationship with the other parent with unjustified reasons (Ken Lewis, 2020, p. 47). Douglas Darnall (1997) an expert in parental alienation distinguish between parental alienation and parental alienation syndrome. He said parental alienation (PA) more to alienating parent's behaviour while parental alienation syndrome (PAS) are reactions of the alienated child (Fidler & Bala, 2010, p. 12). Wallerstein and Kelly (1976) who are divorce researchers found the first case of child's rejection of a parent involving emotional states that lead to such resistance (The effects of parental divorce; Experience of the child in later latency, p. 257).

Parental alienation syndrome (PAS) is a term first introduced by Dr. Richard Gardner; an American psychiatrist involved in child custody-related cases including parental alienation for such a long time. Quoted from the writing of Gardner (1985), parental alienation is a term that indicates the process of persuading or influencing a child to refuse or reject his other parent (alienated parent). Even though the disputes usually occur between parents, it can also happen between parents and grandparent or parent with relatives. Gardner used "brain-washing" as the term that shows the act of parental alienation. It said that through the act of "brainwashing" and the child's own urge to alienate the parent leads to parental alienation syndrome. Gardner defined the parental alienation syndrome is a disorder that arises primarily in the context of child custody disputes (Richard A. Gardner, 2006).

Current understanding on definition of parental alienation can be referred to American Psychological Association (1994) which describe parental alienation as both process and result of psychological manipulation of a child by one party into expressing an unwarranted fear, rudeness or unfriendliness behaviour towards a parent or other family members.

The term of "alienator" or "aligned parent" is applied to the parent who influences his or her child to reject another parent. Parent who are rejected can be referred to as "alienated" or "rejected parents." Meanwhile, if a child tends to show rejection or rebellion or any actions that show emotions such as anger, resentment, or dissatisfaction towards the alienated parent, are also referred to as "alienated" (Gani RK, 2019). Other terminologies used for parental alienation are gatekeeping, hostile aggressive parenting, and visitation interference (Amy J. L. Baker J. M., 2014, p. 11). According to Gardner (1985) there are eight main features that indicate the presence of parental alienation syndrome found in severe cases then decrease to mild and moderate. The diagnosis to identify the presence of elements of parental alienation syndrome, the expert will look at the behaviour, emotional, thoughts and attitudes of the child towards the targeted parent (Linda J. Gottlieb, 2012).

However, the discussion of parental alienation syndrome nowadays differs from theories in the past. There are opinions that critics Gardner's theory of parental alienation syndrome suggests that it is more gender like to do so. Nevertheless, this article will be focusing on parental alienation according to legal perspective and court decision making especially in Malaysia.

Elements of Parental Alienation

Gardner (1985) identify the eight elements were: "the child's denigration against the target parent; frivolous rationalization for the child's criticism of the target parent; lack of ambivalence; the independent thinker phenomenon; reflexive support of the alienating parent against the target parent; absence of guilt over exploitation and mistreatment of the target parent; borrowed scenarios; and spread of the child's animosity toward the target's extended family" (Bernet & Baker, 2013, p. 99). Clawar & Rivlin (1991) in "Children Held Hostage" then conducted a study through divorce situations where the findings of the study showed cases of children rejecting parents by 60 percent of the time, showed regularly at that time (Linda J. Gottlieb, 2012, p. 6).

The motive to alienating is vary, even some opinion said it is because of psychological issue on alienating parents. The following are the ways that are likely to be done by aligned parents which already have been surveyed with the parents involved. This behaviour that can cause relationships between children and the other parent to become increasingly strained. Among them is using words that incite the child to hate another parent, such as always stating his inappropriate act to the child. Second, interfering with communication between the child and the alienated parent such as limiting the time of conversation with the child or not replying to messages and answering the call parent. Third, erasing and replacing memories with respect to him and their child. For example, by having another spouse and giving titles such as mother or father to their spouse. Indirectly the presence of new people in their lives is highly likely to affect the relationship between the alienated parent and their child. Fourth, encouraging the child to disobey the alienated parent's beliefs. They encourage the child to be secretive with the aim of keeping the alienated parent away from their child until the child even begins to accept and betray them. Fifth, disregarding your rights as a parent and ex-spouse takes the opportunity to fulfil his or her wishes by limiting the time and space between the alienated parent and their child (Amy J. L. Baker P. R., 2014, pp. 11-12).

Baker (2010) said according to American Psychological Society on Abuse Children (APSAC) includes five of feature of psychological mistreatment which are refusing, distancing, interfering, exploiting, and denying emotions as methods used by alienating parent (Rowlands, 2019, p. 3).

Bernet, et. al. (2021) classified alienating behaviours to three level: mild; the alienating parent commit in one to two non-serious acts without the desire to interrupt the child and the other parent relationships. Moderate level: where the alienating parent begins to be more interfering, disrupting also controlling their activities. Severe level: the alienating parent disrupt most of the activities between the child and the other parent. They intent to ruin the relationship and they have no willingness to change (Definitions and terminology regarding child alignments, estrangement, and alienation: A survey of custody evaluators, p. 9). It can be concluded that most acts of alienation involving interference in relationship, signs of insecurities, dominating and not wanting to lose.

Legal Measure of Parental Alienation

American Psychiatric Association 5th edition, Diagnostic and Statistical Manual of Mental Disorders (DSM-5) has not specifically diagnosis parental alienation syndrome but the related term regarding alienated child is under the title "Problems Related to Family Upbringing", sub-heading V61.20 Parent-Child Relational Problems. The description under this regarding parental alienation, "the parent-child relational problem is associated with impaired functioning in behavioural, cognitive, or affective domains." For instance, parental overprotection, excessive parental pressure including any threats of violence. Then under V61.29 Child Affected by Parental Relationship Distress, basically describe on clinical research should focus on the negative impact of parental relationship discord such high levels of conflict on child's mental and other medical disorders (American Psychiatric Association, 2013, pp. 715-716).

The term of parental alienation before has been recognized under International Classification of Diseases (ICD-11) of the World Health Organization (WHO) under index-factor diagnosis "Caregiver child relationship problem" with Code QE52.0 and WHO confirmed on 25th May 2019. Conversely, in recent the term of parental alienation has been removed from ICD-11 classification by reason of it is a term and matter relating to legal proceeding. (WHO, 2020, n.p).

Some opinions state parental alienation is a form of abuse. This statement indicates the existence of the rights of children who have been abused and neglected (Meier, Dickson, O'Sullivan, Rosen, & Hayes, 2019, p. 26). But only in several country has claim parental alienation as a crime and enacted the law for example Brazil and Mexico. In 2010, Brazilian legal order has passed the Parental Alienation Law (Law 12.318/2010) also known as the Parental Alienation Syndrome Act. In Article 2 of the act defines parental alienation if it interferes the child's psychology and emotions, promoted or inducted by one parent, grandparent or anyone entitled to the child's custodial, authority, and supervision which makes the child deny the other parent, or causes a barrier in the established emotional bond between the child and the targeted parent (Almeida, 2014, p. 178).

Apparently, there is no specific provisions regarding parental alienation in Malaysia. In the case of *Hoong Wai Kit v. Teh Toong Joo* [2019], the learned judge in her judgment said there are no laws regarding parental alienation, and it is not illegal. The learned judge added that only through studies of divorce couples can help to identify the impact on the children of the marriage so that it would not worsen.

Discussion of Parental Alienation on Determining the Right of Child Custody or *Ḥaḍānah*

There are differences between assessment through scientific methods and legal pursuit, but both emphasize the burden of proof. In the court it is an important aspect of the proof of the case although the background of each case is various (Emery, 2005, p. 8). From a psychiatric point of view, for the diagnosis of parental alienation, it requires the verification of both the alienating behaviour of the alienating parent and the child showing signs of parental alienation in himself (Bernet, Recurrent Misinformation Regarding Parental Alienation Theory, 2021, p. 3). Baker (2020) in the article "Parental alienation and empirical research" stated nonetheless, it does not mean all children who rejected another parent are alienated (Bernet, 2021, p. 7). Some case in high-conflict custody battles, parental alienation may be introduced by one party against another in court and the evidence will not occur regularly. However, the wise judges are aware of parental alienation and prioritize the welfare of the child and will not place the child under the care of abusive parents (Bernet & Baker, 2013, p. 100).

According to Family Justice Council (2024) in the Guidance on responding to a child's unexplained reluctance, resistance or refusal to spend time with a parent and allegations of alienating behaviour, it is provided that the court must be satisfied that the three elements are well establish before the court conclude that alienating behaviour had occurred which are:- 1) the child is reluctant, resisting or refusing to engage in, a relationship with a parent or carer; 2) the reluctance, resistance or refusal is not consequent on the actions of that parent towards the child or the other parent, which may therefore be an appropriate justified rejection by the child (AJR), or is not caused by any other factor such as the child's alignment, affinity or attachment (AAA); and 3) the other parent has engaged in behaviours that have directly or indirectly impacted on the child, leading to the child's reluctance, resistance or refusal to engage in a relationship with that parent. Hence, it is important for the court to consider whether the alienating elements has occurred between parents and the child because in the case of custody and *ḥaḍānah*, the welfare of the child from the marriage is the utmost important and prior.

Quoted from Jeannemarie Masetti, a court evaluator based in New York, United States of America, she stated that in supreme and family court, the decision made by the court is based on evidence and all documentation included in the trial according to related provisions. It is the responsibility of the mental health professional to identify a case related to parental alienation and guide the court in making the best decision, in its discretion. It is said that for an allegation of parental alienation to be made, the court needs to be exposed to elements and characteristics that show that parental alienation has indeed taken place and that it has affected the child concerned either mentally or physically (Linda J. Gottlieb, 2012, pp. 217-218). The court may seek advice from an expert who is trained or experienced in child welfare as it is beyond the court's expertise to identify the details of the case on its own as enacted under section 104 of the Islamic Family Law (Federal Territories) Act 1984 and section 100 of the Law Reform (Marriage and Divorce) Act 1976.

Section 86 of the Islamic Family Law (Federal territories) Act 1984 stated that it is the power of the court to order custody of the child. The paramount consideration shall be the welfare and best interest of the child in regard of the wishes of the parents and the wishes of the child if the child has attained the age that allows him to deliver his own opinion. Section 100 of the Law Reform (Marriage and Divorce) Act 1976 also mentioned the same thing regarding child custody for non-Muslim.

Previously, it has stated that there is no specific law related to parental alienation, but the court acknowledges its existence and takes into account the occurrence of parental alienation in cases related to child custody or *ḥaḍānah*. The following are the cases in Malaysia that have mentioned the parental alienation.

In the case of *Ananda Dharmalingam v. Chantella Honeybee Sargon* [2007] 1 CLJ 481, the situation keeps going back and forth between the husband and wife until the wife appeal for custody and regain

the right of custody of the children. Thus, the husband who is the petitioner in this case had appeals for the custody of their two children from the marriage. The court in this case order an examination of a child psychiatry on the two children which age under seven and a little older. During 2003 until 2004, the child psychiatry confirmed that the children were emotionally injured by the forced separation since 2000. The children clearly express their wishes to live with their mother, and the court has not found any sign of parental alienation syndrome as alleged by the petitioner husband. The court held that the right of custody given to the mother within taking consideration of the best interest and welfare for the children.

In the case of *Low Swee Siong v. Tan Siew Siew & Other Appeals* [2013] 5 CLJ 461, the husband as the petitioner had few times appeal to the court but then withdraw the application. The child has been under care of the petitioner husband specifically being taken care of his sister and husband (a childless couple) to the point the child called her aunt as “Mama” since the divorce for ten years. It is stated that the child was with her mother for only nine months which lead to her wish to not leave Malaysia for UK as she has been under the care of her father and aunt. The High Court also acknowledge the possibility of parental alienation syndrome where some children develop when they are living away from the other parent. The petitioner husband was in contempt of the court because of taking the child away which is against the court order. The High Court then held that the mother given the custody of the child which then was reaffirmed by the Court of Appeal. The mother seems more entitled to the right of custody as she has provided such materials supporting material before the court. However, the Court of Appeal in its view said that the High Court shall count the wish of the child to be with the father since it is the welfare of the child must be taken paramount consideration with. Hence, the Court of Appeal grant the father full time access and a stay of the order of custody of the child.

In the case of *Melissa Marie Albert v. Malcolm Fernandez & another Appeal* [2019] 8 CLJ 181, the husband told the High Court that the marriage was plagued with disputes and quarrels due to temper of the wife, threaten to hurt herself and violence until their maids left because of the mother’s temper. Meanwhile, the wife accused the husband who is the one with quick temper, dishonesty, abuse, and manipulation. The wife also denied the allegations towards her and claim that she is the one who always spend her time with the child of the marriage, a five-year-old boy. Previously, the High Court granted the custody to the father based on an interview with the child for the purpose of determining interim custody. Based on the details of the case, the High Court also has conducted the interview during the time of the mother has been prevented her access with the child for three weeks. The Court of Appeal views that the child would be feeling distance from the mother and not deny the likelihood of parental alienation cause to the child by the father against the mother based on the conversation he had with the child. The conversation has used some terms such as ‘toxic environment’, ‘battle’ referring to the wife. The Court of Appeal then granted the order of custody to the mother and access similar to the decision of the High Court before to the father.

Although there is no law specifically discusses on parental alienation, the court may ask a health professional to identify whether there is parental alienation as accused by a party in court. In 2018, Ministry of Health Malaysia has provided a guideline to assess a case of child custody, namely *Guideline on Medical Assessment of Child Custody Cases*. Parental alienation has been mentioned under Article 5.5, stated the definition of parental alienation and the appointed assessor shall assess if there is any element of alienation and make hypotheses according to the meaning of parental alienation and its elements.

Seri Amalina Mohd Khair (2020) said parental alienation is not a valid cause of action nor an offence in Malaysia. She added although parental alienation cannot be a valid cause of action, the alienated parent or rejected parent may file a civil suit under intentional infliction of emotional distress of tort. Divorce cases and tort cases must be litigated separately. Hence, parental alienation that has cause damage in relationship may be adjudicate under intentional infliction of emotional distress of tort.

The Effects of Parental Alienation and the Right of the Child

Fidler and Bala (2010) in their research categorized the behaviour of alienated children may show to three aspects which are: problems in processing information and reasoning, difficulty in socializing, and problems related to emotions and psychological (pp. 20-21). According to Baker (2005) based on

research on adults who self-identify themselves found most of the effects are low self-confidence, depression and involved with drug and alcohol, difficulty to trusting themselves and other people, and getting through divorce. Another effect mentioned includes rejecting to have children in the future (The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study, pp. 293-299)

Baker And Ami (2011) found the long term-effects of parental alienation on adults from broken homes which are low self-esteem based on the frequency and seriousness of parental alienation they had experienced, feeling like they are not enough and are less educated, high number of participants involved with alcohol and suffered depression (Boyd, 2015, p. 9). YA Tuan Kamal Bahshah, the learned judge of Syariah High Court Negeri Sembilan (2020) said among the effects of parental alienation on the child's psychology are develop anxiety and depression where they prefer to cut off themselves from others and being alone. The child becomes more depressed thinking about their relationship with parents. Besides, the child tends to have anger issues as a result of manipulation by the alienator parent that has cause the child to act in rude behaviours, using inappropriate words as well as not able to control their emotions. Based on the effects that can be seen through the findings of the researchers on parental alienation, it can be concluded that children who experience the process of divorce with their parents are also affected, in the case of parental alienation.

Pertubuhan Memupuk Asas Ikatan Keluarga (PEMALIK), also known as Association for Fostering Family Ties Kuala Lumpur And Selangor, is a non-government organization founded in 2006. This organization was once highlighting the parental alienation issue in 2008, said that parental alienation is a form of abuse involving manipulation of the emotion of a child in various ways including aggressive and tacit methods. The reason behind this act is unknown depends on the individual but clearly, it has caused harm to other parties which is another parent and their child. Further said, the fathers are one amongst the party affected after the court has delivered the decision where another party who granted custody, denied complete access to the children.

In relation to child custody or *ḥaḍānah*, it is not only the right of person to obtain custody but also the right of a child to be taken care of. *Ḥaḍānah* is both right and responsibility depending on different points of view (Najibah Mohd Zin, et al., 2016, p. 271). If there is any signs of abuse or neglect on a child can be considered an offence and violation of their rights to be protected and loved. According to Part V of the Child Act 2001 regarding child in need of care and protection, a child is classified as mentally and emotionally injured if it is proved with evidences, any behaviour involving a mental disorder such as anxiety, depression, aggression, withdrawal, or delayed development.

The United Nations Convention on the Right of Child (CRC) on November 1989, discussed on the matter of children have the same rights as everyone else and they are entitled of special care and assistance (UNHRC, 1990). The CRC consist of 42 articles related to the rights of the child. There are children who have experienced various challenges where their rights are denied in terms of education, health, and even basic needs. Parents and families play an important role as the people closest to the child by fulfilling their needs both in terms of basic needs, love, and necessary protection they deserve.

In 1995, Malaysia has accepted the convention on the rights of the child by revising the 12 articles and left 8 articles from it which are as shown in Table 1 :

Article 1	Definition of child
Article 2	Discrimination towards child
Article 7	The right of nationality
Article 13	Freedom of expression
Article 14	Freedom of religion and thought
Article 15	Freedom of association
Article 28	The right of education
Article 37	Torture and loss of liberty

Table 1. The rights of the child according to the CRC adapted by Malaysia in 1995.

In Islam even the importance of the rights of children in a family relationship is emphasized. Among the rights of children included in the family are right of lineage, right of suckling, right of maintenance, right of gender equality between siblings and right of guardianship (Baharudin & Mohd Yusoff, 2020, p. 76). In the case of Nooranita bte Kamaruddin v Faeiz bin Yeop Ahmad [2007], the court dismissed the appeal by the mother because of the child has lived with the father since she was six-year-old after the mother married to another man. Hence, the mother has lost the right of custody to the child and the child has lived with the respondent which is the father for four years with a good education and welfare. Chief Kadi highlighted the purpose of ḥadānah is the best interest and welfare for the child and the right of the child is more important than the interest of the custodian.

Based on the case, it can be seen that the welfare of a child is the paramount consideration than the wishes of the parties to claim the right of custody because the purpose of ḥadānah is to protect the rights and welfare of the child, not the parties who want to claim ḥadānah. The same goes in the case of Nong Azman Shah v. Ahood Thamer Badei [1996], where the court ruled that custody of the child was given to the appellant as the mother of the children did not meet the conditions as the rightful custodian for not being responsible and handing over the affairs of the child to the nanny. The court looks to the welfare and interests of the child above parties involved. Although in general the custody of a minor is given to the mother, but it is still subject to *hukum syarak* and this enactment (in this case, the Islamic Family Law (Negeri Sembilan) Enactment 1983 which then amended in 2003). Therefore, in the event of abuse were it affecting the child mentally or physically, the court with its discretion and judgment will take into account factor in relation to the child including the right of the child to be preserved and fulfilled.

Conclusion

From the discussion before, it can be concluded that parental alienation indeed exists. Parental alienation started to develop at the level of mild to high-conflict cases i.e., cases that takes a long period of trial and seldomly involve abuse either mental or physical or both. For the court to recognize the parental alienation, the opinion of an expert is needed, namely the mental health professionals. Although there is no specific law is gazetted regarding parental alienation matter in Malaysia, if the signs are clearly in presence within the expert's view that the child in the case has been affected mentally or physically, then the court may take consideration whether parental alienation happened, or it can fall under the category of abuse. It needs to be highlighted that the court is not bound to follow any views or advice from public officer or health professionals regarding child welfare as enacted under section 100 of the Law Reform (Marriage and Divorce) Act 1976 and section 86 of the Islamic Family Law (Federal territories) Act 1984.

Based on study that has been conducted, the researcher found that the court in Malaysia recognize the existence of parental alienation in certain cases as mentioned before in the case of Hoong Wai Kit v. The Toong Joo [2019]. Following the example of cases given, parental alienation clearly has a

significant impact on a child's mental health. The lengthy trial period of child custody cases also has distressed the mental condition of the child involved. Considering the concept of parental alienation, not all child rejection toward a parent is a parental alienation. It is important to understand the signs and elements of parental alienation, where it requires existence of acts from the alienating parent and the treatment of the child which is influenced by the alienating parent and reject the other parent in their lives.

The disclosure of parental alienation in Malaysia especially is poorly known except within health and legal professionals involved in cases related to divorce and child custody. Moreover, it is undeniable the writings and materials are mostly referred from another country such as the United States of America, Canada, United Kingdom and other few countries. Hence, there is crucial need for exposure and writings on parental alienation both from medical and legal perspective. Even though parental alienation is difficult to prove in court, it exists and occurs in child custody cases. However, the understanding of parental alienation is insufficient and unspecified. The probability of parental alienation alone is not enough to serve as an argument in court.

Therefore, further discussion regarding parental alienation needs to be done in more detail. Legal bodies including judicial, legal practitioners and health professionals need to play their respective roles. It may seem like insignificant matter for us but without us knowing there are children and families who may currently experiencing this right now.

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