

The Implication of Adultery in Child Custody Cases in Malaysia

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Abstract: Divorce can be ugly at the best of times but where adultery is concerned the court often becomes even more aggressive and adversarial. For an adulterer who is looking to get child custody, the battle will be much harder as the behavior of the unfaithful spouse can have a negative effect on his or her custody and visitation rights. The laws are meant to focus on the child not the parent. One emerging concern in the area of child custody is when adulterous parent demands for the custody of the child. The mere fact that a husband or wife is unfaithful does not make them a bad parent. However, concern arises as to whether an adulterous parent who is granted with the custody right who proceeds to carry on with the adulterous affair. If this happens, it may jeopardize the health and welfare of the children. This would also put a greater weight in determining the custody of the child. This study attempts to look as to how far will the wishes of an adulterous parent be considered by the court. This study will explore as to how the law reconciles the tension pertaining to the battle of custody between an adulterous and innocent parent. Several cases, statutory provisions and other legal and non-legal literature is studied in order to see how adultery affects the custody of a child. This study proves that welfare of a child is always focused as the paramount consideration in deciding disputes relating to custody.

Key words: Adultery, divorce, custody, children, child

INTRODUCTION

Marriage is a social practice which may be endowed with a variety of meanings and functions (Dewar and Parker, 1992.). A husband or wife should live together for all eternity and should only be parted by death. However, not many couples grow old together in a marriage. Some are quite unfortunate to experience a divorce. Divorce can be ugly at the best of times but where adultery is concerned the court often becomes even more aggressive and adversarial. Not every adultery matter ends in a divorce. But when it does and minor children are involved, then the behavior of the unfaithful spouse can have a negative effect on his or her custody and visitation rights. It is clear that parents are expected to care for their children but the standard of that care is uncertain (Masson *et al.*, 2008). This is particularly true if that same parent had devoted more time to his or her extramarital relationship.

In a divorce proceeding which involves adultery it can provoke very strong animosities between the two parties. The innocent partner might want to punish the cheating spouse by not allowing him or her to relate to their children. The mere fact that a husband or wife is unfaithful does not make them a bad parent. However if

the actions they take to carry on the affair jeopardize the health and welfare of the children then it would be of a greater weight in determining custody. Usually, if one spouse is granted the sole custody it is quite natural that the other spouse will be granted visitation rights.

There is no clear cut answer to this issue of adultery and custody. A judge must look at the best interest of a child when determining the issue of child custody. It is up to the individual judge to examine the facts and circumstances of an alleged affair to decide if it will have any impact on a child's custody. A parent who blatantly conducts an affair in the presence of the child, shows very poor judgment and should be taken into consideration when awarding custody.

The interest of the child is the most important element considered by the court in determining custody of children. Normi Abdul Malik highlighted in her research factors that will be considered by the court in determining the welfare or interest of the child in custody disputes (Malek, 2011). This study highlighted on the factors considered by the court and dealt briefly on the aspect of adultery and custody. Hence, this research will explore as to how the law reconciles the tension pertaining to the battle of custody between an adulterous and innocent parent. Research discusses to what extent are the wishes of an adulterous parent be considered.

MEANING OF ADULTERY

Adultery may be defined as sexual intercourse between two persons of whom one or both are married but who are not married to each other. A person must have had sexual intercourse voluntarily before adultery may be proved and if a woman is raped or if she is forced to have sexual intercourse, adultery may not be proved.

To petition for divorce, Section 54(1) LRA states that the court shall have regard that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. The petitioner who is petitioning for divorce on the ground of adultery must prove not only that the respondent has committed adultery but that in consequence of that adultery, the petitioner finds it intolerable to live with the respondent. The adultery must be the cause of the breakdown of the marriage.

Although, adultery is not a criminal offence, being a serious matrimonial offence, the standard of proof required for the allegation of adultery is beyond reasonable doubt. In WLR 1684-1687, CA Willmer L.J. said: "True, it is not a criminal offence; it is a matrimonial offence. It is for the husband petitioner to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is serious matrimonial offence. It follows, in my view, that a high standard of proof is required in order to satisfy the court that the offence has been committed".

The idea of adultery comprising sexual intercourse is a very common sense approach but the definition ignores the fact that sexual conduct less than intercourse may be just as distressing to the petitioner and yet they would not be able to petition (Rodgers, 2004). Also the definition applies only to heterosexual intercourse only and, therefore, there would be no means of redress through this fact for the petitioner if their partner had a homosexual or lesbian relationship (Rodgers, 2004).

LAW ON CUSTODY AND VISITATION

In Malaysia, various statutory laws deal with custody and visitation of children. Regardless of how the parents treat each other the court is only concerned about the relationship the parents have with their children, not each other. Parent's chance of primary custody will be based on how they interact with their children, what they do with them, how they foster their well-being.

Law Reform (marriage and divorce) Act 1976 (LRA): The LRA under Section 88(2) has made it a statutory requirement to consider the welfare of the child as the

paramount consideration in deciding whose custody a child should be placed. Subject to the welfare of the child as the paramount consideration, the court under Section 88(2) shall have regards to the wishes of the parents and the wishes of the child who is of an age to express an independent opinion.

There is a rebuttal presumption under Section 88(3) LRA that a child below the age of seven years to be with his or her mother. However, in deciding whether this presumption will apply, the court shall regard to the undesirability of disturbing the life of a child by changes of custody. Also, Section 88(4) LRA states that where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

It is seen clearly that the LRA clearly places the most importance upon the welfare and happiness of the child. The courts will not hesitate to grant custody order even if it is for the children's welfare that they be separated. Each child's welfare is determined independently.

Moreover, it is only a presumption that a child below the age of seven to be with his or her mother. Although, there is no substitute to the natural mother's love and care, yet strong grounds will still be needed to rebut this presumption.

The guardianship of infants act 1961 (GIA): The Guardianship of Infants Act 1961 is an act to provide for the guardianship of an infant. Section 5 GIA provides for the equality of parental rights over a child. Section 11 GIA allows the court to exercise its power to have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parents or both of them.

From the above provisions, it is clear that under the GIA, the guardian of an infant shall have custody of the infant. The primary regard of the court when considering the award of custody of an infant under the GIA is also the welfare of the child. However, the wishes of the parent or parents have to be considered as well.

The child act 2001: The Child Act 2001 (Act 611) is an act which consolidate and amend the laws relating to the care, protection and rehabilitation and children. However, the Child Act 2001 under Section 18 addresses the issue of custody wherein any protector or police officer who is satisfied on reasonable grounds that a child is in need of care and protection may take the child into temporary custody, unless the protector or police officer is satisfied that the taking of proceedings in relation to the child is undesirable in the best interest of the child or the proceedings are to be taken by some other person.

Although, The Child Act 2001 acknowledges the family as the fundamental group in society which provides the natural environment for the growth, support and well-being of all its members, particularly children, it has seen not to specifically deal with matters which involves custody battle between two parents.

International standing on rights of custody and visitation:

The Convention on the Rights of the Child (CRC) is part of the legally binding international instruments for the guarantee and the protection of Human Rights. Adopted in 1989, the Convention's objective is to protect the rights of all children in the world. In line with its objectives, the States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence (Article 9(1) CRC). Article 9(3) CRC explains that States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. Hence, the CRC stresses that the welfare and interest of the child must be the primary consideration in all matters pertaining to children.

DOES ADULTERY AFFECT THE CUSTODY OF A CHILD?

Adultery does to an extent play a factor in determining the parenting of a child. Every child wants to always be like their parents. Hence, adultery is a very delicate and sensitive issue that will determine the upbringing of a child. The judge in the case of *L v S* (2002) 2 AMR 1347-1363, illustrated that physical wellbeing needs to be balanced with moral needs.

"In matters of custody, the authorities show that the word welfare must be taken in its widest so that the welfare of the child is not to be measured by which parent earns the most money and can provide the child with best physical comforts alone. A child's moral needs must be taken into account as well".

In the case of *Re Satpal, An Infant* 1 MLJ 283-286, the mother of the child left her matrimonial home to return to her parent's home forty days after the birth of the child and did not return ever since. She purportedly underwent

a 'marriage' ceremony with the second respondent although it was uncertain if the marriage was valid. Meanwhile, the child's father applied for his custody. The learned judge considered the possibility of the marriage between the first and second respondent being invalid but opined that the woman's adultery should be no reason for depriving her of the care and control of her son. On the 'wishes of the parents', the learned judge was clearly in favour of the child's father when he said: "Now the father has, through no fault of his own, been deprived of the custody, care and control of his son by the wrongful act of the mother in deserting her husband without cause and taking the boy away with her. The father has throughout exercised considerable patience and in my opinion behave in commendable moderation and restraint and I attach considerable importance to his wishes in these circumstances. He is in a position to give his son the benefit of a comfortable and substantial home in surroundings vastly superior to those under which he is now living together with all the advantages of security, education and healthy family associations which he is not, in my opinion, at present enjoying or likely to enjoy. In the interest of the child alone and having regard primarily to his welfare, both moral and physical, I have come to the conclusion that the sooner he is removed from his present environment which I consider in every respect both undesirable and unsatisfactory, the better".

In the above case, the courts considered the meaning of welfare as a whole, in which it did not merely look at whether the child is happier in one place than in another but also the well-being of the child. This case emphasis on both moral and physical needs.

Similarly, the case of *Shammugam v Pitchamany and Anor* (1976) 2 MLJ 222 in which a wife had adulterous association with the co-respondent who was a lodger in the same house with the respondent wife. The opportunity to commit adultery if the parties were so inclined was always present whenever the petitioner was not around. On the issue of custody, it has been disclosed that all the children of the marriage except one child, the eldest, aged 15 are already with the petitioner (husband). It is established that the petitioner is the headmaster of a school earning a substantial monthly salary and who has also testified that he has taken various steps towards the welfare of the children including the taking of education insurance. Is however, disclosed in her own evidence that the respondent is unemployed and that she is living with her father who according to her is also unemployed.

Therefore, since the custody of the children is already with the husband, it shall remain with the husband

with unrestricted right of access by the mother. As it appears that the eldest child has been with her all along, the custody of the eldest child shall continue to remain with the mother. The above case looked at the whole general well-being of the children as the paramount consideration in determining the custody. In this case the court felt that morally and physically, the wellbeing of the children is better off with the petitioner husband. However, the courts did not deprive the mother (respondent) from the custody of the eldest child aged 15 even with her having an adulterous relationship with the co-respondent. The fact that the mother is guilty of adultery is not itself a sufficient ground in law to deprive the mother of the custody of the child (Kamala, 2009).

Moreover, in the case of Marina Nahulandran v Appiah Nahulandran and Anor 1 MLJ 137-138, wherein a petition for divorce was made by a wife against her husband on the grounds of adultery. The petition was uncontested and abundantly clear that the marriage had broken down as a result of lack of affection and consideration shown by the wife and the husband had fallen in love with a woman and after a protracted affair had decided to start a new life with her. In this case too, in considering the question of the boy's custody the court placed the child's welfare as the paramount consideration.

The petitioner wife in the above case, did not want the guilty party to be given any consideration pertaining to the custody of the child. However, the courts explained that this may have been valid in the dark ages when adulterers were even stoned and adulteresses put to death. In the enlightened years of today, court does not hold that a spouse who commits a matrimonial offence, whether the spouse is male or female forfeits all his legal, civil and human rights. A father quo father has as much right to custody as a child as the mother, subject to the consideration for the welfare of the child. Spouses who commit matrimonial offences expose themselves to divorce proceedings and there it ends and should end. Otherwise they remain perfectly ordinary human beings with all the attributes and weaknesses of human beings. They do not become social outcasts or lepers.

In Marina Nahulandran case, the custody of one child was given to the petitioner wife as the child was schooling in Taiping and appeared settled and happy in that circumstances. The custody of the other child was to be remained with the father as the child was settled, contented and happy with the father. The boy also seemed to have an emotional attachment with the woman whom the father is in a relationship. Focus in this case was the children's happiness of being with which parent and not the dispute between the parents.

In *Loura Dorris a/p Laurence v Thuraisingam a/l James* 2 MLJ 229, wife made application for custody of a 6-year-old daughter. Wife admitted to the court that she was cohabiting with a married man. The court dismissed the wife application for custody, stated that a woman who for no good reason walks out of a marriage to live with another man, then seeks to obtain an order that custody be taken away from her husband will likely fail in that application since walking off and leaving the children behind is not the right conduct of a mother. The court concluded that it is against the customs to allow the applicant who was a cohabitee and who longed for a free lifestyle to take care of the child. The court was of the view that granting of custody to the applicant would also ruin the child's future and that the applicant's adultery, moreover with a married man, was frowned upon Malaysian society.

The case of *Loura Dorris* can be distinguished with the case *Khoo Cheng Nee v Lubin Chiew Pau Sing* 4 MLJ 171 where in the husband alleged inter alia that the wife was living in immoral circumstance with different men and was therefore unsuitable to have custody of the children. The wife admitted to the relationships with different men and also that her financial position was precarious. As to the issue of the wife's immoral circumstance, Abdul Wahab Patail JC in distinguishing *Loura Dorris* stated that: "Dubious as her conduct may be, the court is only concerned with the question of what exactly is the children being exposed to and whether it is contrary to their welfare. Adultery, although frowned upon by our society, by itself is not a sufficient ground to disqualify a mother from having custody of her children".

The case of *Khoo Cheng Nee* made it clear that the award of custody is not to reward one party and to punish the party to blame for the failure of the marriage. The wishes of the parent as to custody are in opposition to one another, therefore the court is left with the welfare of the children as the paramount or first and foremost, although not the sole consideration. The respondent in this case who is seeking for the custody of the children fail to establish a stable home before making an application.

In *Khoo Cheng Nee*, the court explained that the mother may not be the best mother but she has managed. The mother may have failed as a wife to her husband but the question here remains whether she has failed as a mother to her children. The court in looking at all the circumstances of this case finds that she has not so much walked out of the matrimonial home as they never had much of matrimonial home established. She had her children with her. Merely that another person has emerged in her life is not necessarily by itself bad for the children.

The case of *Teoh Hock Soon v Chan Peng Yee* MLJU 71, deals with the custody issue of 3 children born out of wedlock. The plaintiff (husband) and the defendant (wife) registered a civil marriage on 6 May 1995 but were subsequently divorced on 27 March 1998. The husband contended that the divorce was due to the wife being involved in an adulterous affair with a third party almost immediately after the registration of the marriage. Later, on or about 1998, the wife approached the husband asking him to accept her back into his life after being left by the third party. The husband agreed as he loved the wife although he was heartbroken by her adultery. The plaintiff and the defendant went through a Chinese customary marriage on or about 5 January 2000. This customary marriage was not registered under the LRA. Out of the union between the plaintiff and the defendant, 3 children were born.

The defendant (wife) in the above case, averred that her customary marriage to the plaintiff (husband) was not registered under the LRA. As such, the defendant is not married to the plaintiff and her status is that of a single mother. Hence, she is free to have her own private life, including having a relationship with Christopher her married boyfriend who lives in Adelaide, Australia.

As far as the court is concerned, only the plaintiff and the defendant know the truth as to why they did not register their marriage under the law. It is true that legally the defendant is single and not married. The relationship between the defendant and Christopher is their own private matter. However, the crucial point to note here is that in the eyes of the children, the plaintiff is their father and the defendant is their mother and the plaintiff are husband and wife. Therefore, it is immoral for the defendant to hold herself out to her children as the plaintiff's wife and yet have an intimate cyber relationship with Christopher.

It is immoral for the defendant to flaunt her boyfriend to her children, by having telephone or Skype conversations with the boyfriend in the presence of the girls, knowing full well that the girls have always believed that the plaintiff is their father and the defendant is their mother. The defendant may well contend that what she is doing is her own private matter and she is single and not married and there is nothing immoral in her relationship with Christopher. The fact remains that the defendant is implanting in the innocent minds of her children the wrong moral and religious values by her conduct of having an online affair with Christopher when living in a marriage relationship with the Plaintiff.

The judge in this case did not agree with the case of *Khoo Cheng Nee* which stressed upon the fact that adultery, although frowned upon by our society by itself

is not a sufficient ground to disqualify a mother from having custody of her children and merely that another person has emerged in her life is not necessarily by itself bad for the children.

In the present case of *Teoh Hock Soon*, even without the physical act of adultery, it is still morally wrong for the defendant to hold herself out as the Plaintiff's wife to the 3 children and yet openly expose them to the telephone conversations with Christopher, all the time referring to him as her boyfriend. Therefore, the judge was of the view that the defendant is an unfit mother and she has all the wrong moral values which are harmful to the proper upbringing and welfare of the 3 children.

No doubt in the above case, both the plaintiff and the defendant are equally to be blamed for not registering their marriage under the law, if one wants to apportion blameworthiness. However, this is not the issue here. The issue here is to determine the guardianship, custody, care and control of the children. Whether a child is born of the lawful wedlock or out of the wedlock, the importance must still be given to the welfare of the children. Be it a legitimate or illegitimate child, they are usually innocent souls who are left to juggle in this immense misfortune.

In *Goh Kim Hwa v Khoo Swee Huah* 2 MLJ 156, the husband was given the custody of the three children, a boy and two girls, upon a decree nisi being granted to him based on his wife's desertion. Soon after the wife moved out of the house, the husband's mistress and her child from a previous marriage moved in and lived with the three children. The wife applied custody of the three children. In this case the judge observed the presence of the husband's mistress in the matrimonial home may not be conducive to the welfare and proper upbringing of a 13-year-old boy and his two sisters aged 12 and 9.

The judge in this case interviewed the three children and found that the boy wished to remain with his father, whilst the older girl wished to be with the mother. The younger girl had no certain opinion. Hence, the boy was ordered to remain in the custody of his father. Since both the girls had always been together, the custody were given to the mother.

The case of *Goh Kim Hwa* also connotes that the wishes of the children are always considered paramount. The wishes of each individual child shall be considered separately. Although, the court did consider the immoral arrangement by the husband that may have a negative effect on the minds of the three young children, the wishes of the children was still essential.

The issue pertaining to the presence of mistress was also dealt with in the case *Winnie Young v William Lee Say Beng* 1 MLJ 123. The child in this case was 9 year of

age and had initially lived with his mother at his maternal grandmother's house. Subsequently, the child went to live with his father and his paternal grandparents. The father then had a mistress, a widow, living with him with two of her sons from her previous marriage.

They subsequently had a baby. The mother applied for the custody of the child. The court refused the mother's application. On the 'immoral' issue, the court said that that was not always necessary s stringent rule in considering the issue of custody of a child. The husband in this case would have married his mistress but for the obstacle posed by the wife to the dissolution of the marriage. Besides the child in this case liked the mistress as she had treated him well. The court interviewed the child and concluded that for the child's future happiness and sense of security, it was best that there should not be a change in the custody of the child.

Therefore, *Goh Kim Hwa v Khoo Swee Huah* and *Winnie Young v Willian Lee Say Beng* suggests that the presence of a mistress does not necessarily indicate an 'immoral' surrounding for a child. The court will look on the happiness and security of the child.

Moreover, in the case of *Allen v Allen* 1 All ER 724, it was held that the word 'welfare' in the English equivalent section means physical as well as moral welfare and that merely because a woman has once committed adultery it cannot be said she is not a fit person, vis-a-vis one who has not, to have the care and control of a child. This case suggest that adultery does not necessarily make a woman a bad mother.

CONCLUSION

It is clearly seen that adultery does in certain circumstances affect the custody of a child. In general, the conduct of a parent will only be relevant if it affects his or her ability to be a parent (Herring, 2001). The court will consider which parent is best able to bring up the child in the whole sense and this may include instilling moral values (Herring, 2001). It might therefore, for this reason be open to a judge to consider a parent's lifestyle (Herring, 2001).

Hence, the courts will never deny a parent's rights. The courts always emphasize the element of physical, moral and emotional well-being of the child (Ibrahain *et al.*, 2011). Even, if custody is not granted to an adulterous parent, visitation rights will still be awarded. The meaning of 'welfare' is given a very broad meaning as to cover the general wellbeing of a child, including all aspects of the child's upbringing, religiously, morally, physically and emotionally. The child's happiness, comfort, security, surrounding and education go to make up his wellbeing.

Parenting behavior may be a central issue in determining the child's outcome. A child welfare and well-being is not measured in monetary terms and the income of the parents but with the importance of a proper love and well upbringing of a child. Although, disputes, differences and animosity between parents on their marital affairs does impact on the child's custody, importance will always be the welfare and interest of the child in determining the custody.

Custody of children are determined based on the interest of a child and not the interest of a parent. An adulterous parent may have failed to be a good husband or wife. Failing as a good husband or wife does prove them to be bad father or mother. The court shall consider the well-being and happiness of the child as a whole and the grant the custody based on the wellbeing, interest and wishes of the child.

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