

**THE IMPACT OF DIVORCE AND THE RIGHT TO THE
CUSTODY OF CHILDREN IN NON-MUSLIM FAMILY LAW**

PREFACE

This project paper is concerned with the right of custody in non-muslim family law.

I chose to write on it because it concerns a lot of us in our everyday lives. In today's modern competitive world, people in hot pursuit of enjoyment, pleasure, education and other physical aspects, sometimes forget the one fundamental area in life, that is, to strengthen the family unit. In the pursuit of their ambition and pleasure, without realising it, they had disregarded the need of religion, good relationship with others and most important of all the need to secure and foster love between the spouses and their children as well their relatives. This lack of love ultimately leads to the breakdown of the family unit.

Moreover the long established concept of "extended-family" in Malaysia where the in-laws stay with a married couple and exert their influence on the spouses may lead to a strain of the spouses relationship which will end up in the breakdown of the marriage. As a result of such breakdown in marriages the children suffer. This MAY lead the young immature children to resort to drugs or crimes.

Therefore the purpose in writing this essay is to discuss the future of the children relating to their custody after the breakdown of their parents' marriage irrespective of whether they are legitimate or illegitimate. The question and the determination of custody is therefore important as it will ensure that children under the majority age are properly looked after so that they will not fall victims into any criminal or moral harm.

ABSTRACT

This paper introduces the nature of marriage and its subsequent duties and liabilities. A failed marriage usually brings about many problems and divorce is a remedy provided by the statute to try and help the aggrieved party. Usually when the spouses separate, the question of custody of children is raised. In this respect laws ensure that children will be protected. The Guardianship of Infants Act 1961 empowers the court to ensure that in deciding matters of custody, the court will regard the welfare of children and shall where the infant has a parent or parents the court will consider the wishes of such parent or both of them as the case may be. The court will then only consider the wishes of the children when they have attained the age of discernment. Similarly, the relevant provisions under the Law Reform Marriage and Divorce Act 1976. Part VIII, Protection of Children, refer to question of welfare of these children.

Custody in the wide sense of the word not only entitles the parent or any others given the custody the right to the legal possession and safekeeping of the child, but together with it the duties and liabilities to ensure the rights and wants of them. What is or is not fair to the parent in charge or the children is irrelevant as the court is only interested in "what is BEST for the children". Thus in deciding what is best for them, other consideration may come in relation to custom, child's own wishes, the alternative environment offered to the child, religion, character and behaviour of the parents, conduct of the parents, age and sex of the child, continuity of care and the need of mother's love. Hence the above welfare matters will give the Judge a discretion to decide and reach his own conclusions as he thinks fit. Upon vesting the right to custody, the right of access follows in which the losing party will have some residuary rights which he may enforce.

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CHAPTER I.INTRODUCTION.A. BRIEFLY ON MARRIAGE AND DIVORCE.

Before one begins to discuss the question of custody or maintenance,¹ one has to comprehend what is a marriage and divorce. What preliminaries are required to be satisfied before a marriage could be contracted and what are the consequence of marriage. Both words "preliminaries" and "consequences" are used to mean the mechanics that bring about two people of different sexes into one union called a marriage. Briefly a marriage is preceeded by a promise to get married which follows by an agreement or bethrotal. If a man promises a woman that he will marry her and she accepts, he is deemed to have breached the promise when later he refuses to marry her. Such situation is explained in the case of Harvey v. Johnston,² which said that and engagement is a contract and embodies in it a law of contract in general since there is an existence of consideration in a form of a promise to marry each other.

A marriage is defined by Lord Penzane in Hyde v. Hyde³ as a "voluntary union for life of one man and one woman to the exclusion of all others." Therefore a person who is a transvetite and had undergone a sex operation cannot come within the definition of marriage as laid down by Lord Penzane in the above case.

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1. After divorce.
 2. (1848) 6 CB. 295.
 3. (1866) 1 P&D 130.