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Denial of Visitation: A Japan-Malaysia Comparison*

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Abstract

This paper examines the issue of denial of visitation by a custodial parent by analyzing the case laws of Malaysia and Japan. In light of the concept of the welfare of the child this paper explores the factors considered by the courts in denial of visitation cases in these jurisdictions. It is apparent that in many instances non-custodial parents in Japan have been deprived from establishing a meaningful parent-child relationship following a divorce under the guise of protecting the welfare of the child. This paper goes on to consider whether denial of visitation is justifiable if it preserves the welfare of the child.

Keywords: denial of visitation, welfare of the child, judicial interference, parent-child relationship.

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I Introduction

Denial of visitation by custodial parents¹⁾ is a serious phenomenon faced by non-custodian parents all around the world. Denial of visitation occurs when a custodial parent interferes, restricts or totally denies any form of visitation between a child and the custodial parent or any other persons who are entitled to visitation, by virtue of a court order or through agreements reached between the parties. By denying visitation the custodial parent is in actual fact depriving the non-custodial parent from carrying out his or her parental responsibilities towards the children. The child on the other hand is deprived of parenting of his or her non-custodial parent. There are various ways in which a custodial parent attempts to deny or interfere with a court-ordered visitation or visitation arrangements made between the parties prior to divorce, and sadly in many of the occasions their attempts are successful in destroying a good and harmonious relationship between the child and the non-custodial parent.

In Malaysia and for the matter, in Japan the exact number of incidents of denial of child visitation cannot be ascertained for lack of reliable records, but it has been markedly increasing in recent years.²⁾ Denial of visitation *per se* is seldom litigated; some of the cases are resolved by consultations with family members whereas others are disregarded for want of a suitable remedy. There is no specific provision in the law warranting judges to hear a denial of visitation dispute in these countries. In many instances, denial of visitation becomes a ground for an application for a change of child custody. During the court proceedings, the parents normally accuse each other in an effort to secure a best outcome for themselves, in total disrespect for the welfare of the child concerned. If for a moment they stop to consider the effect of their selfish actions on their children, we would not have cases piling up in the courts.

At this point it is pertinent to highlight that child visitation is not expressly provided for under the Japanese Civil Code³⁾ and therefore it is not deemed as a right of the non-custodial parent or the child. Mutual consent divorce,⁴⁾ peculiar to Japan is done with a stroke of pen⁵⁾ between the parties to the divorce who are not obliged under the law to make visitation arrangements. Children are to be surrendered to one parent who shall have absolute parental authority over the children and the other parent is to disappear from the children's life, forever. Nevertheless, since 1964 the family courts have advanced and granted visitation to "deserving" non-custodial parents. Notably, visitation in Japan is a mere measure awarded at the discretion of the custodial parent or the family court. The uncertainty surrounding visitation and the reluctance of the family court judges to interfere gives the custodial parent an upper hand in denying visitation under the guise of the welfare of the child.

In contrast, the Malaysian law compels the courts to make reasonable provisions for visitation in

1) For the purpose of this paper custodian parent is a parent appointed by the courts or a parent having parental authority in a mutual consent divorce in Japan.

2) This observation is made based on the case law and consultations with lawyers handling family law disputes.

3) Japanese Civil Code is the main legislation regulating family and child related laws in Japan.

4) About 90% of divorce in Japan is mutual consent divorce conducted between the parties without judicial intervention. In contrast, the law requires both disputed and consent divorces in Malaysia to be filed in the court.

5) In Japan sign/seal of a person is placed by using a stamp called "hanko" or "inkan".

every custody disputes. In deciding in whose custody a child should be placed, the paramount consideration is the welfare of the child and subject to this the courts have regard to the wishes of the parents and to the wishes of the child, where he or she is of an age to express an independent opinion.⁶⁾ There is a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother.⁷⁾ An order for custody normally contains provision on reasonable visitation to the child by the non-custodial parent at such times and with such frequency as the court may consider reasonable. Only in a very exceptional situation do the Malaysian courts limit or deny visitation bearing in mind that the non-custodial parent is legally entitled to visitation following a divorce or judicial separation.

II Welfare of the Child Concept

In Malaysia, the statutes make it perfectly clear that the child's welfare should predominate. Thus, the question that is asked by the court or the presiding judge in guardianship, custody or visitation disputes shall be "what serves the welfare of the child". The Malaysian courts had sought guidance from the English cases⁸⁾ for the interpretation of the phrase, '*the paramount consideration shall be the welfare of the child*'. Similarly in Japan, the criterion for awarding visitation is also the welfare of the child principle. However, it is conveniently open to the interpretation of the family courts and there are extremely detailed criteria as to when visitation can be terminated, limited or absolutely denied. The welfare of the child is not necessarily a primary consideration, values or ideas commonly accepted by the society, the interests of the parents and social order override them in many cases. In fact, any excuse will do if visitation can be deemed to interfere with the upbringing of the child by the custodial parent. In general, the Japanese family courts are said to be reluctant to issue visitation orders if the custodial parent opposes to it.⁹⁾

Unlike Japan, in Malaysia the essence of the paramount consideration principle is that the child's welfare¹⁰⁾ must prevail over any other consideration in a guardianship, custody or visitation disputes. The Court in *Re Satpal Singh, An Infant*¹¹⁾ held that 'welfare'¹²⁾ "must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child will be happier in one place than in another but his general well-being. The welfare of the child, both moral and physical, should be the paramount consideration".¹³⁾

6) Section 88 (2) Malaysian Law Reform (Marriage & Divorce) Act, 1976.

7) Section 88 (3) Malaysian Law Reform (Marriage & Divorce) Act, 1976.

8) English authorities prior to the coming into force of the English Child Act, 1989 is still persuasive in Malaysian courts. In *Re Ko (an Infant)* Edgar Joseph Jr. J stated that 'it is clear that the difference in wording is without distinction' and accepted that 'English authorities, explaining their effect, have been consistently relied upon by our courts.'

9) Colin P.A. Jones, In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody And Visitation in Japan, *Asian-Pacific Law & Policy Journal*, Vol 8, Issue 2 (Spring 2007)

10) The term 'welfare' has always been given a wide import. Lindley LJ has stated in *Re McGrath (Infants)* [1893] 1Ch 143 at p 148 that 'But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be regarded.'

11) [1958] MLJ 283

12) In this case reference was made to "welfare" under section 11 of 1961 Act.

13) *In re Thain* (1926) 1 Ch 687 (Lord Hanworth)

In the Federal Court case of *Mahabir Prasad v Mahabir Prasad*¹⁴⁾ Raja Azlan Shah CJ said that the phrase ‘first and paramount consideration’¹⁵⁾ does not mean that one should view the matter of the children’s welfare as first on the list of factors to be considered, but rather that it must be the *overriding consideration*. “It connotes a process whereby, when all the relevant facts, relationship, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children’s welfare. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed”.¹⁶⁾

In Japan, cases involving children are decided by taking into consideration the welfare of the child principle,¹⁷⁾ but it is not the ‘paramount consideration’ or an overriding factor. The concept is neither defined in the Japanese Civil Code nor advanced by the Supreme Court of Japan. Family court judges place much reliance on other factors such as the wishes of the parents and societal norms in deciding whether visitation should be allowed or not. It is not very clear from those cases on what amounts to “the welfare of the child”. What is apparent is that many criteria have been established to deny visitation than to allow it.

III Denial of Visitation

The general principle is that visitation should not be denied unless there are cogent reasons. A non-custodial parent is only denied visitation in a very exceptional circumstances, such as when there is serious and repeated incidents of child abuse or where the non-custodial parent is insane, thereby unable to continue visitation. This is because when the relationship with the non-custodial parent is a positive one, children with expanded and flexible visitation are more content and satisfied, and they may view divorce less negatively. But, denial of visitation is now rampant and sometimes is seen to be assisted by the judicial system.

In Malaysia, modification of visitation arrangement is allowed but visitation is rarely denied by the courts. The landmark case that called for court’s intervention on denial of visitation is *T v T*.¹⁸⁾ In this case the question for the court was whether the conduct of the father has been such that it should disqualify him from having visitation with the child. The parents of a girl were divorced and custody was awarded to the mother. The non-custodian father was given visitation to the child on the afternoon of Wednesday in each week between 5pm and 7pm and on the morning of Sunday each week between 9am and 1pm. The mother applied for an order that the father be denied visitation to the child as it was alleged that the father had used the visits to the child to undermine the

14) [1982] 1 MLJ 189 at p 193.

15) As stipulated in section 2 of the Guardianship of Infants Ordinance (Sarawak)

16) The House of Lords case of *I v C* was cited where Lord MacDermott’s explained the words of English provision of section 1 of the Guardianship ordinance “It seems to me that they must mean more than the child’s welfare is to be treated as the top in a list of items relevant to the matter in question. I think that they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interest of the child’s welfare as that term has now to be understood. That is the first consideration because it rules on or determines the course to be followed.

17) The phrase is termed in Japanese as ‘*kodomo no saizen no reiki*’ or ‘*kodomo no fukushi*’.

18) [1966] 2 MLJ 302

mother's authority over the child and make the child disobedient to and resentful of the mother.

The learned judge in this case held that the general principle is that an order for visitation to the child will generally be made at the instance of a parent not having the child's custody unless it is in the child's welfare to forbid visitation. Even though the child psychiatric in the case was of the view that the child's attitude towards the mother improved immensely after the father stopped visiting the child, the learned Judge did not absolutely deny visitation but allowed a restricted visitation as it is found to serve the welfare of the child. With a view of avoiding any emotional conflict of loyalties and affections in the mind of the child the original order was varied, so as to allow the father to visit the child once a month only under circumstances which preclude any contact between the parties.

In Japan, visitation was apparently denied by the courts in cases involving domestic violence, when conflict between the parents is said to cause mental instability to the child or custodial parent and when a new family is formed due to remarriage of the custodial parent or adoption by a step-parent.

1. Domestic Violence

Visitation may be ceased in cases where the father had inflicted injury on the mother and showed intolerable aggressiveness. But, domestic violence is very difficult to prove even where medical records are available. The courts must be cautious about malicious mother syndrome of some custodial parents in domestic violence accusations because these mothers tend to have master plans to deny visitation. In one case, a mother left their matrimonial home with her 3 years old child due to domestic violence inflicted by the toddler's father. The father was ordered to take part in counseling sessions to control his violent actions which proved to be futile. He never felt sympathy to his wife or regretted his infliction of injury on her. His visits appear to have caused stress and fear to her and she subsequently denied visitation. The Tokyo Family Court¹⁹⁾ rejected the father's application for visitation because the judge was worried of the impact of the mother's stressful condition on the child. Instead of requesting the mother to attend a counseling session to overcome her stress, the learned judge has denied visitation to the father who has never caused any harm to his child. The judge in this case could have ordered the father to meet his child in the absence of the mother, for example, in the presence of grandparents or relatives but the judge has instead opted to the easiest option of denying visitation in entirety which could have been the mother's target.

In another case, due to domestic violence the father was prohibited from contacting his wife and child aged 2 years pending the hearing of a divorce petition. In the meantime, the father in violation of the prohibition order went to the kindergarten and forcefully met the child. He was found to have no affection for the child but just acted²⁰⁾ out of impulse. The Tokyo Family Court²⁰⁾ held that the conflict between the parties became very serious and if visitation is allowed, the child may be adversely affected, and therefore visitation was denied altogether. Here too the learned judge has failed to consider the importance of having the father in the child's life after the divorce. A single act of violation of a court order not to have any contact with the child pending the disposal of a di-

19) Tokyo Family Court Judgement dated 21. 5. 2002 (平成14年 5月21日)

20) Tokyo Family Court Judgement dated 31. 10. 2002. (平成14年10月31日)

voice petition has caused the father a total rejection of visitation opportunity.

2. Parents` Conflict

Conflict before, during and after a divorce is inevitable. When parents cooperate and minimize conflicts, children do better with parenting after divorce. However, most parents are not capable of managing conflicts. The conflict could be about money, children or any other things with each parent trying to prove their innocence. Many parents do not wish to have any contacts even for the sake of their children, and it results in interference of visitation, either directly or indirectly. Some parents may seek consultation with close family or friends realizing that eventually they have to resolve it but for many it is a prestige problem.

In Malaysia, disputes are usually resolved or decided by the courts which clearly narrate the rights and obligations of the parties in its order. Although not many cases are filed in the court for denial of visitation, in practice custodial parents do deny visitation when conflicts subsequently arise. In high conflict situations, interaction between the parents is reduced by the intervention of their family members or lawyers.²¹⁾ Supervised visitation is encouraged whereby, sometimes, lawyer's office is conveniently utilized as visiting place by the non-custodial parent. At times the grandparents will pick up and return the children to the custodial parent instead of the non-custodial parent. The police do not interfere in family disputes unless a complaint is lodged for public nuisance. Then again, it will be just to advise the parties to settle their disputes amicably.

In Japan, when parents divorce by mutual consent, many questions are left unresolved and the slightest attempt to discuss an issue will attract conflict between the parties. Being the primary caretaker, mothers retain their children after divorce and when conflict arises, the fathers are denied visitation with the children. In some instances, the mother returns to her parents` home and the grandparents may be against visits between their grandchildren and the non-custodial father. In other cases, visitation may cause conflict because the visiting non-custodial parent may intervene in the way the child is being raised by the custodial parent and consequently visitation is denied. Family and relatives sometimes extend consultations in post-divorce conflicts but lawyer's advice is rarely sought. A non-custodial parent often seeks the intervention of the family court (mediation) if the custodial parent does not keep to his or her promise on visitation arrangements.

In a case, the father of a 3 years old child filed a suit because the mother denied him visitation with the child which had been previously awarded by the family court. The Tokyo High Court²²⁾ observed that the marriage ended due to matrimonial conflicts which continued during the visits. The mother strictly opposed to any further visitation claiming that it caused mental agony to her. The court anticipated further conflicts between the parties if the visitation was allowed to continue and temporarily denied visitation. The judge instructed the court's investigating officer to conduct investigations to ascertain possibility of having visitation in the future and if necessary to have supervised visitation in the court's vicinity.

21) Reliance on lawyers to resolve family dispute is yet another legacy of the British colonization in Malaysia. The term "family lawyers" does not refer to lawyers practicing family law but connotes to lawyers attending to a particular family's affairs. Many families in Malaysia have their own lawyers to attend to their legal issues because almost all the matters are resolved in adversarial manner.

22) Tokyo High Court Judgement dated 2. 2. 2007. (平成19年2月2日)

In another case, the conflicts between the parties were so serious that visitation of the father with his children aged 4 and 2 was denied by the Osaka Family Court.²³⁾ The court ordered the father to wait until the children grow up and become willing to appreciate visitation. However, the court affirmed that father's affection and guidance is necessary for a sound development of the children and thereby ordered the mother to regularly notify the father of the children's progress through photographs and letters.

Conflict between parents is a critical factor. The family courts have denied visitation due to conflicts between the parents, which is naturally inevitable even after divorce. The courts should have approached the issue by ordering reconciliation between the parties or supervised visitation. The fact that courts deny visitation on the basis of the irreconcilable conflicts give a solid ground for custodial parents to create conflicts after divorce, in order to convince the family courts that it is viable to deny visitation. Furthermore, in the second case there is nothing to stop the mother from not furnishing the father with the child's progress knowing very well that the court's order is not enforceable.

3. New Family Formation

Formation of a new family setting due to a second marriage of the custodial parent is not considered as a hindrance for the maintenance of a parent-child relationship by the non-custodial parent, in Malaysia. In the past, remarriage was not very common in Malaysia. People fear getting into yet another legal matrimonial relationship. But, nowadays many parents remarry and maintaining relationship with a non-custodial biological parent becomes an issue. Visitation is usually denied by the remarried custodial parent and the non-custodial parent will then apply for a change of custody due to a "change of circumstances". There have been cases where the courts have allowed visitation with the biological parent after a parent has remarried when it is seen to serve the welfare of the child to continue relationship but a change of custody is usually not permitted under such a situation. In Abdul Ghani bin Awang v Sheriliza bte Yusof²⁴⁾ the child concerned was aged 11 and had lived with his mother for 9 years after his parents divorced. His mother wished to bring him to Hungary with her new husband. The child expressed a wish to join his mother and stepfather, with whom he had already formed an attachment. The court allowed visitation to the natural non-custodial father because the custodial mother and her husband expressed willingness to bear the cost to send the boy over to Malaysia once a year to visit his father.

In contrast, Japanese courts are likely to refuse an application for visitation from a non-custodial parent if the child lives in a new family setting after adoption by a stepparent. If the child has been adopted by a stepparent married to a custodial parent, the family courts sometimes attempt to persuade the non-custodial parent to withdraw the application for visitation. This attitude of the court seems to suggest that when a stepparent arrives in the child's life the natural parent has to disappear. The learned judges have to bear in their mind that a divorce order does not end a kinship relationship and likewise, an adoption order does not create a kinship relationship. At times, the family courts have instructed investigation into the exact reason for the application in order to

23) Osaka Family Court Judgement dated 22. 12. 1994. (平成 5 年12月22日)

24) [1988] 3 MLJ 153

determine whether the applicant genuinely wants contact with the child or has other motives such as intervening in the newly established adopted family.

In recent development the courts have attempted to encourage visitation with natural non-custodial parent even after the custodial parent remarries. The Yokohama Family Court²⁵⁾ allowed a non-custodian parent to directly contact his 13 years old child who had been adopted by a stepfather, on the rationale that the child possessed sufficient maturity to understand the situation. In another case, when the parents divorce, the father was appointed as the custodian of their two children and the mother was allowed visitation. Subsequently the father remarried. The stepmother adopted the children and exercised parental authority jointly with their father. The natural mother was denied visitation. The Osaka High Court²⁶⁾ held that visitation of children by their mother should be allowed to continue even though the father had remarried and the stepmother had adopted the children. The court stressed the importance of maintaining the relationship between the children and their biological mother and allowed visits on every fourth Sunday of the month, with stern warning to the mother not to unilaterally participate in the activities at the children's school.

4. Trauma to Child

In a case, a mother's application for visitation was denied by the Gifu Family Court²⁷⁾. A 3 year old child was found to be suffering from mental instability after the meeting with the mother and therefore she was denied visitation by the father. The court upheld the father's denial and rejected visitation opportunity to the mother. I wonder what could have caused mental trauma to the child of three, if not for the separation with the mother. But, the court found the meeting and not the separation with the mother to be traumatic to the tender aged toddler. In another case, the Urawa Family Court²⁸⁾ rejected visitation to the child on the basis that the father's unwarranted behavior caused the child to be timid and fearful of visitation. In yet another case the Nagoya Family Court²⁹⁾ stopped the father from visiting his 14 year old child because the father's interference with the grandmother's custody exercise caused confusion and mental agony to the child. The child was not consulted before the decision was made because the law only requires the wishes of a child of 15 and above be sought by a judge when the circumstances of the case warrants it.

5. Ulterior Motive

In a case, the parties separated and the mother applied for divorce. The father's visitation was interfered and he applied for a court ruling permitting visitation pending a divorce decree. The Tokyo High Court³⁰⁾ disallowed the application. The court noted that the father was furious with the mother for advancing divorce and concluded that he created an excuse to meet the children just to irritate the mother. The court's unfounded suspicion ended in the father being denied visitation pending the disposal of the divorce petition. The court could have ordered supervised visitation in the vicinity of the court under the supervision of the court's investigating officer instead of totally

25) Yokohama Family Court Judgement dated 30. 4. 1996. (平成7年4月30日)

26) Osaka High Court Judgement dated 18. 2. 1992 (平成3年2月18日)

27) Gifu Family Court Judgement dated 18. 3. 1997 (平成8年3月18日)

28) Urama Family Court Judgement dated 16. 9. 1981 (昭和56年9月16日)

29) Nagoya Family Court Judgement dated 11. 11. 2000 (平成11年11月11日)

30) Tokyo High Court Judgement dated 27. 6. 1985 (昭和60年6月27日)

denying visitation but, it took the easy way out.

IV Justifiable Denial

Having looked at the factors employed to deny visitation by custodial parents and the courts, let us look at situations where denial of visitation is justified in order to protect the welfare of the child.

1. Child Abuse

Most courts refuse visitation when there is evidence that the non-custodial parent is physically abusing or mistreating the child during the visits or temporary care. A parent should not be allowed to visit a child if there is a possibility that the parent would injure or cause fear to the child. Sometimes a child is at elevated risk for violence during the process of and after separation of his or her parents. When allegations of child abuse occur, careful supervision of visitation³¹⁾ with the alleged abusive parent is necessary until a determination about the validity of the abuse has been made. If child abuse is confirmed and visitation is still considered useful for the child, long-term supervision is likely to be the only way to allow safe contact to continue.

A parent who is found to have sexually abused his or her child should never be allowed any visitation because he or she has grossly abused the responsibility to protect the child. The child will be better off without such a parent who does not have any respect for humanity. Regrettably, it is not unusual for a malicious mother syndrome or the parental alienation syndrome custodial mothers to accuse the non-custodial fathers of sexual abuse of the child or to “program” a child to make such allegations, in order to deny visitation. The courts therefore have strenuous tasks of carefully evaluating the evidence from parents, the child and also the child experts to arrive at a decision that best serves the welfare of the child.

2. Harm to the Child

Harm means impairment of health and development. Health and emotional condition of the child should be examined before application for visitation is allowed. A non-custodial parent’s exercise of right to visitation may be restricted or denied, to prevent psychological injury to the child. The Yokohama Family Court³²⁾ had after evaluating the facts of the case decided the elder sister aged 13 years can have contact with her father whereas the younger sister aged 9 years shall not. The reason being that there is a possibility of causing psychological harm to the younger child and it is in the welfare of the child to avoid negative psychological effect. In another case, the mother applied for divorce on the grounds of domestic violence. After divorce the non-custodial father was required to go through a few sessions of counseling but it did not help as he had always caused fear to custodial mother and the children during his visits held at her premises. The Tokyo Family Court³³⁾ decided that the non-custodial father should be denied visitation with his children because

31) Supervised visitation is a contact between a child and adult, usually parent, that takes place in the presence of a third person who is responsible for ensuring the safety of those involved. Supervised visits are necessary when contact with the adult may present a risk to the child or to a parent.

32) Yokohama Family Court Judgement dated 30. 4. 1997 (平成 8 年 4 月 30 日)

33) Tokyo Family Court Judgement dated 21. 5. 2002 (平成 14 年 5 月 21 日)

the father's acts of violence caused serious mental trauma to the custodial mother and tender aged children.

In Malaysia, the case of Ananda Dharmalingam v Chantella Honeybee Sargon³⁴⁾ deserves citation. The custody of two children aged 11 and 7 were given to the father and visitation to the mother. During one of the visitation the children refused to return to the father and remained with the mother. The High Court refused to order the mother to deliver the children to the father based on reports from a child psychiatrist which confirmed that the children were emotionally injured by the forced separation with their mother. The matter went to the Court of Appeal which said that the court has a duty under the Child Act 2001 to protect the children who are obviously emotionally or physically injured. Both the children have shown signs of emotional injury as can be seen from the psychiatric reports. The court held that "the reality had to be acknowledged in that the two children in this case could not be compelled to see their father under the present circumstances. It was certainly not the intention of the learned judge to have the father of the two children 'debarred' from visitation in the sense that he is unsuitable. The situation was that visitation simply could not be made to work at the present time until the two children recover from the trauma of the past events". On the ground of putting a stop to the trauma suffered by the children which was detrimental to the welfare of the children, the court denied the father the opportunity to have any further visitation.

3. Unwarranted Character of a Parent

Where the non-custodial parent exhibits signs of mental instability or has serious mental disease, the courts may deny that parent visitation with his or her children or may impose special conditions for parent-child relationship to be maintained. The courts are often cautious in granting visitation to non-custodial parent sentenced to imprisonment for violent crime, such as serial killing or armed robbery, or abuse of alcohol or illegal drugs, and possess immoral behavior, because of the bad example set by the non-custodial parent and due to concern over the safety and well-being of the child. A psychologist or welfare officers' opinion may assist the court to make a sound decision.

In Malaysia the case of Savinder Kaur v Tharman Singh³⁵⁾ deserves citation. Here, a father who had been divorced on the ground of cruelty consisting of drunken bouts involving vulgar abuse of his wife and children was granted supervised visitation to the children for a few hours a month to be held at the solicitors' office because it was found to be in the welfare of the children. In contrast, in the case of Harbans Singh a/l Gurdial Singh v Baljit Kaur a/p Bhagawan Singh³⁶⁾ the court held that in considering the welfare of the child, the personality and character of both its parents are important especially in determining the issue of denial of visitation. The learned judge stated that under ordinary circumstances the court will be reluctant to deprive a parent and a child of their harmonious parent-child relationship. But, the court has discretion to deny visitation if an exceptional circumstances warrants it in the welfare of the child. In this case the father's vulgar abuse and violence of the mother in the presence of the tender aged children was deemed to cause irreparable

34) [2007] 2 MLJ 1

35) [1985] 1 MLJ 273

36) [1998] MLJ 9

emotional harm to the welfare children and therefore, visitation was denied altogether.

V Conclusion

In Malaysia, welfare of the child is provided as substantive law and applied as the overriding principle in all cases involving children. The wishes of parents, wishes of the child, religious and customary values will be considered if it is consistent with the welfare of the child. The courts have employed the rules applied under English laws as a guidance to interpret the vagueness surrounding the welfare of child principle to arrive at sound decisions in visitation disputes. Maternal preference concept is legally binding and are applied when children are aged seven and below. The presumption is however applied with great caution and visitation is permitted in every case to preserve the well-being of the children. By relying on the welfare of the child principle the Malaysian courts are found to preserve parent-child relationship by encouraging visitation.

In comparison, in Japan, welfare of the child principle is not codified in the Japanese Civil Code and not regarded as an overriding factor. It is merely an element to be considered by the family courts when a child is involved in disputes between its parents. Other factors such as the effect of visitation on the custodial parent, the child's living and school environment, customs and societal norms are relevant in visitation disputes. The family court mediators who observe the parties efforts to reconcile their disputes do not truly understand the importance of the welfare of the child principle. The parties thus may achieve a decision which is most convenient to them if they play their cards well. The parent asking for divorce, who is normally the mother, always have an upper hand in the decision making as mothers are perceived to make good decision for their children than the fathers. The Japanese law and family courts have denied visitation also by adopting the welfare of child concept.

It is recommended that a set of law is enacted in Japan to define the principle of welfare of the child as clearly as possible. It has to be made the overriding principle in disputes concerning children. A carefully drafted checklist should provide guidance to the family court judges about the factors to be considered in permitting visitation, leaving no leeway for judges to exercise excessive flexibility in interpreting the welfare concept. This will ensure uniformity in decisions pertaining to denial of visitation. The court mediators, investigating officers and medical experts attached to the family court should be trained to apply this welfare of the child concept during their observation and interviews with the parents and children. The present policy of considering the opinion of a child aged fifteen and above should be reduced to at least twelve as children attain maturity much earlier. The family court judges, mediators, investigating officers and medical experts must be facilitated to conduct interviews in camera with the children aged twelve and above, to analyze if a parent is unnecessarily imposing pressure on the children to parrot his or her wishes.

The law must not permit denial of visitation by a custodial parent, unless there are cogent reasons, for example serious abuse of the child by the non-custodial parent in the past and that it continues during the visits, the non-custodial parent's vice or criminal acts are found to be injurious to the child's emotional development or when serious mental illness of the parent cause severe trauma

for the child. It should further specify the implication of denying visitation by a custodial parent and make enforceable remedies available to the victimized parent. The remedy should be non-punitive as imposing penalties for disobeying court orders may have adverse impact on the custodial parent and the children. Moreover, causing financial hardship to a family which is already in a state of despair without the non-custodial parent's presence may raise strenuous opposition.

Cooperation of custodial parents is essential to make visitation meaningful for their children. Whether responsibilities should be created under the law to compel non-custodial parents to encourage visitation is a question for the legislature to ponder. This would depend on the understanding of the welfare of the child principle. If the principle is understood as a means to protect the interests of a child as a person having a distinctive interest from his or her parents, the welfare of the child must be the overriding principle. But, if the underlying principle is to protect the interests of custodial parent together with the child, then the custodial parent's emotional or mental instability need to be given equal weight.

The lack of support services after divorce appears to be one of the reasons for the parties having to deal with conflicts by themselves. Assistance from family members to handle matrimonial conflicts is also lacking in the current neutral family life-style. The fact that Japanese people are naturally ashamed to share their problems with friends or family members makes it even more difficult to find solutions to post-divorce conflicts. The only option available is to seek the interference of the family court which seems to be very sympathetic towards the divorced custodial mothers. Counseling sessions should be made available for the parents to handle post-divorce conflicts in order to preserve the welfare of the child.

Reference

1. Colin P.A. Jones, In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody And Visitation in Japan, *Asian- Pacific Law & Policy Journal*, Vol 8, Issue 2 ,Spring (2007)
2. Satoshi Minamikata, Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Non-litigious Approach in Chotei, *Family Law Quarterly*, Vol.39, No.2, pp.489-506 (2005)
3. Tanamura Masayuki, "Rikongo No Ko No Kango", *Minpo* 7. (2007)
4. Colin P.A. Jones, *Marbury v Madison and The Matrix: What Child Custody and Visitation in Japan show us about Japanese Court System* (2005).
5. Wai Kum Leong, *A Communitarian Effort in Guardianship and Custody of Children After Parent's Divorce* (2006).
6. Mimi Kamariah Majid, *Custody and Guardianship in Malaysia* (1999).
7. Nagoya "MenkaiKoryuKenkyuKai", "Menkai Koryu Shinpan Rei No Jishouteki Kenkyu", *Hanrei Times* No.1292, (15. 5. 2009).
8. *Japanese Civil Code* (1989).
9. *Malaysian Law Reform (Marriage & Divorce) Act*, (1976).