

# Visitation Rights under Family Law: Do Children Have a Right of Refusal?

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**Keywords:** Children, family, refusal, right, visitation.

**Abstract:** Parenting role is a long continuous process wherein a strong initial bond between parents and their children is important for the nurturance and development of the child. Children development and achievement is usually related to positive parental involvement. However, when parents are divorced, this parenting role is divided. During divorce, the welfare and interest of a child is always considered as the important element in deciding the dispute of custody and visitation of the child. A mother is usually considered as the preferred custodial parent when the child is of a tender age. The court in deciding the dispute of child custody will look at several factors before granting the custody to a parent. Wishes of a child will be considered in deciding the issue of custody and visitation once the child attains/reaches a discernible age. When both parents are mentally sound, capable and interested in caring for the child, the courts recognize that it is important for the child to have a connection with each parent. However, sometimes a child show unwillingness and loathe against a parent and would rather not visit his or her other parent. This article will critically analyse the statutory provisions that govern custody and right of visitation of children in Malaysia generally and in particular to determine a right of child in refusing visitation orders against his or her other parent. The research methodologies applied in this article will be the analysis of primary and secondary materials. Article also includes a comparative methodology by analysing cases and the rights of children under the Convention on the Rights of the Child 1989 (CRC). Several cases, statutory provisions and other legal and non-legal literature is studied to see to what extent a child's right of refusal to visit his or her other parent is considered by court. This article proves that welfare of a child is always focused as the paramount consideration in deciding disputes relating to custody.

## 1 INTRODUCTION

Parenting role is a long continuous process wherein a strong initial bond between parents and their children is important for the nurturance and development of the child. Hence, every married parent are automatically joint guardians of their children. No separation or divorce can deny a parent's right over the children. It is important to remember that a divorce process itself will have a large impact on the children. Children may not be able to accept the practical and logistical challenges that occurs during a divorce. Research by Odenweller (2014) showed that parents are not the only ones affected during their divorce, it spreads through the entire family; the findings of the research showed that all ten of the students whom have divorced parents reported having trouble with their academics, because of their parents' conflicts.

Things are worsening when child is separated from a parent or asked to make a choice of parent that the child would like to stay with. Jackson (1994) agreed the toll that a legal visitation battle takes on a child is alarming. Children at some point in time will resent the visitation schedule and refuse to go see the other parent. Court usually does not refuse visitation unless there is risk of physical or mental harm to the child. According to Tanase (2011) dispute over visitation is a right of the parent or a right of the child is remnant from the period when parents exercised strong control over their children in the name of parental rights, with some arguing that such a viewpoint is unsuitable for the modern idea of the best interest of the child, and others, particularly in the United States, arguing against the socialist notion that children were raised by the society as a whole.

In divorce cases, parents who are denied child custody in court are often granted generous visitation

rights. Courts usually supports the involvement of both parents when determining the issue of custody and visitation of a child. Chapman (2017) opined that raising children should be a joint venture that requires communication, understanding, love and a willingness to compromise. For both parents and children, visitation is critical to maintaining a sense of connectedness during and after a divorce. Suzana, Roslina and Najibah (2017) discussed the current position of shared parenting after marital separation in Malaysia with a brief comparative review of Australian law and policies which are more advanced on the subject of shared parenting. Johnston (2005) in discussing Parental Alienation Syndrome (PAS) explained that what helps is early prevention of alienation, a good assessment of the multiple factors that contribute to alienation within the child and family, clear court orders that affirm parental rights and restore an appropriate access plan (one that the child can tolerate); ongoing case management and family-focused therapy (not just parent-child reunification).

Articles above showed the vital role of both parents in every children welfare and upbringing even if they are divorced or separated. Hence, this paper seeks to fill the gap and critically analyse to what extend the right of child in refusing visitation orders against his or her other parent will be considered by the court.

## 2 METHOD

This is a qualitative research on visitation rights of children under Family law. A library research method is used to examine the concept of visitation rights of children under civil Family Law. This included legislation in Malaysia as well as a comparative methodology by analysing the rights of children under the Convention on the Rights of the Child 1989 (CRC) and cases that provides some form of viability and practicality in dealing with refusal of a child's right to visitation.

Literature in the form of books, journal articles, procedures/guidelines and relevant websites are used to provide insights and information relating to the study. The related provisions as stated in the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (LRA) is analysed to highlight the current legal mechanism in dealing with the right of a child to refuse visitation by a parent. Valid sources from the internet are also referred to in keeping up with the latest development of the matter. By analysing court decisions, it will provide a comprehensive indication

of the decision-making process as case studies are usually problem and solution-centric.

## 3 PRACTICE IN MALAYSIA

In general, Malaysia practices two separate legal systems in matters concerning family issues. Family law relating to non-Muslims is governed separately from family law relating to Muslims. Family matters relating to non-Muslims are governed under the civil jurisdiction whereas family matters relating to Muslims are governed under the Syariah jurisdiction.

Family matters pertaining to non-Muslims in Malaysia is governed by the Law Reform (Marriage & Divorce) Act 1976 (hereinafter referred as LRA 1976). The objective of the LRA 1976 is to regulate marriage and divorce.

Under the LRA 1976 issue pertaining to protection of children has been broadly dealt with under Part V111. The court under section 88(1) of the LRA 1976 may at any time by order place a child in the custody of his or her father or his or her mother, and under exceptional circumstances to any other relative of the child. In deciding in whose custody, a child should be placed, section 88(2) of the LRA 1976 states that the paramount consideration shall be the welfare of the child, and subject to this the court shall have regard- (a) to the wishes of the parents of the child; and (b) to the wishes of the child, where he or she is of an age to express an independent opinion

With regards to right of access, under section 89(2)(c) the court may provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable. Likewise, under section 89(2)(d) LRA 1976, the court may give a parent or any member of the family of a parent the right of access to the child at such times and with such frequency as the court may consider reasonable.

It is seen that the court when making custody and right of access takes into consideration the welfare of the child. According to Carbone (2014) although the best interest standard is centuries old, its meaning has never been fixed; instead, courts often invoke the standard to justify a decision made for other reasons. Generally, right of access or visitation is awarded to the non-custodial parent, as this is a parental right which is necessary to both the parent. Only in exceptional circumstances will a non-custodial parent be denied the right of access or visitation.

In the case of *Renuka a/p Muniandy @ Ramakrishnan v Jeeva a/l Kalia Perumal* [2017]

MLJU 411 a divorce petition was filed by the wife against the husband. There were four children out of the marriage aged 18, 15, 8 and 7 years. The guardianship, full custody, control and care of the children were given to the wife and reasonable and/or supervised access was given to the husband.

However, disputes arose between parties with regards to access of the husband. The wife agreed that the husband be given reasonable and/or supervised access not amounting to overnight access. The wife further seeks for an order that the husband be prohibited and restrained from making any form of personal contact with the wife and the children other than in the presence and/or plain view of an enforcement officer or such other person as may be specified by the court and that the husband shall only be allowed to make such personal contacts in places as may be specified by the court.

The husband however seeks liberal access to the children whenever he can visit them in Malaysia (if he is working in Indonesia) or if he is working in Malaysia then regular access and the right to take them back to stay with him for ½ of all school holidays each year. The husband further prays for an order that he be given liberal telephone contact with the children so that he can call them often and check on their progress regularly due to the nature of his work.

The children were personally interviewed by the judge and it was seen that there was a lot of anger and hatred in the said children against their father and these emotions were further witnessed in court when the 1st child testified in court against the father. The 1st child said that the father's act of violence towards his family and his alcohol habits were unforgivable. As a result of the father's conduct towards his family, the said children do not wish to see or have any contact with the father. Throughout the interview as well as the trial process, the said children insisted on not meeting their father and wished that the court did not make an order for such purpose.

The court's paramount consideration in the case of Renuka a/p Muniandy @ Ramakrishnan is the welfare of the said children, and the wishes of the parents and the said children. Although it appears that the wife and the said children were living happily without the husband/father, the undeniable fact remains that he is the father of the said children and he wants to be given reasonable access to the said children. To deny the father access completely would not be just since the father wants to meet the said children badly. It must be borne in mind that the father is also required to maintain the said children.

However, the court was of the view that the father should not be given frequent reasonable access as in most normal cases. In view of the past incidents and how it had impacted the said children which resulted in the children's refusal to meet the father, having regard also to the fact that the father is to maintain the said children until the completion of their tertiary education in the event they manage to pursue their tertiary education, the court opined that a supervised access is necessary. When the father is back in Malaysia from his work in Indonesia and/or any other foreign countries, the father be given supervised access on a Saturday for 3 hours; or if and when the father is working in Malaysia, the father be given supervised access on alternate Saturdays for 3 hours.

The court further ordered that such access to be given to the father as stated above shall be further subject to the wishes of the said child following the principle in the case of Leong Sam Moy v. Low Chee Tiam (1997) 2 CLJ Supp 212, where it was held that access is the basic right of the child rather than that of the parents. The court also added that it is now the responsibility of the wife, as the mother, to prepare the child mentally and emotionally, so that the said children will be more willing and comfortable to see their father. It is also the responsibility of the husband to be patient and try his utmost to make up for the past misdeeds, and to win the said children's respect and trust, and ultimately the children's love. The father should not force access on the child if the child is not ready or willing yet.

In the case of Aravindraj a/l Chandrasekaran v Renu Kumari Rai (2015) MLJU 101, the husband is a Malaysian citizen and the wife is an Indian citizen and currently unemployed. There were two young children, a son 7 year in age and a daughter 5 year in age. At the trial of the divorce petition on 10 March 2014, the wife was absent, and the court proceeded *ex-parte*, in which the court in the decree nisi allowed the husband custody of the children and access was given to the wife.

The wife, in varying the order contended that both young children required their mother's love and care which was denied to them by the decree nisi. The children were placed under the care of their paternal grandparents because the father was mostly at work. The grandfather is a government pensioner and the grandmother is a housewife. In addition, the mother alleged that her daughter was sexually abused by the members of the husband's family and accordingly the mother wished to bring both children back with her to India with access given to the father. The husband denied the allegations of the wife and replied that the

interest of the children is best served by maintaining the status quo as per the decree nisi ordered.

From the interview with the children, it was unmistakably clear that the children wish to live with the father. They were afraid of the mother who in their view is mentally unstable because of their bad experience from her past verbal scolding and physical abuse by beating them. In addition, they do not want to live in India. The elder son preferred his schooling in Malaysia where he has fostered friendship with many other pupils here. Furthermore, the younger daughter denied that she was ever sexually abused or harmed as alleged by the mother and both children are happy living under the care of their grandparents when the father is away at work.

The court was satisfied that the children were candid and truthful during the interview and they were not coached on how to answer the questions posed. In fact, the elder son was very mature for his age. The findings from the interview were also consistent with reports of a psychologist and the Social Welfare Department adduced by the husband. Besides, the husband is gainfully employed whilst the wife is not, and it is obvious that the husband is in the better position to maintain and provide for the children. In the circumstances, the court find it is in the best interest of the children that they remain in the continued custody of the father with limited supervised access given to the mother as per the decree nisi.

In *Khoo Cheng Nee V Lubin Chiew Pau Sing* [1996] 4 MLJ 171 at p.183 Abdul Wahab Patail JC “It is to the best interests of welfare of the children that the state of feuding between the parents must cease. There shall be no bad-mouthing of one parent by the other to the children. There shall be no hiding of the children from the other parent. The children's relationship with each parent must be allowed to grow naturally, better still fostered by one parent for the other.” Furthermore, Moore, Ordway, and Francis (2013) too proposed that by conducting comprehensive assessments, developing more effective treatment strategies, advocating for the rights of children, and creating a specific protocol for the multidisciplinary team, fewer families would suffer from the long-term effects of parental alienation.

Hence, in the above cases the relationship between a parent and child will always be maintained. A child should have the opportunity to spend quality time with both their parents. It would be unfair to sever all ties between parent and child. The court has always applied the balance of protecting family

integrity and protection of children in such circumstances.

## 4 INTERNATIONAL PERSPECTIVE

The right of a child is a very notable issue which is recognized globally. The Convention on the Rights of the Child 1989 (CRC) is the first legally binding international instrument to ensure that the world recognizes that children have human rights. Malaysia ratified this Convention in 1995. Article 3 stresses that the welfare of the child must be a primary consideration in all cases concerning children. Under Article 9 the 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.

Article 12 clearly emphasizes that the States Parties shall assure to the child who can form his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Hence, the CRC emphasizes the right to respect the views of the child; wherein when adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions considered.

In the international context, children right have been identified and considered in court proceedings. In the case *Re T (Abduction: Child's Objections To Return)* [2000] 2 FLR 192, G, aged 11, and her brother T, aged 6, were habitually resident in Spain with their mother when their father wrongfully removed them to England. The father claimed that the mother was an alcoholic and incapable of caring for the children. G supported this, complaining of the mother's treatment of both children when drunk. The Spanish court awarded custody to the mother notwithstanding G's views, which it considered had been heavily influenced by the father. The court ordered the return of both children to Spain. The father appealed, arguing that the judge had been wrong to refuse to take account of G's objections to returning to the mother's care. The court allowed the

father's appeal and refused to order the children's return to the mother. Court of Appeal Simon Brown, Ward and Sedley LJ explained at p.193:

"It was necessary to establish why the child objected to returning to Spain, her age and degree of maturity and, considering the strength and validity of the child's views, whether it was appropriate to take account of her objections. A review of the evidence from doctors, of the child's own letters, of oral evidence on her maturity and objections, and of additional evidence as to her state of mind, led to the conclusion that the child was fearful of returning due to her mother's drink problem, that she was mature beyond her years given the burdens that she had had to carry and that, although coloured by her father's hostility to her mother, her views were genuine, as was demonstrated by the consistency of her approach and the expressions of love for the mother contained in correspondence. In all the circumstances the court was compelled to take account of the child's clear and reasoned views. In deciding whether to exercise the discretion to refuse to order the child's return, the spirit and purpose of the Convention also had to be considered, but in this case did not override the respect to be paid to the child's wishes. Regarding the younger child, the evidence was sufficiently clear and compelling to conclude that he would be placed in an intolerable situation if he were to be returned to Spain alone. The two children had been through difficult times together; the younger child had been dependent on his sister and she had acted as his 'little mother' at times."

Although the judges in the case considered the views of the children, the court did emphasize on the father a duty to mend the broken bridges in the family and to have the parental bond and contact with the children and mother continued. Ross Mackay (2005) supports that the process of separation can take a toll on the mental health of separating parents, which can in turn impair the quality of parenting.

Following the case of *Re W (Abduction: Child's Objections)* [2010] 2 FLR 1165, wherein the relationship between the parents was troubled, and marked by occasional violence and problems with drink, for which each blamed the other. Eventually, the mother secretly removed the three children from the family home in Ireland and brought them to England, without the father's consent. The father responded by travelling to England; he remained there for a number of months, obtaining a job and attempting to salvage his relationship with the mother. However, a trial period of reconciliation ended after only a few weeks, following another violent incident. The father then went back to Ireland

and applied for the children's return. The mother accepted that the removal had been wrongful, but argued that the father had acquiesced in the children remaining in England, that there was a grave risk of harm to the children if they were to return to Ireland, and that it was appropriate to 'take account' of the objections of the children, now aged 8, 6 and 3, to a return to Ireland. The two older children spoke to the Children and Family Court Advisory and Support Service (CAFCASS) officer together; the officer reported that the children had given a believable account of violence by the father towards the mother and towards them, and had told her that they were frightened of the father; the children had stated categorically that they did not want to return to Ireland, were upset at the prospect of doing so, and wanted, if it was necessary to return, to move to an address far away from the father and unknown to him. The judge found that there was no acquiescence, but that the children had strong objections to a return and that the older two children were not too young to have their views considered. Judge concluded that she should exercise her discretion not to return the two older children, and that, therefore, as the youngest child would be placed in an intolerable position if he were returned alone, none of children should be returned. The father sought leave to appeal, arguing that the views of the 6-year-old child should not have been considered, that the evidence of the children's objections was in any event too thin, and that the judge had failed to refer to various relevant factors at the discretionary stage of her judgment. The court refused the leave to appeal. The children objected to a return to Ireland and it was appropriate to take account of their views.

In *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, 734, Millett LJ at p. 734 said, 'It is to be observed that, if a child is not of an age and degree of maturity which makes it appropriate to take his views into account, he must be returned despite his objections and without any further inquiry whether his return is in his best interests. If, on the other hand, he is of sufficient age and maturity for his views to be taken into account, the Convention clearly envisages that he will not be returned against his wishes, unless there are countervailing factors which require his wishes to be overridden.'

In *B v K (Child Abduction)* [1993] 1 FCR 382, decided by Johnson J in October 1991, three children were removed from Germany. The judge held that a girl nearly 9 and a boy aged 7 had attained an age and a degree of maturity at which it was appropriate for him to take account of their views. As for the youngest child, the court accepted the oral report from

the court welfare officer that the youngest child would be devastated to be separated from the two elder children and would be exposed to psychological harm and would be placed in an intolerable situation if he were returned to Germany and the elder two children were not. Thus, the court concluded that the youngest child shall not be returned to Germany.

The Ontario Court v M and M (Abduction: Children's Objections) [1997] 1 FLR 475, Hollis J), the judge was satisfied that he should take into account the objections of a girl not quite 10 years old to returning to Ontario. He held at 485 that: 'In the absence of any medical evidence I do not think it right to find a grave risk of exposing the children to psychological harm by returning them, despite the persuasive comments of the senior court welfare officer, but I do find a grave risk if returned of placing [the elder girl] in an intolerable situation

## 5 RESEARCH OUTCOMES

In most of the cases above, the wishes of the children and views were considered by the courts in terms of their right to refuse to return to the parent. Moreover, courts are also more inclined to keep the children united and together. In the international context, refusal of a child with regards to visitation rights is not only viewed considering the level of maturity of the child that should commensurate with her chronological age but further authenticated with the court welfare officer's views. In *Re T (Abduction: Child's Objections To Return)* [2000] 2 FLR 192 at p. 205, a clinical report of the child was done to evaluate her psychological state to see if the separation of the parents could have affected the child; as such the child was subjected to a personality test and interview and it was concluded that the girl was intelligent, adaptable and able to cope with the problems between her parents. The child was also subjected to see a psychologist, social worker, medical doctor and headmaster of the school in order to decide what was best for the child's welfare and future [Re T (Abduction: Child's Objections To Return) [2000] 2 FLR 192 at p. 223]. Hence, it is observed that the court requires extensive evidence to corroborate the child's wishes to deny a parent its visitation rights.

Moreover, in *Re W (Abduction: Child's Objections)* [2010] 2 FLR 1165 at p. 1169, the court depended upon the evidence of a Cafcass officer who had interviewed the children together prior to the hearing. One of the important factors that the court considered in *Re W (Abduction: Child's Objections)* [2010] 2 FLR 1165 at p. 1172 was the fact that the

family had been settling into life in London for nine months and the father had at all material times known of their whereabouts in London.

In Malaysia and in the international context, the courts emphasise on the best interest of the child and focuses on a mechanism for resolving the tension between the parent and the child. The court stressed to safeguard the reciprocal interests of parents and children in preserving their relationships. In preserving the relationship, each parent is required to play a crucial role to mend his or her relationship that took a negative turn.

Thus, a thorough investigation of the facts surrounding the child's living situation, reports from relevant stakeholder is used as a useful evidence to decide on the right of the child to refuse visitation against a parent. The court will refer to all relevant factors at the discretion stage to determine the best wishes of the child.

## 6 CONCLUSIONS

In most cases, wishes of the child will always be considered in determining the refusal of visitation rights. Parents who have been denied visitation may have the opportunity to later have their visitation rights restored. In some cases, the court will spell out an action plan that includes taking parenting classes or other steps toward restoration. As such, judges will only permit the restriction or denial of visitation rights for limited circumstances. It is in the children's best interests for parents to work together to develop a workable visitation schedule.

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