

## FEDERAL CONSTITUTION, LEGISLATION AND DECIDED CASES' PERSPECTIVE ON CHILD CUSTODY AFTER DIVORCE IN MALAYSIA

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**Abstract.** Child custody laws after divorce are important. In Malaysia, the Federal Constitution is the highest law of the Federation. It provides the general ideas on custody. Legislation and decided cases interpret the Constitution's perspective on custody. Muslims are bound by Islamic family law and the Shari'ah court, whereas Civil family law and the Civil court bind the non-Muslims. Thus, both courts cannot interfere with each other's jurisdiction in custody. For example, a Muslim parent cannot petition for custody in the Civil court. The Fundamental Liberties provisions of the Constitution are related to custody. Thus, provisions concerning personal freedoms, the prohibition of slavery and forced labour, equality before the law, freedoms of movement, speech, assembly, association, and religion, as well as rights to education and property, ensure that custody protects both the child and others. The provisions are practised by legislation and decided cases through the principle of the child's welfare. The principle concerns the child's residence, contact, upbringing, the parties who will live with the child, and also maintenance. For example, the right of the child to express personal views on custody is related to the freedom of speech under the Constitution. Therefore, this article highlights a theme that custody is recognised under the Constitution through the Fundamental Liberties provisions.

**Keywords:** *fundamental liberties, child custody after divorce, the child's welfare, access, maintenance*

### Introduction

Child custody after divorce in family law is a crucial issue. It affects the child, parents, family members, non-family members, society, and local authorities. Legislation explains all custody principles, whereas courts interpret the legislation in deciding on custody. Custody decisions affect the child in two situations. First, the child will live with the custodial party and have access to the visiting party. The custodial party will decide the child's upbringing or share it with the visiting party. The visiting party will continue to have relationships with the child. If the visiting party is the father, he will also continue to provide the child, via the custodial party, with maintenance. Second, the child will live with more than one party (Adzim et al., 2021). For example, the child will live with the mother in the first and second weeks of the month, and the father will live with the child in the third and fourth weeks of the month. The parties will also decide together on the child's upbringing. The involvement of many parties in custody indicates the protection of personal rights. In Malaysia, the Federal Constitution and legislation state that custody involves Muslims and non-Muslims. The Muslims are bound by Islamic law, whereas the non-Muslims adopt Civil law. The Civil and Shari'ah courts interpret the Constitution and legislation on custody based on the child's welfare. The child's welfare encompasses religion, morality, maintenance, personal views, and the fitness of parties (Malek, 2001). For example, a Muslim child cannot live

with a non-Muslim custodial party. Immoral parties are not suitable to take care of the child. A father should continue to provide the child with maintenance post-divorce. The child should also express their personal views on custody, as it affects their life.

As the highest source of law in Malaysia, the Constitution establishes provisions relating to custody (Keong, 2016). For example, fundamental liberties provisions apply to custody. Federal and State legislations detail the practice of custody, whereas the courts interpret these provisions in line with the child's welfare. The courts have the jurisdiction to vary the practice to protect the child. Based on the above statements, this article analyses four issues, namely: (1) the Constitution's perspective on custody, (2) legislation and decided cases interpreting the Constitution's perspective on custody, (3) conclusion and recommendations.

### ***Federal constitution's perspective on child custody after divorce***

The Federal Constitution establishes provisions relating to child custody after divorce. The first part of the provisions is fundamental liberties. The relevant provisions are Articles 5,6,8 – 13 of the Constitution. In Article 5, all persons, including the child, have personal freedom under the law (Mohamed and Ahmad, 2022). The article recognises the child as a person with feelings and needs. In custody, the child's welfare involves residence, access, and the child's upbringing. The child's welfare recognises the child as a person, but not as property. Article 6 denounces slavery and forced labour. The child is vulnerable to modern slavery and forced labour. In custody, the parent or others who live with the child cannot make the child a slave and force him to work. In Article 8, all persons are equal before the law (Padil et al., 2021). In custody, protection is given to the rights, interests, and welfare of the child, the parents, and the other parties. However, the child's rights, interests, and welfare take precedence over those of others. For example, a newborn shall live with the mother or other qualified female party because they show more love and care for the newborn than the father or other male parties. The arrangement protects the rights, interests, and welfare of the newborn.

Article 9 establishes the freedom of movement. This freedom means that anyone in Malaysia can live anywhere in the Federation (Bari and Shuaib, 2004). Custody arrangements involve residence, access, and the child's upbringing. For example, it is possible that the mother lives with the child in the State of Johore, and the father has access to the child while living in the State of Selangor. The long distances between Johore and Selangor shall affect the child's access and maintenance if the father has conflicts with the mother. There is another possibility that the child will live with the mother for two weeks in Kuala Lumpur and with the mother for another two weeks in Selangor. Article 10 concerns the freedom of speech. The child, the parents, and the other parties can express their opinions on custody arrangements. The child can choose his or her preferred custodial party. However, the preference must follow the child's welfare. The parents and the other parties will give their views to assist the courts in determining the best party to live with the child, have access, and decide on the child's upbringing. For example, the child may prefer to live with the father. The courts will analyse the child's view because the father could have influenced the child into expressing the preference. The other aspects of Article 10 are the freedoms of assembly and association (Mohamed et al., 2014). Parties with interests in custody may form legal associations to advocate for the rights of parents and children. The associations would be regarded as a third force monitoring custody in Malaysia.

Article 11 concerns the freedom of religion. Islam is the official religion of Malaysia, and other religions may also be practised. However, other religions are prohibited from being propagated among the Muslims (Masum and Ahmad, 2013). In custody, the child's religion is important for the courts to consider before making orders. For example, in Islamic law, the Shari'ah court will not grant custody of a Muslim child to a non-Muslim party. Likewise, in custody for non-Muslims, the Civil court will ensure that the child's religion remains the same as the religion of the parents. In Malaysia, religious issues are sensitive, and the courts exercise caution when deciding on custody. In Article 12, the right to education extends to the child (Tan and Neo, 2023). Any court order on custody includes the child's opportunity to have access to an adequate education. The child's education is part of the child's upbringing. The safety of the child is an important aspect of the right to education. The child's residence should be near schools. The standard of the child's education should be maintained post-divorce. For example, before the divorce, the child was attending a private school. This standard should be maintained post-divorce.

Article 13 concerns the right to property. All persons, including the child, can acquire property if they observe the law (Shuaib, 2012). In custody, the courts also deal with inheritance, donation, and hibah. For example, the child lives with the mother and is also a beneficiary of the deceased father's property. The courts ensure that a guardian is appointed to administer the child's property on the child's behalf until the child reaches the age of majority. The application of guardianship is also extended to donation and hibah. The above Articles of the Constitution are important because they form the basis for custody laws for Muslims and non-Muslims in Malaysia. The Constitution is the supreme law of the country. Any legislation must align with the Constitution; if not, it is considered void and invalid. The protection of a child's rights, interests, and welfare must be upheld in all legal areas without exception or excuse.

### ***Legislation and decided cases interpreting the constitution's perspective on child custody after divorce***

The intention of the above provisions of the Federal Constitution is manifested in the Federal and State legislation on child custody after divorce. A Federal legislation, i.e., the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976), binds non-Muslims. However, the other Federal legislation, i.e., Islamic Family Law (Federal Territories) Act 1984 (IFLA 1984), and the State Islamic family law legislations bind Muslims. The main references for this part are the LRA 1976 and the IFLA 1984. Regarding the IFLA 1984, it is considered a source of reference by States practising Islamic family law. There are three discussions highlighting the constitutional interpretation by legislation and decided cases on custody. The first discussion is the principle of the child's welfare in custody. Both Civil and Islamic laws on custody impose several important duties on the civil and Shari'ah courts. The duties are based on the child's welfare. In the child's welfare, the child's constitutional rights are prioritised over those of the parents and others. The reason for the priority is that the child is vulnerable, weak, and needs protection from others. For example, in *Lim Yik Ying v. Liang Yung Piao & Anor* of 2000 1 M.L.J. 205, custody of the child was awarded to the mother and access to the father after the Civil court recognised her background, nature of her work, her abode, her family relationship, and her ability to bring up the child. In *Wan Abdul Aziz v. Siti Aishah* of 1975 1 J.H. (1) 47, 50, the Shari'ah Appeal Board indicated that custody of the girl should remain with the grandmother and the father. In *Harun v. Che Gayah* of

1975 1 J.H. (1) 6, the Shari'ah court awarded custody of the girl to her mother and granted access to the father, as the girl had been brought up by her mother since childhood, whereas the father had only cared for her for a month. In *Zety Aznin Azmi v. Abd Mutalib Abdullah* of 2008 2 Sh.L.R. 109, the mother obtained custody of the children. The Shari'ah court stated clearly that the welfare of the children was the paramount consideration in custody and access.

The child's welfare includes the importance of the wishes of the parents and the other parties. The wishes are actually part of the right to express views in the Constitution. The courts will consider their views before making any custody order. The views of the parents are important because the courts will consider them to determine who will have custody and who will be granted access to the child. For example, in *Ng Say Chuan v. Lim Szu Ling* of 2010 4 M.L.J. 796, the Civil Court agreed with the views of the parents and granted the interim order stating that custody of the children was awarded to the mother and access to the father. The nature of a custody order is holistic. Therefore, the courts will summon other parties, such as medical practitioners, psychologists, and Welfare Department officers, to provide their views on custody matters. For example, in *Sivajothi a/p K Suppiah v. Kunathasan a/l Chelliah* of 2000 6 M.L.J. 48, the court considered the reports of the consultant psychiatrist and the Social Welfare Department, manifesting that the child's separation from her father would adversely affect her mental and personality, and they recommended that the child be allowed to live with the father. In Civil law, the child has the fundamental right to express personal views on custody if they reach a suitable age to do so. Likewise, in Islamic law, custody terminates after the male child reaches the age of seven years, and the female child, the age of nine years. The Shari'ah court will allow the child to express their personal views on who they want to live with. Then, the court will evaluate them based on the principle of the child's welfare.

In *M Saraswathi Devi a/p K Gobind v. Keith Ian Monteiro* of 2006 3 M.L.J. 88, the court awarded custody of the 14-year-old child to the father and access to the mother due to the acceptance of the Civil court to the wish of the child to live with the father and not the mother. In *Mohamed Koyamo v. Sapura* of 1974 5 J.H. 352, custody of the older children was awarded to the mother after the Shari'ah court had interviewed the children and they had replied three times that they wanted to live with the mother. In *Mansor v. Che Pah* of 1975 2 J.H. 261, custody of the children was awarded to the mother because one of the children was of tender years, manifesting the better right of the mother to custody, and the two children were of the age of discernment or maturity and preferred to live with the mother. In *Sharifah Sapoyah v. Wan Alwi* of 1988 6 J.H. 259, because the children reached the age of discernment or maturity and they had preferred to live with the mother, the Shari'ah court had awarded custody of the children to the mother. In *Nooranita Kamaruddin v. Faeiz Yeop Ahmad* of 2007 4 Sh.L.R. 97, because the mother remarried a person connected to the child, custody of the child was awarded to the father. Thus, the Shari'ah court interviewed the child, but she refused to choose which parent she wanted to reside with and requested that the court determine the issue. In *Norani Abd Rahman v. Md Taib Hanapi* of 2008 4 Sh.L.R. 79, the Shari'ah court awarded custody of the four children to the mother. The main basis of the decision was the interview conducted with each child individually. In *Nordaliya Shamsudin v. Ahmad Nasri Shaharudin* of 2009 28 J.H. (1) 79, the Shari'ah court awarded custody of the daughter to the mother, and the father obtained access.

Thus, an interview was conducted with the daughter, who preferred to live with the mother, and the father consented to the choice of the daughter.

The above principle of the child's welfare is related to Articles 5 and 10 of the Constitution. The child, the parents, and others are persons with feelings and interests. The child is obviously vulnerable to abuse and neglect. This is the reason the child's feelings are prioritised over others. Biologically, the mother's feelings are prioritised over others after the child because of her close relationship with the child. Thus, the personal freedoms of these parties are protected through legislation and courts. They also have the right to express their views on custody. The views are actually freedom of speech. Since custody concerns the child's welfare, the courts are given the power to evaluate their opinions. For example, there is a possibility that the child is coerced by one of the parents to express his or her views on custody arrangements. On a positive note, all parties are involved in ensuring that the child has a good upbringing. The second discussion is the factors used by the courts to determine custody. The courts interpret the child's welfare by considering factors such as the mental state of the parties, their financial standings, and their moral lives. Parties who are of unsound mind cannot live with the child because of the child's safety and well-being. The parties' finances are important so the courts can award adequate child maintenance. Immoral parties are not the best examples for the child's upbringing. In *Hoo Tat Fong (P) v. Lim Cheun Eng* of 2001 5 M.L.J. 660, the Civil Court ordered the transfer of custody of the two children from the mother to the father because of sexual abuse suffered by the children from the family members of the mother. In *L v. S* of 2002 7 M.L.J. 584, the award of custody of the two-year-old child was given to the mother and access to the father due to her ability to spend more time with the child because of working for only two hours in the afternoon and the father's violent behaviour, which is not in the child's welfare. In *Ananda Dharmalingam v. Chantella Honeybee Sargon (P) and other Appeal* of 2007 2 M.L.J. 1, the award of custody of the children was given to the mother after the Court of Appeal recognised the fitness of the mother as the parent, in which the medical reports indicated that she was free from depression or any mental illness. In *Awatif Ibrahim v. Haji Salleh* of 1979 6 J.H. 142, the Shari'ah court held that the grandmother was denied custody because of her residence in Egypt. This situation would hinder maximum contact between the child and the parents who were living in Malaysia.

The importance of the factors to the child's welfare is obvious, where the courts will determine custody involving two or more children separately. It means that the court will either place all of them to live under one residence or place each of them at a separate residence. For example, in *Gan Koo Kea v. Gan Shiow Lih (F)* of 2003 4 M.L.J. 770, the mother obtained custody and the father granted access of the children because they had lived with the mother more than the father, the respective tender age of the children, the event of the children abuse by the father, and the failure of the father to have a continuous relationship with the children through frequent contact. In *Jayakumar a/l Karuppanan & Anor v. Jeyakumar Krishnan* of 2006 4 M.L.J. 770, custody of the child was awarded to the mother because the child had stayed with the mother since birth. In *Faridah Hanim Omar v. Abd. Latiff Ashaari* of 2006 22 J.H. (1) 27, the Shari'ah court awarded custody of the three children, aged 19, 14, and 12 years, to the mother, and the father obtained access. Civil and Islamic law also empowers the courts to grant custody to parents, family members, non-family members, and the

authority. However, the mother would normally have custody of a child below seven years. However, she will lose custody if she is unfit to reside with the child.

For example, in *Ng Say Chuan v. Lim Szu Ling* of 2010 4 M.L.J. 796, there was an interim order that custody of the three children was given to the mother and access to the father. Later, the father applied to change the order, indicating his desire to have custody. The court rejected the application because the father failed to discharge the rebuttable presumption stating that custody of children under the age of seven years shall be given to the mother. The court also stated that a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the court's intervention. In *Wong Kim Fong (F) v. Teau Ah Kau @ Chong Kwong Fatt* of 1998 1 M.L.J. 359, the court awarded custody of the son to the mother and access to the father because the mother had manifested love, affection, and dedication to the son and had cared for him even after she was separated from him. In *Sivajothi a/p K Suppiah v. Kunathanan a/l Chelliah* of 2000 6 M.L.J. 48, the court awarded custody of three young daughters of tender age to the mother instead of the father because of the natural love of the mother for the daughters and at the same time, the father was busy with business. In *Rosnah v. Mohamed Nor* of 1975 1 J.H. (1) 42, custody of the female child was awarded to the mother as she had the better right to custody than the uncle. In *Ahmad v. Aishah* of 1977 1 J.H. (1) 55, custody of the eldest child was awarded to the mother even though prior to the application the child had lived with the father and the stepmother. In *Faridah Daud & Anor v. Mohd Firdaus Abdullah @ Jettle Francis* of 2004 17 J.H. (1) 25, the grandmother was awarded custody of the two female children. The mother and the father obtained access. The main reason for the decision was that the mother had remarried a person not connected with the children. The nature of the father prevented him from adequately loving and caring for the children. In *Mohd Radhi Haji Che Daud v. Khadijah Yaacob* of 2004 17 J.H. (1) 19, the custody of the two children was awarded to the father and the grandmother because, prior to the application, the children had resided with them for three years. In *Awatif Ibrahim v. Haji Salleh* of 1979 6 J.H. 142, the Shari'ah court awarded the custody of the child to the father instead of the maternal grandmother, who resided in Egypt, on the evidence that the mother had contracted another marriage. Although in terms of priority, the grandmother should be awarded custody, the court was of the view that the residence of the grandmother, which was in Egypt, might hinder the child from having a continuous relationship with the parents through frequent contact and affect the rights, interests, and welfare of the child.

Under Islamic law, the religion of the party having custody is important. The Shari'ah court cannot grant custody to the non-Muslim party. In *Radziah Ibrahim v. Peter R. Gottschalk @ Yusuff Abdullah* of 2009 27 J.H. (2) 259, the Shari'ah court awarded an interim order for the custody of the daughter to the mother. The father was prevented from meeting the daughter because he did not live his life as a Muslim. His character could influence the faith of the daughter through meetings between him and her. In the *Application for Interim Hadhanah, Siti Zubaidah Chew Abdullah @ Chew Yin* of 2009 J.H. 65, the Shari'ah court granted an interim order for the custody of the daughter to be awarded to the mother, who had converted to Islam together with the daughter. The father, a non-Muslim, was awarded access. Both Civil and Islamic law agree that immorality is a ground for the courts to terminate the right of the party to have custody. In *Yeoh Ken Lee v. Liew Chooi Hong* of 2005 5 C.L.J. 408, the father applied to vary an order which granted custody of the minor children to the mother. The

variation was for the transfer of custody from the mother to the father. The court allowed the application based on the fact that the mother committed abuse against the child, and she also denied the father contact with the children. In *Fazeya Hassan Ahmed Moustafa v. Suzeiri A. Samad* of 2008 25 J.H. (1) 73, the Shari'ah court awarded the custody of the four children to the father, and the mother obtained access. The mother was disqualified from having custody because she was living an immoral life and practising immoral behaviours, which would affect the children. In *Fakriah Yusoff v. Zulkifli Ismail* of 2009 1 Sh.L.R. 86, the mother obtained the custody of the child, and access was awarded to the father. The father failed to prove that the mother had a bad character, which would disqualify her from having custody.

The rights of more than one party and the child to custody are related to Article 8 of the Constitution. All parties have a chance to have custody of the child. The courts must not only determine love and care for the child, but also other factors such as finance and morality. However, the mother is prioritised over others to have custody because of her affectionate love and care for the child. The requirement of religion is also related to Article 10 of the Constitution. Basically, mutual parental consent is a requirement for determining the religion of the child. The Civil Court normally would maintain the religion of the child if there is a parental conversion to another religion. However, in Islamic law, it is a different principle that the religion of the child is Islam, and so too the religion of the party having custody. These differences are allowed by virtue of the Constitution denying the Civil court to interfere with Islamic law.

The third discussion is custody and access arrangements. In custody arrangements, both Civil and Islamic law recognise that the one who has custody will decide on the child's upbringing. This situation is not in line with the concept of joint parental responsibilities. Both parties, in particular the parents, must exercise such responsibilities. Another matter is that both laws automatically recognise sole custody. It means that the parties must apply for joint custody. The courts can grant an order for the child to live with a party or more than one party based on the child's welfare. They can vary such an order by firstly ordering the child to live with a party and later with more than one party. The variation of order must not affect the child's upbringing. In *Mohan Raj St Patmanathan v. Prema Rani a/p Kandiah Ponnampalam & Anor* of 2005 4 M.L.J. 444, the court awarded joint custody based on the application made by the father. However, the father agreed for the children to continue living with the mother. In *Jennifer Patricia a/p Thomas v. Calvin Martin a/l Victor David* of 2005 6 M.L.J. 728, the court awarded joint custody to the father based on the tacit approval of the mother, who failed to submit a reply to the application made by the father. In *Legasri a/p Purana Chandran @ Maniam v. Sreepathy a/l Ganapathy Krishnan Iyer* of 2010 5 M.L.J. 411, the father and the mother were awarded joint custody of the child. The child would live with the mother and have contact with the father. After failing to obtain sole custody of the child, the mother absconded with the child and denied the father contact. The father then applied *ex parte* to vary the original order. The court allowed the application.

In access arrangements, Civil and Islamic law allow the party who is granted access by the courts to have contact with the child. For example, in *Imran Syakir Mohamad v. Norzihani Yusof* of 2008 3 Sh.L.R. 46, the father applied for an interim restraining order and access to the child because he failed to have contact with him, who was residing with the mother. The father was worried about the safety and welfare of the child. The Shari'ah court allowed the application. It stated that the child should be deprived of his rights to have a continuous relationship with the father. This access is so

important that the court could prohibit the party with custody from taking the child out of Malaysia. Normally, the court will grant access to the father. The father will have contact with the child and ensure the continuity of the discharge of the child's maintenance. The court can vary orders for access based on the child's welfare. For example, the court ordered the father to have access to the child once a week. Later, the court can vary the order granting the father access to the child twice a week. *Jennifer Patricia a/p Thomas v. Calvin Martin a/l Victor David* of 2005 6 M.L.J. 728, the court issued a consent order restraining the father from removing the child, who was under the custody of the mother outside of Malaysia, without the prior consent of the mother.

The access arrangements are also important to ensure that the child continues to get maintenance from the visiting party, in particular, the father. For example, in *Mazlina Mustafa v. Mohd Lazee Dorani* of 2006 4 Sh.L.R. 136, the Shari'ah court varied the order on the child's maintenance from the amount of RM 600 to RM 1,300 to be paid by the father. In *Norzaini Alias v. Mohamad Sharif Mohamad Taib* of 2006 4 Sh.L.R. 153, the father was ordered to provide the child's maintenance with the amount of RM 200 a month. In *Aidorra Ibrahim v. Azman Abdul Jalil* of 2008 2 Sh.L.R. 140, the Shari'ah court ordered the father to provide child maintenance for the monthly amount of RM 600 and the arrears of RM 12,750 through the attachment of earnings from the employer. In *Alias Mat Sam v. Hanami Kassan* of 2008 2 Sh.L.R. 103, the Shari'ah court ordered the father to provide the child's maintenance for the monthly amount of RM 400 through the attachment of earnings from the employer. In *Zainip Ahmad v. Abdul Aziz Hussain* of 2008 1 Sh.L.R. 105, the Shari'ah court ordered the father to be sentenced to four months' imprisonment because he failed to provide the child's maintenance for the five children. The father's deliberate resignation from his job was a violation of the court order, which had earlier made an order on attachment of earnings towards his previous employer. In *Muhammad Zaiman Jarmin v. Norasih Majid* of 2009 2 Sh.L.R. 153, the father applied to vary the order requiring him to provide maintenance for the three children for RM 450 per month. The Shari'ah court reduced the amount to RM 330 per month in view of his employment and income. In *Noorhayati Muhammad Kushairi v. Mazlin Aris* of 2009 4 Sh.L.R. 158, the Shari'ah court ordered the father to pay RM 29,050 in arrears of maintenance to the five children. The payment would be made through the monthly instalments of RM 2,000. The court rejected the plea of bankruptcy as an excuse for not discharging the maintenance based on Islamic law. In *Rohana Ahmad v. Mohd Faizal Ismail* of 2009 3 Sh.L.R. 92, the father was ordered to provide maintenance for the three children for the amount of RM 300 per month. The Shari'ah court stated that the maintenance should be based on the means of the person responsible for providing it in accordance with Islamic law. In *Murshida Mustakim v. Hassim Abdullah* of 2009 1 Sh.L.R. 59, the Shari'ah court postponed the sentencing of the father who failed to provide maintenance for the children for a period of five months, with an assurance of RM 2,000 deposited into the father's account. The account book was to be surrendered to the court for safekeeping with one surety. In *Nora Ahmad v. Zabarni Chik* of 2009 1 Sh.L.R. 178, the mother applied for the child's maintenance for the monthly amount of RM 2,400 and the yearly amount of RM 4,800. The Shari'ah court rejected her application because the father was not rich. Instead, the father was ordered to pay the monthly amount of RM 1,160 and the yearly amount of RM 1,800.

The principle of custody and access arrangements is related to Articles 9, 12, and 13 of the Constitution. The freedom of movement is important to the child, the parents, and

the other parties. The child must be allowed to live with more than one party as long as it positively affects the child's mental health. This freedom is also important to the party having access. The party, in particular, the father could meet the child for love and care as well as the child's maintenance. The child has the right to education and has property. Custody occurs after divorce, and it should not deny the child access to education. The child deserved physical and spiritual education. The party that has custody must provide the child with an adequate place for study. Likewise, the party having access, in particular the father, must provide adequate money for the child's education. In some situations, the child inherited property from his or her deceased father. His property must be managed and protected by an appointed guardian.

## **Conclusion**

The Federal Constitution influences legislation and courts to deal with a child's custody after divorce. The provisions of the Constitution recognise the child, the parents, and others as persons with feelings and interests. The application of the fundamental liberties under the Constitution in custody is important. Custody also exists to manage these feelings and interests. Since the child is weak and vulnerable, custody prioritises his or her rights. The Constitution mandates legislation to administer custody, and courts act as interpreters of legislation and the Constitution on custody. The interpretation concerns the principle of the child's welfare, the factors used by the courts to determine custody, and custody as well as access arrangements. As a recommendation, legislation that interprets the Constitution in custody should include clear provisions recognising joint custody. The courts should not be burdened to declare joint custody as an alternative to sole custody. Sole custody recognises sole parental responsibilities. Thus, joint parental responsibilities should be applied by the parties. This is not in line with the concept that fathers will be fathers with responsibilities even after divorce.

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## **Conflict of interest**

The authors confirm that there is no conflict of interest involved with any parties in this article.

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