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CHILD CUSTODY AND ACCESS DURING PANDEMIC: BEING IN THE LIMELIGHT

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Abstract:

Covid-19 Pandemic has affected human life socially, economically, and politically where their movement and activities have been restricted. The well-being of family institutions is among the most important aspects that are significantly affected by the pandemic. Issues surrounding custody, visitation, and access over a child involving divorced or separated parents may invite disputes between parties if not amicably resolved. By using a qualitative analysis of library-based sources and interviews, this article attempts to highlight the issues relating to custody and access orders in response to the pandemics. It is found that the traditional court order on custody and access over a child remains enforceable until a variation order pertaining to the same has been made. Nevertheless, during the Movement and Control Order (MCO) or other administrative movement control such as the Enhanced Movement Control Order/Tightened Movement Control (EMCO/PKPD) and Targeted Enhanced Movement Control Order (TEMCO), where the operation of the court is limited or rather suspended, the existing orders seemed to be impractical to certain extent particularly in-person access or shared parenting time where the child will get time to be physical with the father and mother. In the end, recommendations are posted for the betterment of parties in facing the issue.

Keywords:

Custody, Access, Children, Covid-19, Pandemic, Movement and Control Order (MCO)

Introduction

Custody and access over a child is a long accepted practice where one parent is given a right of custody over a child by the court while the other is a right of access particularly when parties are no longer in a good marriage knot. This relates so much to the right of parents and children whereby both parents have a right to be with their children and vice versa. Failing to follow the court's order may subject the parties to contempt of court or inflict implications such as child abduction, abuse, or refusal of application by the court for those who disobey the court's rule. Nevertheless, in certain situations the parties may face difficulty in following the court's rule particularly during pandemics, where the movement of parties and children are restricted. Significantly, Szalma & Rekai (2020) categorised cases pertaining to contact patterns during Covid-19 Pandemic into three categories, that are no changes in visitation, significant changes in visitation and complete lack of visitation. They stated that in responding to Covid-19 Pandemic, face to face contact patterns and the role of ICTs have changed. Thus, the International Committee of the Red Cross (ICRC) stated that pandemic may increase stress and anxiety among people when it relates to isolation and quarantine measures where separation with family members is inevitably occurring (<https://www.icrc.org/en/document/Covid-19-global-pandemic-may-increase-stress>). Even though, it is sometimes hard to reach an agreement between parents when it comes to custody and access matters, yet dispute does not benefit anybody. Thus, this article focuses on how the traditional family law on the issue can be relaxed during Covid-19 outbreak. The reference will be given to the statutes governing the issues that the Law Reform (Marriage & Divorce) Act 1976 (LRA) for non-Muslim and the Islamic Family Law (Federal Territory) Act 1984 (IFLA) for Muslim.

The Law on Custody and Its Application

Generally, custody of a child refers to certain rights owned by any person over a child including care and control (M.G. Pillai, 2009). Upon dissolution of a marriage or during the matrimonial court proceedings, any party to a marriage, which refers to either father or mother of the child or any interested party that includes any relative of the child or of any association the objects of which include child welfare or to any other suitable person, may apply for a custody order from the court. In the instance case of *Re S (Children: care proceedings)* [2014] EWFC 2, the court viewed that for the best interest of those children, the court did not consider them to be returned to live with their parents as that may give the totality of harm that they have each and severally suffered. Initially, disputes between parents over custody were private matters that were brought for court's intervention only when the parties could not agree on how a child should be brought up and taken care of (Schepard, 2004). On many occasions, if the parties can reach a mutual agreement and parenting plan, the court will normally issue its approval unless the agreement and plan will be detrimental to a child's interests and well-being. In case the parties cannot mutually agree on custody and access of a child, a court's jurisdiction will be invoked for a court to decide for them. At this point, they are bound to follow the required rules and principles as well as the outcome of a court's decision. Similarly, the court may have the power to adjust earlier arrangements made by parties, if the circumstances justify so, as the court stands on the principle that a child needs to have a "proper relationship" with the parents in normal circumstances and to the deficiencies of the restricted arrangements. The principle is derived from the case *Re H (a child) (contact order: relaxation of restrictions prior to full hearing)* [2013] EWCA Civ 72 where Black LJ stated that it was right for a judge to give weight to matters, which were unsatisfied about a stopgap arrangement now that it would have to last for a much longer time than anticipated.

Furthermore, for the sake of a child's welfare, the court may decide that custody includes or excludes care and control of a child. In other words, one parent may be granted with custody, while the other with care and control (Majid, 1999). The court may grant custody of a child to the father or mother, solely or grant it to both jointly. A custodial parent is entitled to decide all questions relating to the upbringing and education of a child if it is granted solely to him or her. The main purpose of a sole custody order would be to award one custodial parent to be the primary decision maker and focus of a child's emotional life. The other non-custodial parent has no right to participate in major decisions for a child's future (Schepard, 2004). In the case of joint custody, both would have a say in the child's upbringing and education, but one of them may have the child physically living with him or her (Majid, 1999).

Nevertheless, a court shall take into account several considerations when granting a custody order to one party and order of visitation or access to another. The paramount and foremost consideration will be given to the welfare of a child. However, parents' and a child's wishes will not completely be ignored by a court. Other factors that may be contemplated by a court include the moral fitness of the competing parties, the comparative physical environment offered by them, the emotional ties of a child to them and of the parties to the child ("Note, Alternative to Parental Right in Child Custody Disputes Involving Third Parties," 1963). The age, sex and health of a child, the desire to maintain continuity of existing relationships between a child and a third party and the articulated preference of a child are also important factors considered. Importantly, when considering between both parents, the court will look for the better of the two by emphasising on parental rights and responsibilities (Mohd Zin, 2005).

It is worth noting that the law does not prescribe that the custodian of a child shall always be the mother or father of a child. It can be any interested party who is entrusted by the court for the custody of a child as stated in section 88(1) of the LRA. In the section, it is stated that the court may, at any time, make an order to place a child in the custody of his or her mother. Furthermore, it states that in exceptional circumstances, the court may order a child to be placed under the custody of any relative, or any association or any suitable person as the court deems fit, other than either the father or mother of a child. This indicates that the court is given a discretionary power to decide who should be the custodian by considering several factors, which are in the best interests of a child. The phrase, "at any time", as stated in the section, empowers the court to make orders of custody, even without divorce proceedings being commenced (*Saraswathy v Palakrishnan* [1986] 2 MLJ 127). It means that the commencement of a divorce proceeding is not a prerequisite for the order of custody to be made by a court.

Presumably, it is for the good of a child during his or her infancy to be with his or her mother according to sections 88(3) of the LRA. The infancy age has been described as below seven years. Nevertheless, such presumption can always be rebutted if circumstances justify that the custody should be shifted to those other than the mother in some situations for instance the physical or mental unfitness of the mother to take care of the child. In deciding whether the presumption applied to the facts of this case, section 88(3) provided that the court shall have regard to the undesirability of disturbing a children's life by changes in custody (*Tay Chuen Siang v Wang Chiao-Wen (f)* [2009] 9 CLJ 84). In this regard, the court in the case of *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] MLJU 05, made a significant remark that the presumption in the provision was not on its own a necessarily decisive factor. The court was not precluded from considering other factors, which may be relevant to a child's welfare.

In addition to this, section 89(1) states that the custody order may be granted with or without attachments to any conditions. In other words, the custody may be made absolute or attached with conditions where the court deems necessary. The conditions that may be imposed by a court are listed in section 89(2) (a) – (e). These include the place where a child is to reside, temporary care and control of some person other than the person given custody, the child's right to visit their non-custodial parent, time and frequency of visits as well as prohibitions from taking the child out of Malaysia by the custodian. The law also empowers the court to vary or rescind a custody order at any time and from time to time upon application of any interested parties. The application must be based on misrepresentation, mistake of fact or any material change in the circumstances as stipulated by section 96. Thus, a custody order, which has already been granted, is not final, irreversible, or exclusive to any person. Pertaining to durations of an order, civil law describes that the order shall expire on the attainment of eighteen years of a child or any shorter period or where the child has a physical or mental disability, on the ceasing of such disability, whichever is later.

On the other hand, custody is known as *hadhanah* under *Syariah* law. It simply means to clasp in one's arm or to cuddle someone (Mohd Zin, 2016). In a specific context, it means the protection from harm given to those who cannot act for themselves and the care given to them by ensuring anything that provides advantages and benefits them. The person who owns the right of *hadhanah* is called *hadhinah*. Nasir (1990) wrote that custody is an established right for a baby from the time of its birth and is a form of guardianship of a child. In Arabic it is called *hadhana* or *hidhana*, the time when an infant needs a woman to look after it at his or her early age. It is stated that *hadhanah* is not only the right of parents or other persons from *ahl al-hadhanah*, instead, it is the right of a child which should never be waived (Mohd Zin, 2016).

According to the provision of section 81(1) of the IFLA, it is clearly stated that the mother shall be best entitled to the custody of her infant children during the connubial relationship, as well as after its dissolution. The court in the case of *Zawiyah v Ruslan* (1980) 1 JH (2) 102 decided that the *hadhanah* of a three-year-old boy was to be granted to his mother, since he was below the age of seven. However, if the court thought that she was disqualified, the custody would pass to persons according to order of preference as stated in section 81(2) (a) - (l) of the Act. Those persons are the maternal grandmother, how-high-soever, the father, the paternal grandmother, how-high-soever, the full sister, the uterine sister, the sanguine sister, the full sister's daughter, the uterine sister's daughter, the sanguine sister's daughter, the maternal aunt, the paternal aunt and the male relatives who could be their heirs as '*asabah* or residuaries. In the case of *Wan Abdul Aziz v Siti Aishah* (1977) 1 JH 50, the appellate court granted *hadhanah* to a father on the principle that even though, theoretically, a mother was entitled to *hadhanah* of a small child, but if it happened to be in conflict with a child's welfare, the child's welfare would supersede it. In this case, the court considered the fact that the child had been living with the father and the grandmother for more than two and a half years, which made the child become overly attached to them. Removing the child from the situation that she was living in would disturb her emotions. Section 81(3) and (4) of the IFLA describe further conditions for persons who qualify for custody of a child. More importantly, a man who is not within the prohibited degree of relationship, as mentioned in section 9 of the IFLA, would have no right to custody of a female child. In a case where there are several persons that are equally qualified and willing to take charge of a child, the qualities of virtuosity and seniority would be given priority. These provisions indicate the different positions between civil and *Syariah* laws.

Like the provision of the LRA, section 86(3) of the IFLA provides for a rebuttable presumption that it is for the good of a child during his or her infancy to be with his or her mother. In deciding whether that presumption applies to the facts of any case, the court would consider the lack of desire to disturb the life of a child by changes of custody. However, the IFLA does not prescribe the age of infancy, as it does in section 88 (3) of the LRA. More importantly, according to the provision of section 84 (1) of the IFLA, the right of the *hadhinah* to the custody of a child ceases upon a child attaining the age of seven years for a boy and nine years for a girl. Upon an application made by the *hadhinah*, the court may allow her to retain the custody of a child until the attainment of the age of nine years for a boy and eleven years for a female. Subsection (2) of the section further states that after termination of the right of the *hadhinah*, the custody passes to the father. If the child has reached the age of discernment, he or she would have the choice of living with either of the parents, unless the court orders otherwise. Notably, the age of discernment is not spelt out by the provision and it very much depends on a child's understanding and level of maturity (Siraj, 2012). In the case of *Zaliha Zakaria v Rahmat* (1987) 2 JH 316, the court was of the opinion that a five-year-old boy was yet to reach the age of discernment and thus, was not qualified to make his own choice of living. Similar to its civil counterparts, section 87(1) of the IFLA empowers the court to attach conditions while making an order for custody. The conditions that may be imposed are similar to the civil court, which are described in section 87(2) (a) – (e) of the IFLA.

In short, child custody is one of the legal fields, where the court has considerable discretion in defining the welfare of a child according to Malaysian law (Ibrahim, 2018). To prevent arbitrariness and to ensure justice, appellate reviews have been the principal method of appeal under civil and *Syariah* family law in Malaysia.

The Law on Access and Its Application

Access is a right given to a non-custodial parent to visit and communicate with his or her child living with the other parent or guardian (Majid, 1999). Usually, when sole custody is given to one parent, the other will be granted access or visitation rights (Buehler, 1989). It is normally attached to a custody order. The court may grant the right of access liberally or specifically to a non-custodial parent to ensure that the child-parent relationship does not end after the separation of the parents. It is neither to reward nor to punish any party for the failure of their marriage (M.G. Pillai, 2009). As such, Lowery & Settle (1985) concluded that a visitation structure which encouraged the father to incorporate time with his child as part of his lifestyle, minimised the loss subjectively experienced by a child.

Additionally, payment of maintenance or child support is a continuous responsibility of a father even after a divorce. Thus, a court is normally willing to grant the right of access or visitation to a non-custodial father as a kind of surety for the costs paid. As such, it is said that visitation and child support are related attitudinally, empirically, and sometimes even legally (Kamaruddin, Mat Amin & Asmuni, 2005). Fathers who do not visit their children are less likely to pay child support. It could be that they lack commitment to visit their children regularly or they found obstacles to visitation. Therefore, the right of access granted by a court to a non-custodial parent, especially to a father, shares the burden and responsibility of raising a child. Substantially, access can be both a right and a responsibility depending on how it is viewed (Abdul Malik, 2011). It is the right of a parent to see and visit their child and the obligation of a parent to visit and monitor the development and well-being of their child. On the other hand, it is a right of a child to have access to both parents irrespective of the parents' marriage situation. Similarly, it is the child's obligation to show his or her love and obedience

to both parents by visiting them. Section 89(2) (d) of the LRA provides that in granting the custody order, the court may also grant the right of access to the parent who is deprived of custody. It may also be given to any member of the family of a parent who is dead or has been deprived of custody by describing times and frequency of the access as well as other suitable conditions. The conditions include location, length, and frequency of a visit as well as other limitations, if any, where the rights are to be exercised in the best interests of a child. The principle has long been established in the case of *T v T* [1966] 2 MLJ 302, where the court stated that the general principle was to grant access to a non-custodial parent unless it was in the best interests of a child to forbid it. When a court grants the access right to a non-custodial parent, the same principle of a child's welfare will be emphasised. The effect of granting the right of access to the non-custodial parent was established by the court in the case of *Diana Clarie Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 1 CLJ 721. In this case, the court asserted that the right of access was granted to balance the rights of both parents to have a sense of responsibility towards their children, regardless of who the custody was granted.

Moreover, in the case of *Bhavani Devi a/p Balakrishnan v Mahendran a/l Perimaloo* (In the Shah Alam High Court, Originating Summons No 24-2181-2009), the court ruled that severing a child-parent relationship by denying access should be avoided by a court except in very exceptional circumstances (http://selangor.kehakiman.gov.my/sites/selangor.kehakiman.gov.my/attachments/2421812009_.pdf, 2009). It was better for a court to provide parents with opportunities to get close and show his or her love and affection to their child. Nevertheless, when a court contemplates between the rights of a child and the parents, the right to access is seen as a child's right, rather than a parent's right. This principle was highlighted in the case of *Legasri Purana Chandran @ Maniam v. Sreepathy Ganapathy Krishan Iyer* [2010] MLJU 326 where the court found that the child had been deprived of access to her father. Therefore, it became one of the grounds for a court to grant a variation order to the terms of a *Decree Nisi*. The order is similar to a custody order, and the court exercises considerable discretion in ordering the access, which is subject to an appellate review. In the case of *Shyam Ishta Puthucheary v Rajveer Singh Dhaliwal* [2011] 3 AMR 173, Yeoh Wee Siam JC granted the right of access to the defendant with a limitation that the right was to be exercised within Malaysia only. He was not allowed to travel with the children outside Malaysia. Meanwhile, section 87(2) (d) of the IFLA also provides for the right of access for non-custodial parents. However, the law on access under *Syariah* law has a wider interpretation in the sense that a child shall have the right to love and affection from both the father and mother, irrespective of who the custodian is. It very much relates to the principle that it is a sin to deny a child the opportunity to be acquainted with his or her parents. Mohamad Shakir Abdul Hamid J highlighted this principle in *Nordaliya Shamsudin v Ahmad Nasri Shaharudin* [2010] 1 CLJ (Sya) 266.

However, both parties might not always accept a court's decision on custody of a child. It is even worse when the access or visitation right of a non-custodial parent is sometimes not exercisable. Even though a court may have already prescribed conditions of the right of custody and access, practically, the "power" to allow or disallow the access is in the hands of the custodial parent. The unavailability of law in Malaysia, which ensures the implementation of the access right, has caused "winner-loser" or "child owner" feelings of the custodial parent (Md Salleh, 2018).

Supervised Access

Generally, supervised access or contact with regard to parents-child relationship may involve a third person having oversight of and responsibility for, ensuring the safety of the child when visiting with a parent or during a change-over from one parent to the other (Schindeler, 2019). The author further argued that among the main reasons for the making of orders for supervised contact may be broadly classified as one of the protections for a child or among matters under the child welfare purview. Within this context, the application of supervised access is extended not only to a situation when the right to access is denied by the other party, but includes situations which allow parents who may be a risk to their children or to another parent to experience parent-child contact while in the presence of an appropriate third party (Crook & Oehme, 2007). Such programs emerged as an option for courts responding to families experiencing separation and divorce, when conflict between parents necessitates an "outside resource" to allow the child contact with a noncustodial parent (Birnbaum & Alaggi, 2006). In relation thereto, Alaggia (2006) stressed on the importance of ongoing contact between children and their non-custodial parents particularly at a time when the children are experiencing confusion and feeling the loss of both their parents.

As far as Malaysia is concerned, another important provision relating to access can be found under rule 7(2), Divorce and Matrimonial Proceedings Rules 1980. The rule provides that where a petition for divorce, nullity or judicial separation discloses that there is a minor child of the family who is under 16 or who is over that age and is receiving instruction at an educational establishment or undergoing training for a trade or profession, the petition shall be accompanied by a separate written statement containing the information required by Form 4. Reference to Form 4 shows that this form is in fact a 'Statement as to the Arrangements for Children'. In this form, the parties need to state, in respect of each child, arrangements relating to residence, education, financial provision and access. For access, the statement must include any arrangements which have been agreed for access by either of the parties and the extent to which access is and has been afforded.

Based on an experience shared by one of the Family Court judges in Malaysia (personal communication, 30 August 2018), even though the arrangement relating to child access has been stated in the statement, or perhaps has been agreed by the parties, there are situations where the agreement has not been complied with. This could be due to many reasons, for instance, the mother refuses to allow the father to visit his child on the ground that the father failed to pay maintenance. However, when the court makes an inquiry to the father, he explains that he has been terminated from a job and therefore could not afford to pay maintenance. Yet, he wants to see his child. In such a situation, the family court extended the service by conducting supervised access. Supervised access is normally applied by a parent who is deprived of his/her right to visit the child. In this situation, the parent asks help from the court to facilitate child access and to enable them to see the child in the court. The meeting is normally held in the children's room. Nevertheless, in wider practice, the place and method of implementing the supervised access is not confined only in the court building with the presence of a judge or court's personnel, it may take place in a police station or any agreed places with the purpose of facilitating reunification between parents and children. Furthermore, there were also situations where the child does not want to see the parent because of the time factor that caused distance between the child and his parent. In this situation, the judge will call the child and explain that his father or mother would like to see him and gives some sort of persuasion to the child to meet his parent. This is because the family court takes into consideration seriously about child-parent relationships and the need to re-establish bond between them if it

seems like they have started to feel the distance. Practically, to accommodate supervised access, which is normally done in children's room, the family court will allocate an officer to for supervisory purpose. There were children's toys and small games to assist parents and children spend their time together.

Shared Parenting

Che Soh (2011) mentioned that since a child's best interest was a prevailing standard in child custody, several attempts have been made to interpret it. The author wrote that the concept of shared parenting seemed to be accepted in many western countries, assuming that the child's interest would be best served when both parents shared a strong positive parenting role in the child's upbringing, after their separation or divorce. Occasionally, the term shared parenting has been interchangeably used with the word joint. Folberg (1991) mentioned that joint custody may also be referred to as shared parenting, joint parenting, co-custody, concurrent custody, shared custody, co-parenting, or joint managing conservators. However, the most important idea is to have both parents share the responsibility of continuously rearing a child by having some portion of time spent with the child, either equally distributed or at any agreed portion. However, the law in Malaysia, be it civil or *Syariah*, is silent on the application of the concept. In other words, there is no attempt to legislate it. The courts may, on their discretion, incorporate the idea of having shared parenting or joint custody into an order, as long as it is in the best interests of a child and practical to be executed (Che Soh, 2011). This can be illustrated by a few civil and *Syariah* court cases.

In *Sivajothi A/P K Suppiah v Kunathasan A/L Chelliah* [2000] 6 MLJ 48 joint custody was refused by a court on the grounds that there would be innumerable and unending problems, which were not suitable for a child's interest. Similarly, in *Nordaliya Shamsudin v Ahmad Nasri Shaharudin* [2010] 1 CLJ (Sya) 266, the court refused to grant joint custody to a counterclaim made by the defendant, as the court found that was inappropriate to do so, as the child was not very attached to the defendant. Contrarily, in *Manimagalai a/p Gowindasamy v Indran a/l Sadasivam* [2011] MLJU 954 the court granted joint custody to both parents as the child's interest would be best served by both.

However, in the case of any parent living abroad or if the relationship of both parents is in such a condition that it is irreparable, in the sense that they would not be able to make joint decisions for the child's welfare, it would be hard for a court to grant a shared parenting order.

Issues In Implementing Absolute Court Orders And Supervised Access

Undeniably, adhering to the rules of pandemic quarantine which need every person to be in one household with restricted outdoor movement have caused difficulty to both parents particularly in implementing the court absolute custody and access orders. In other words, when there is no condition attached to the orders pertaining to situations which can be described as emergency, parents are expected to follow that existing orders. Understandably, the pandemic does not change any order or agreement in place, and it is not a reason to deny parenting time. The problem may arise as to how to exercise the parenting time in such a situation where a child or children with different time of access must be physically returned to another parent for custody or access. A parent, having the child physically be with him or her may easily deny the right of another and unilaterally cut off the right for reason of undue risk of pandemic. This can be seen in two reported cases in Canada, namely *Ribeiro v Wright* 2020 ONSC 1829 (CanLII) and *Ivens v Ivens* 2020 ONSC 2194. In *Ribeiro's* case, the mother applied to the court to suspend all in-person access of the father over their child for fear that the father will not

observe social distancing for the child during periods of access. The court in the case urged both parents to renew their effort to address health and safety issues for the child in a more conciliatory and productive manner as none of them have ever experienced before anything like what is happening during Covid-19 Pandemic. While, in *Ivens's* case, the urgency of the moment has been used by the applicant mother to terminate the father's parenting time over their child, thus acting in contrary to the court orders on custody and access. In the instance case, the court highlighted that fear of coronavirus, while understandable in the context of protecting the children, cannot be the sole determinant of parenting arrangements. The court also emphasised that both parents shall obey all public health directions regarding social distancing, hand washing and other aspects of protecting themselves and the children from the coronavirus.

Furthermore, in a paper authored by Oehme, O'Rourke & Bradley (2020), the authors shared the experience of the state of Florida in conducting virtual visits between children and non-custodial parents to cope with the limitations during pandemic. This effort was initiated in order to maintain crucial relationships between parents and children in a safe manner. However, new guidelines and protocols are needed to regulate virtual visits and to be more prepared in facing any kind of disruptions in family services. According to the Chief Registrar of Kedah Syariah Judiciary Department remarked that during MCO all legal proceedings in the Syariah Court are postponed and cannot be implemented including those cases in Syariah High Court and Syariah Subordinate Court. The matters involving custody and access of children are amongst affected cases. This can be inferred from the response by the Chief Registrar, saying that...

“Operasi Pentadbiran Kehakiman telah ditangguhkan sepenuhnya semasa PKP dan hanya dibuka semula setelah PKPB diumumkan”.... “Apabila kes terkesan dengan penangguhan yang panjang semasa PKP, semua tindakan perundangan terhenti dan penguatkuasaan menjadi tidak boleh dilaksanakan. Apabila menyebut kesan kepada hadhanah dan akses, pihak-pihak yang terlibat perlu bersedia dengan kemungkinan yang telah dinyatakan di atas”.

(Zainol Abidin, email communication, October 6, 2020).

Understandably, the parties may apply to the court to vary any existing order if the circumstances require so including the urgency of Covid-19 Pandemic. Nevertheless, during the imposition of the Movement Control Order (MCO), where the operation of the court is rather limited or suspended, the Chief Syarie Judge of Malaysia, Datuk Dr Mohd Na'im Mokhtar mentioned that the parties still need to follow the court order pertaining to custody and access. Needless to say, divorced parents who are taking turn to take care of child need to discuss between themselves in order to reach a parenting arrangement amicably, which is most suit to their case without ignoring the welfare of child and the Movement Control Order (MCO) imposed by the government (<https://www.bharian.com.my/wanita/keluarga/2020/04/677094/pkp-pasangan-bercerai-perlu-tolak-ansur-jaga-anak>).

Recommendation and Conclusion

Based on the above discussion, there are three recommendations that can be made. Firstly, for the parents, they should have a more balanced perspective towards custody order when it comes to such a situation of pandemic outbreak. Parents need to balance between welfare of child and safety risk where they need to prioritise these aspects over their own interest and preference. Even though it is tempting to meet and touch the child after separated for a long time, but a non-custodial parent should consider avoiding touching during visitation especially if the risk is there. Secondly, it is viewed that the role of a third party such as a counsellor, negotiator or mediator is important in helping both parents during this crucial time. Parents need to be guided and advised accordingly to face this crucial period where anyone has never experienced it before. Parents and child may have feelings such as anxiety, fear of loss, sadness, suspicion towards one another and other bad feelings, which need proper redress from a neutral third party so that such bad feelings can be avoided. Online service for counselling, negotiation or mediation can be offered for 24 hours per week so that parents will not feel alone amid the pandemic. Thus, a more balanced and wise decision can be made for the sake of their child. Thirdly, for the courts and judiciary, strategic planning or arrangements need to be made to assist the parties. It is now high time to call for support at the court level and legal practitioners to assist parties dealing with custody and access matters during pandemic time. This can be done by introducing the online consultations or virtual meetings with courts or legal practitioners to get further direction, order, or advice so that the parties are not left on their own without any proper redress to the issue. Besides, the standard operating procedure must be complied with if physical attendance of the parties and their child in the courts is necessary. In essence, any parties who are dissatisfied with the existing court order on custody and access over child may apply to the court for the variation order. The order must be strictly complied with. Nevertheless, the strict implementation of the court order on custody and access can be relaxed in situations which can be described as emergency, threat or harmful to any parties particularly to child. This requires tolerance and understanding from both custodial and non-custodial parents for the sake of their child. In the current situation of pandemic Covid-19 where physical access is rather impossible or limited, technology and innovation may help to facilitate the access. By that, it is hoped that the parents-child relationship can still be maintained, and child welfare protection can be ensured.

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