

## **PROTECTION OF CHILDREN IN MALAYSIA THROUGH FOSTER CARE LEGISLATION AND POLICY**

**Azizah Mohd**

International Islamic University Malaysia  
Associate Professor, Dr.  
azizahmohd@iium.edu.my

**Nadhilah A. Kadir**

International Islamic University Malaysia  
nadhilah1108@yahoo.com

### **Abstract**

Children are immature, naive and unable to care for themselves. Due to this very nature of children, they are in need of among others, care, attention and supervision from adults. Care, attention and supervision are among the means of care and protection of children, which can only be acquired in a family environment. One of the ways to achieve family environment is through Foster Care where a child who is in need of care and protection will be placed with a family permanently or temporarily or until they are able to care for themselves. Foster care will at least provide for a family life experience especially for children without family or who have problems in their family life. This paper is to examine the Concept of Foster care in Malaysia and the law relating to it as to provide protection to children in need of care and protection. Examination will focus on relevant legislations and policy relating to Foster Care. Discussion will extend to analysis on whether the available laws and policies are adequate to sustain children protection in Malaysia through Foster Care.

**Keywords:** Child Protection, Foster Care, Malaysian Legislation

**JEL Classification:** K 19.

### **1.0 INTRODUCTION**

Foster care generally means “the formal and informal custodial care of children outside their own biological family home when their parents are unable, unwilling, or prohibited from caring for them”.(Mcmillan, n.d.; 363).

In all foster care cases, the child's biological or adoptive parents, or other legal guardians, temporarily give up legal custody of the child.( Franz, Janie; Woodward, A, 2006). Under Malaysian law, there is no definition of foster care, however, the Child Act 2001 (CA 2001) defines 'foster parent' as a person who is taking care of the child, but is not a parent or relative of the child. (Child Act 2001; s.2). On the other hand, based on the practice of the Social Welfare Department (the SWD) in Malaysia, foster care has been defined as placement of a child in the care, custody and control of foster parents under section 30(1)(e) of the CA 2001.(Kassim, N.; 2011)

## **2.0 FOSTER CARE LEGISLATIONS AND POLICIES IN MALAYSIA**

### **2.1. Legislation that Governs Both Muslim and Non Muslims**

Malaysia is a party to the CRC since 17<sup>th</sup> February 1995 (United Nations ; 1995) and ratified among others the provision of foster care where it provides that a child who is temporarily or permanently deprived of family environment is entitled to special protection and assistance provided by the State. Children who are unable to live with or who have to be separated from the parents due to certain reasons such as death of the parents, abandonment, neglect or abuse have the rights to protection and assistance from the government. Alternatively, the government has the obligation to provide alternative care for these children, for instance through foster placement, *kafālah*, adoption or if necessary institutional care (Convention on the Rights of Child, article 20(1 & 2).

In compliance with its obligation under the CRC, Malaysia has enacted the Child Act 2001 (the CA 2001) (Act 611) to ensure that the children will be provided with necessary care and protection, especially to those children deprived of family environment for example, the CA 2001 provides that when a child has no parent or guardian or has been abandoned, he can be ordered to be placed in the care, custody and control of a suitable foster parent appointed by the Director General for a period of two years or until he attains the age of eighteen years, whichever is the shorter, pending foster placement the child will be placed in a place of safety (Child Act 2001; s. 30(1)(e)). Generally, the children who have been admitted into the place of safety or Children's Homes are orphans as well as children who have been abused, neglected or abandoned by their parent or guardian. All Children's Homes have been gazetted as a place of safety under the CA 2001. Besides that, the admission of children into the Children's Homes is for a specified period as determined by the court until their biological families are ready to accept them or until the Social Welfare Officers manage to find suitable foster families for them (Government of Malaysia, 2007; n. 23; 94). If there is no possibility of

reunification with the biological parents or the parents cannot be traced, the children are placed in the Children's Homes or foster care until they reach eighteen years old (Child Act 2001; s. 30(1) (d)&(e)). If the order has been made by the Court For Children under section 30(1)(e) of the CA 2001 for foster care placement, the Director General shall immediately make an effort to place the child in the care, custody and control of a foster parent so as to give effect to the order(Child Act 2001; s. 30(2)). Accordingly, the SWD will find a suitable foster parent through their 'Foster Home' programme. The applications are made by interested individuals to foster a child through the SWD in the local area. Since the CA 2001 is silent on the procedures of foster care, it will be based on the practice of the SWD. If a suitable foster parent is successfully found, the child will be placed in their care, custody and control for at least two years. Within this period, the child will be brought up and maintained by the foster parent in a family environment (Jabatan Kebajikan Masyarakat, n.d.). In placing children in need of care and protection in foster care, the CA 2001 provides that the court should take best interests of the child as the paramount consideration (Child Act 2001; s. 30(5)). The best interests of the child shall include consideration as to the family background, general conduct, home surrounding, school record and medical history of the child (Child Act 2001; s. 30(6)(a)).

The SWD will also further monitor the well being of the child until the process of adoption under the Registration of Adoption Act 1952 (the RAA) and the Adoption Act 1952 (the AA) (Government of Malaysia, 2007; n.23(57), 96). The RAA is applicable to both Muslims and non-Muslims in Peninsular Malaysia.<sup>1</sup> The RAA provides for registration of *de facto* adoption of a child under the age of eighteen years, has never been married, is in the custody of, and has been brought up, maintained and educated for a period not less than two years continuously by any person or spouses (Registration of Adoptions Act 1952; s. (6(1)). Therefore, this Act is most applicable to registration of children in foster care especially those who are fostered permanently. The adoption will be registered by the Registrar after he has been satisfied with evidence either oral or documentary that such adoption took place (Registration of Adoptions Act 1952; s. (6(1) (a)).

Adoption under the RAA will not affect the foster child's biological parentage. It is a mere registration in acknowledging that the foster child has now been legally adopted and that the adoptive parents will have custody over the child. There will

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<sup>1</sup> For Sabah and Sarawak, the law that is applicable is Adoption Ordinance Sabah 1960, Adoption Ordinance Sarawak 1958.

be no transfer of parentage and the adopted child will not stand in equal footing with the adoptive family. (Mohd, A, 1998: 101). Regardless of the registration, the adopted child's bloodline with the natural parents is preserved. The adopted child cannot inherit property from his adoptive parent and vice versa. The registration of adoption will provide a family environment to the adopted child, secure the adopted child's welfare, exempting from income tax, assisting the process to include the adoptee in his or her adopter's passport or travel document, the adoptee's identification card and administration for educational purposes (Engku Ali, M.T., 1998; 88).

The Care Centre Acts 1993 (the CCA) governs the welfare institutions particularly when they are managed by individuals or NGOs. The CCA provides for the registration, control and inspection of care centres and for other related matters. It governs a residential care centre and a day care centre since both types have been included in the definition of "care centre" (Care Centres Act 1993, s.2). The amendments to the CCA will assist the registration of the NGO's institutions and strengthen the enforcement of the Act in ensuring quality care is provided to the target groups (Government of Malaysia, 2006: 318). Foster placement that takes place in welfare institutions are basically managed either by the SWD, NGOs or individuals so as to ensure that the children will not be left alone when they are in need of care and protection as well as rehabilitation. In general, staff in the institutions work on a twenty-four hour basis through rotating shifts. Some of these institutions may also provide family foster care services where the children will be placed with foster parents to be brought up in a family environment. The SWD maintains a register of the NGOs that provide services for children in need and provides them with a yearly grant to facilitate in programme sustenance (Government of Malaysia, 2007: 111).

The government of Malaysia through the SWD runs Children's Homes and Family System Children's Homes (RTH) for orphans, needy as well as abandoned, abused and neglected children (Government of Malaysia, 2007; 94-95). During the Ninth Plan, three new Children's Homes and seven RTH were established in providing care and protection for children in need (Government of Malaysia, 2006; 309). In addition, the SWD observes cases regarding fostering applications before the child are placed with suitable applicants (Government of Malaysia, 2007; 96). Besides that, the CCA is enacted to govern residential care centres, especially those provided by individuals or NGOs in providing alternative care for children in need of care and protection either with or without fee (Government of Malaysia, 2007; 96). The registration of these foster care

institutions enables the SWD to monitor their operation as well as to ensure the quality of child care provided for the residents.

Another foster care law is Child Care Centre Act 1984 (the CCCA). This statute governs the establishment of child care centres in Malaysia. It was reviewed in 2005 to ensure that the minimal standard of care is provided for children in the centres, to institute greater enforcement measures and to enhance quality child care (Government of Malaysia, 2006; 309). The CCCA provides for the registration, control and inspection of child care centres and for purposes related to it. The “child care centre” has been defined under the CCCA to refer to any places that receive four or more children under the age of four years from more than one family to be looked after by paying a fee (Child Care Centre Act 1984, s. 2). Foster care may be in a form of daytime or part-time when it is restricted to a few hours a day or for brief periods (Ai.Bi. A. D. B.). It seems that this kind of foster care is delivered by child care centre in providing temporary care for children, whose parents are unable to do so due to certain reasons like working.

The amendment of the CCCA in 2006 provides four categories of child care centre which are home based child care centre, work place based child care centre, community based child care centre and institution based child care centre (Child Care Centre Act 1984, s. 2). The CCCA provides that all child care centres in Malaysia are required to register with the SWD (Child Care Centre Act 1984, s. 4).

## **2.2. Legislation that Governs non Muslim**

The reception of English common law has been authorized by the enactment of Civil Law Act 1956 (Act 67). This statute allows the application of English common law in the absence of local law regarding the same matter and it shall be applied so far only as the circumstances of the States of Malaysia, and their respective inhabitants permit and subject to such qualification as local circumstances render necessary (Civil Law Act 1956, s. 5).

Adoption Act 1952 (the AA) is the statute governing adoption of non Muslims in Peninsular Malaysia. The AA is applicable when a child is to be adopted by an adoptive parent as well as by a foster parent. Nevertheless, it is more relevant to adoption than foster care. On the other hand, if the foster parent wishes to adopt his foster child, then the AA will become relevant. Foster care is known as one of the methods to adopt a child since it fulfils the requirement of an adoption, i.e. the child has to be in the care and possession of the prospective adoptive parent for a

period at least three consecutive months (Adoption Act 1952, s. 4(4a)) that is meant as a trial period or probationary period of the growth of mutual familiarity (*T.P.C v A.B.U & Anor* ([1983] 2 MLJ; 82). The effect of an adoption order under the AA is that an adopted child will be treated as a birth child. Accordingly, he will be entitled to every birth child's rights such as custody, maintenance and education as well as to inherit the adoptive parent's property (Adoption Act 1952, s. 9). The adoptive parents can also change the child's name following their family's name. In this circumstance, the bloodline of the adopted child with his natural parent seems to be totally cut off (*Re TSY (An Infant)* ([1988] 3 MLJ; 44). In the case of *Hitchcock v W.B and F.E.B* ([1952] 2 QB; 568-569), Lord Goddard C.J emphasized that an adoption order removes the child once and for all from his natural parents and gives him to the adopted parents as though they were, and always had been, his natural parents.

### **2.3. Legislation that Governs Muslims**

In Malaysia, the law that generally governs the Muslims is Islamic law (*the Shari'ah*) in its ordinary form based on the Qur'an and Sunnah of the Prophet Muhammad (pbuh) and juristic discourse especially the Hanafis, the Malikis, the Shafi'is and the Hanbalis. The regulation of this Islamic law was partly codified in several statutes based on each State in Malaysia, the pioneer of which is the Islamic law (Federal Territories) Act 1984.

List II of Ninth Schedule of the Federal Constitution provides for matters that will be governed by the State Legislatures Federal Constitution, art. 74(2)). The matters are Muslim personal and family law including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy and guardianships. Therefore, each State has separate legislation to govern the Islamic Family Law.<sup>2</sup> Besides, each State has its own *Sharīah* court. The court's limited jurisdiction is only applicable to Muslims and in relation to matters in the List II of Ninth Schedule of the Federal Constitution (Mohamed Ibrahim, A.; 6).

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<sup>2</sup> For example the Islamic Family Law (Kedah) Enactment 2005; Islamic Family Law (Kelantan) Enactment 2006; Islamic Family Law (Malacca) Enactment 2002; Islamic Family Law (Negeri Sembilan) Enactment 2003; Islamic Family Law (Federal Territories) Act 1984 (Act 303); Islamic Family Law (Selangor) Enactment 2003; Islamic Family Law (Perak) Enactment 2004; Islamic Family Law (Penang) Enactment 2004; Islamic Family Law (Terengganu) Enactment 1985; Islamic Family Law (Pahang) Enactment 2005; Islamic Family Law (Johor) Enactment 2003; Islamic Family Law (Perlis) Enactment 1992; Islamic Family Law (Sarawak) Ordinance 2001; The Islamic Family Law (Sabah) Enactment 1992.

There is no specific provision in IFLA regarding foster care. However, the IFLA provides that a man who has accepted a child who is not his child as a member of the family shall be imposed with a duty to maintain the child (Islamic Family Law (Federal Territories) Act 1984, s. 78(1)). In lieu to this provision, the Malaysian Initial Report on the CRC is of the view that it has adopted the concept of *kafālah* in providing care and protection for a child in need, whereby the child may be entrusted either by a decision of the *Sharīah* Judge or by the administrative act of the SWD (Government of Malaysia, 2007; 96-97). Islamic law allows an individual to take a child for the purpose of upbringing, education and to treat as his own child. In this case, he protects, feeds, teaches and loves the child as his own. The child is not attributed to him and he does not give the child any rights which the *Sharī'ah* reserves for a birth child (Biswas, Z. I.). Thus, if a child is placed in the care of foster parents, his biological parentage is preserved and he is not considered as a birth child. Nevertheless, he is still able to benefit from foster parent's property through gift or bequest. Accordingly, the *Sharī'ah* judge may entrust the child to public or social institution or to a Muslim family (Islamic Family Law (Federal Territories) Act 1984. s. 86) in providing care for the child's person such as maintenance, shelter, education and if necessary for his property as well as in receiving delegation of guardianship over him (Government of Malaysia, 2007; 97).

### **3.0. NATIONAL CHILD PROTECTION POLICY AND CHILD PROTECTION POLICY 2009**

To provide protection to children in Malaysia to the fullest, government of Malaysia has approved two policies in 2009 i.e., the National Child Policy and National Child Protection Policy (the NCPP) (Abdul Jalil, S, 2009). National Child Policy (the NCP) is a policy on rights of the children to survival, protection, development and participation in order for them to enjoy opportunities for holistic development in a conducive environment. Meanwhile, National Children Protection Policy is to ensure that every child is protected from neglect, abuse, violence, and exploitation. It promotes child protection in line with the CRC and the CA 2001 (Dasar Kanak-kanak Negara, n.d.).

Under the NCPP, awareness will be increased in every level of the society about the importance of child protection, including developing smart partnership with the media and NGOs as well as the private sector and social organization. Thus in its Action Plan, a community awareness programme will concentrate in rising the

public's consciousness about child protection (Pelan Tindakan Perlindungan Kanak-kanak Negara, n.d.).

The NCPP also requires that all the institutions run by the SWD and NGOs that receive grants from the government create their own child protection policy by following its template. Among others, the template underlines the staff's behaviour protocol, employee recruitment and screening as well as procedures on managing abuse claims (Kerangka (Tempelate) Bagi Dasar Perlindungan Kanak – Kanak). Basically, the Children's Homes operated by the SWD have their own child protection policy. Shelter Homes for Children run by an NGO also has its own child protection policy that meets ISO standards. In ensuring that the policy is being implemented, it has been monitored by the board of directors (Jo An, D; 2010).

The NCPP further requires that every child care provider, or those who are working directly with the children by providing them care and protection, be screened and trained in order to avoid hiring someone with a criminal background and further preventing the staff in foster homes or institutions from abusing, exploiting and raping the children (Wajib Saring Kakitangan Pusat Jagaan Kanak – Kanak, 2009). Thus in its Action Plan, child protection module or courses will be focused so as to ensure that the staff is properly and adequately trained before they can look after the children (Pelan Tindakan Perlindungan Kanak-kanak Negara, n.d.).

### **3.1. Foster Care And Child Protection Policy**

As has been mentioned, under the NCPP, the MWFCDC will take action to oblige institutions, either under the SWD or the NGOs that receives grant from the government, to provide child protection policy. By requiring this policy to be drafted in every foster care institution, it will help to provide the children with a safe and protective environment, especially from incidents of abuse, neglect, violence and exploitation. Basically, most of the children who are placed in foster care institutions have experiences of being abused and neglected by their parents. Thus, the staff in the institutions are expected to give them care, protection and love so that they can feel secure. The staff are not suppose to be the ones who cause them to suffer more by abusing, neglecting, violating or exploiting them. In drafting the child protection policy in foster care institutions, the template provided by NCPP can be referred to as a statement of vision and mission, statement of commitment, behavioural protocol, recruitment and screening, procedures in allegations, communication about and to children and training, evaluation and monitoring (Kerangka Template bagi Perlindungan Kanak-kanak,

n.d.). The caregivers or staff have to know and read the policy as well as co operate with each other in implementing it effectively (Dasar Perlindungan Kanak-kanak bagi Rumah Kebajikan Masyarakat, 2003). Training will also be implemented in ensuring that all the staff has better understanding about the child protection policy so as to implement it effectively. The implementation of the policy will also be evaluated and monitored by the authority. (Dasar Perlindungan Kanak-kanak bagi Rumah Kebajikan Masyarakat, 2003).

#### **4.0. CONCLUSION**

In Malaysia, the provision of foster care placement is expressly provided for under the CA 2001. Nevertheless, there are no other provisions in any statute which provide for the procedure or regulations pertaining to foster care system in Malaysia. The limited provision under the CA 2001 only provides for the placement of a child in need of care and protection in foster care and it does not mention in detail regarding the approval process of foster parents or procedures of fostering. As for other statutes, they provide provisions on foster care institutions, such as Children's Homes or foster homes by the NGOs. There are some rules and policy to be followed by the institutions in providing care and protection for children who are in need of care and protection so as to ensure that their safety and well being are safeguarded. Accordingly, since the legislation is silent on procedure of fostering, it is based on the practice of the SWD itself. Hence, the SWD plays an important role in the foster care system in Malaysia.

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