

DISCLAIMER: This document was produced in 2005 and is a summary of the laws of Malaysia that appertain to international parental child abduction, contact and relocation as they were at that time. **reunite** International Child Abduction Centre cannot vouch for the accuracy of this information for use in litigation and it is not intended to provide case specific advice.

## **MALAYSIA**

### **Overview**

Malaysia is a constitutional monarchy and the legal system was founded on the principles of English common law. Islamic principles are also a significant source of legislation, particularly with regard to family law. Article 3 of the 1957 Constitution states that Islam is the religion of the State and each of the 13 states of Malaysia that make up the Federation have enacted their own Islamic Law Act. The sources of law include the Federal Constitution and the Constitutions of the 13 States of Malaysia, legislation enacted by Parliament and the State Assemblies and delegated or subsidiary legislation made by persons or bodies by the powers conferred on them by Acts of Parliament or State Assemblies. Local customs may also be accepted as an informal source of law.

Malaysia has a majority Muslim population with significant communities of Christians, Buddhists, Hindus and followers of indigenous religions. The main school of Islamic jurisprudence is the Shafi School.

### **Foreign Orders**

Foreign orders can only be taken into consideration when awarding custody if the case is being heard by a civil court. This does not apply to Sharia Courts. Malaysia adheres to the principles of private international law in cases involving foreign non-Muslims. Therefore, if a foreign non-Muslim child who is abducted to Malaysia is subject to a foreign custody order and the parent files a custody case the principle of habitual residence of the child will guide the decision of the civil court.

In accordance with the Reciprocal Enforcement of Judgements Act 1958 only orders from courts parallel to or higher than the Malaysian High Court are enforceable.

## **Court Structure**

Malaysia has a dual civil and sharia court system. The civil court system is divided into the subordinate and superior courts and their jurisdiction is governed by the Courts of Judicature Act 1964 and the Subordinate Courts Act 1948. The subordinate courts include the Magistrate Court and the Sessions Court. The superior courts are the High Courts, the Appeal Court and the Federal Court. There are two High Courts, one is the High Court of Malaya and the other is the High Court of Sabah and Sarawak. These courts have original and appellate jurisdiction. The highest court is the Federal Court, which also has original jurisdiction in constitutional matters.

Under the Federal Constitution in a case where all parties are Muslims Sharia law takes precedence. Sharia Courts were established by the Administration of Islamic Law Enactment 1989.

## **Filiation**

A child is legitimate if born at least six lunar months after the commencement of a marriage or less than four lunar year after the dissolution of a marriage. A child born outside this period can still be acknowledged by the father subject to certain conditions, including that the mother and father could have been lawfully married at the time of conception, that paternity has not been established with anyone else and that the man intends to acknowledge the child as a legitimate child. The acknowledgement is irrevocable.

The mother has sole guardianship and custody of her illegitimate children.

## **Custody**

Custody of Muslim children is governed by the Islamic Family Law (Federal Territories) Act of 1984, Sections 81-87 and each of the individual State Enactments. Since each State has an individual enactment it is difficult to speak in specific terms about the application of child custody law in Malaysia, although the enactments are broadly similar. As a general rule the mother has priority when awarding custody of young children until they reach the age of discernment. In Malaysian law this is considered to be seven for a male and nine for a female. This can be raised to nine for a male

and eleven for a female upon application to the court by the custodian, for example as in Article 90 of the Sabah Islamic Family Law Enactment No.15 of 1992. Children who have reached the age of discernment are then able to choose who they wish to be their custodian, although the court can disregard this if it is judged in the best interests of the child to do so. A custodian must be an adult, of good character according to Islamic morality, a Muslim, of sound mind and must not live where the child could be harmed.

The mother will lose custody if she remarries to a non-relative of the child, if she is openly immoral, neglects the child, moves to prevent the father's access or if she becomes an apostate from Islam. If the mother is absent or unable to exercise custody, then the right to exercise custody is awarded according to the following order; maternal grandmother, father, paternal grandmother, full sister, uterine sister, sanguine sister, full sister's daughter, uterine sister's daughter, sanguine sister's daughter, maternal aunts, paternal aunts and the male heirs. A man cannot have custody of a female child unless he is within the prohibited degree of relationship to her.

### **Guardianship**

The father is the primary guardian of his children. If the father is absent guardianship is accorded to the father's father, then the father's executor, the father's executor's executor, the father's father's executor then the father's father's executor's executor. A guardian must be Muslim, adult, sane and trustworthy. The mother can be appointed as the father's executor and thereby obtain the right to exercise the power of a testamentary guardianship over her children. The court is able to appoint the mother as guardian, in which case she may also deal with a minor's property.

The age of majority is eighteen.

### **Access**

The non-custodial parent has the right to have contact with the child, unless this is not in the best interest of the child. Arrangements can be included in the custody order, however, compliance with orders cannot be enforced.

## **Non-Muslim Family Law**

According to the Guardianship of Infants Act 1961, if the mother and father are married they are the equal guardians of their children. If one of the spouses is deceased the surviving spouse becomes the sole guardian. An illegitimate child is one born outside of marriage. In these circumstances the mother is the sole legal guardian. An illegitimate child will become legitimate if the parents are subsequently married.

Article 88 of the Law Reform (Marriage and Divorce) Act 1976 reads that either parent may be awarded custody of their children under 18, in accordance with the best interests of the children, the wishes of the parents and the wishes of the child if he or she is of an age to express an independent opinion. Therefore, in civil court cases non-Muslim mothers can be awarded custody, particularly of very young children, if this is proved to be in the best interests of the child.

A custody order may contain conditions, as the court sees fit, regarding issues such as the place of residence of the child, access arrangements, a prohibition on the removal of the child outside Malaysia and education. In the absence of any agreement or court order, legitimate children are deemed to be in the custody of the mother.

## **Nationality**

If both parents are Malaysian the child will automatically acquire Malaysian nationality. If the father is Malaysian and the mother is of a foreign nationality the child will acquire Malaysian nationality at birth and, if applicable, upon registration of the birth at the Malaysian high commission of the foreign country. If the mother is Malaysian but not the father the child will only acquire Malaysian nationality if born in Malaysia.

## **Leaving the Jurisdiction**

On the application of the mother or father the court can issue an injunction preventing the other parent from travelling out of Malaysia with the child. A clause prohibiting the custodian from removing the child from Malaysia can be included in a custody order. Women and children do not normally need permission from the husband or father to travel abroad while the family unit

is intact, however if there are proceedings in the courts they may be restricted from travelling by a court order.

### **International Law**

Malaysia signed the UN Convention on the Rights of the Child in 1995 with reservations to Articles 1-2, 7, 13-15, 22, 28, 37, 40(3-4) and 44-45.

### **Child Abduction**

Parental child abduction is not a specific crime under Malaysian law, however an injunction can be obtained to restrain the other parent from removing the child from Malaysia. If the parent does not comply with this order they can be held in contempt of court.

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10/08/05