separating/divorcing families often provides counsel with most of the information they need to conduct a thorough interview with a child/adolescent. Having a list of questions to follow or behavioural signs to look for can provide counsel with the necessary skills to take instructions from children and advocate for them.

Children today are much more informed than they were ten years ago. Ensuring children are fairly represented in court and their opinions and objections are adequately voiced can make a significant difference in the decision-making process for the judge. Further, when a child knows his or her opinions are being heard, the damage resulting from litigation can often be minimised. While researchers study the best methods to include children in litigation and what processes to undergo when determining what method to choose in each case, counsel for children should consult with child psychologists to ensure they can avoid problems inherent in representing children.

Notes

1 Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can TS 1983, No 35.
2 *BJG v DLG* [2010] YJ No 119 at paras 2 and 3.
3 Law Society of Alberta; Practice Advisors: Ethics. Available at www.lawsociety.ab.ca/lawyers/practice_advisors/practice_ethics/practice_advice_representing_children.aspx.
4 Government of Alberta: Legal Representation for Child and Youth. October 2012. Policy Manual. Available at http://advocate.gov.ab.ca/home/documents/2012_October_Policy_Manual_Final.pdf, at 15. LRCY or 'Legal Say' is a service that is provided to young people through the Office of the Child and Youth Advocate (an independent officer to the Alberta Legislature under the new Child and Youth Advocate Act of Alberta). The services LRCY provides are available at http://advocate.gov.ab.ca/home/Background.cfm.
5 Rachel Birnbaum and Nicholas Bala, 'The Child's Perspective on Legal Representation: Young Adults Report on their Experiences with Child Lawyers' (2009) 25 Rev Can D Fam 11–71 at para 37.
6 Nicholas Bala, Victoria Talwar and Joanna Harris, 'The Voice of Children in Canadian Family Law Cases' (2005) 24(3) Can Fam LQ 221, cited in Birnbaum and Bala, at para 14.
7 See above, n 6.
8 Merle H Weiner, 'Intolerable situations and counsel for children: Following Switzerland's Example in Hague Abduction Cases' (2009) 58 American University Law Review 335 at 380.
9 *Ibid* at 383.
10 *RM v JS* [2012] AJ No 1148.

Custodial tussles and the unilateral religious conversion of children in Malaysia

Goh Siu Lin
Shook Lin & Bok, Kuala Lumpur
siulin@shooklin.com.my

Malaysian marriages are subject to a dual legal system. Non-Muslims are governed by the Law Reform (Marriage & Divorce) Act 1976 whereas Sharia law governs Muslim marriages.

The existence of these two parallel systems enables a spouse who had contracted a civil marriage to convert to the Islamic faith using this as a platform for 'jurisdiction shopping'.

What is frequently done is the Muslim spouse unilaterally converts the children of the marriage under a shroud of secrecy without the knowledge of his non-Muslim spouse. The Muslim spouse then refers custody issues (via a *hadanah* or custody application) to the Sharia court as a means of wresting custody of the children, in addition to evading financial responsibilities imposed upon him under the civil law. Unsurprisingly, this violates the rights of the non-Muslim parent, the child(ren) and is clearly unconstitutional.

The Malaysian Federal Constitution provides:

> Article 12(3): 'No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than *his* own'; and
>
> Article 12(4): 'For the purposes of Clause (3), the religion of a person under the age of eighteen years shall be decided by *his parent* or guardian.' (Emphasis added.)

These two articles are read with Article 160

(Interpretation provision) and the Eleventh Schedule, which states, inter alia, that 'words importing the masculine gender include females'; and 'words in the singular include the plural, and words in the plural include the singular'.

Further, section 5 of the Guardianship of Infants Act 1961 gives both parents equal parental rights and authority in relation to the custody or upbringing of the infant children.

It is trite that the Sharia court has no jurisdiction to determine issues relating to non-Muslims who, in turn, cannot be compelled to submit to the jurisdiction of the Sharia court. State Islamic law enactments, such as section 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993, stipulate that a Sharia High Court's civil jurisdiction relates to 'actions and proceedings in which all the parties are Muslims'.

However, in recent years, non-Muslim spouses have faced an uphill battle to have an equal voice particularly in the area of custody and guardianship of children, including the determination of their religion and upbringing.

This is reflected in a string of unfortunate court decisions, which have seen judges interpreting Article 12(4) literally to mean only one parent may convert a child. This encourages the exploitation of the judicial system by the Muslim parent.

One such decision is that of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2004] 3 CLJ 516 High Court. The brief facts of that case are as follows:

Shamala is a Hindu mother whose husband converted to Islam in 2002. They had been married for four years and they had two infant children. Unbeknown to her, he had converted their children to Islam. She filed for a custody order from the civil High Court. The husband had appeared in the High Court and sought an adjournment, failing to disclose that he had applied to the Sharia court for a *hadanah* (custody) order.

In May 2003, Shamala's husband obtained an ex parte *hadanah* (custody) order from the Sharia court, when custody proceedings were already under way in the civil court.

In July 2004, the civil High Court granted day-to-day custody of the children to their mother, on condition that she raise her children as Muslims and not expose them to her own Hindu faith.

The judge dismissed Shamala's application for a declaration that the conversion of her two children to Islam had violated her equal right, as their parent, to determine their religious upbringing.

As the children were now Muslims, the High Court held that a Sharia court was the only forum to determine the validity of their conversion. However, the Sharia court lacked the jurisdiction to hear Shamala, a non-Muslim. This left her with no legal redress and she has since left the country with the children.

The Court of Appeal pursuant to Article 128(1) of the Federal Constitution, referred by the consent of all parties, five constitutional questions for deliberation by the Federal Court:

- the validity of the conversion;
- the conflict between Sharia and civil laws governing conversion and family matters;
- whether the Administration of Islamic Law (Federal Territories) Act 1993 runs contrary to the Federal Constitution when a parent converts a minor;
- whether the High Court or the Sharia Court has the authority to make conflicting orders; and
- where would the non-Muslim parent seek remedy when the Muslim spouse had converted their child from a civil marriage.

However, on 12 November 2010, the Federal Court (as reported in *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2011] 1 CLJ 568), struck out the reference on the basis that Shamala was in contempt of court by remaining out of the country and had failed to give her husband access to the children pursuant to prior court orders.[1]

Recent landmark decision

The latest in the series of conversion cases culminated in a landmark decision delivered by the Malaysian High Court at Ipoh on 25 July 2013 in the case of *Indira Gandhi v Mohd Ridzuan Abdullah.*

In 2009, Indira's estranged husband had unilaterally converted their three children (then aged 12 years, 13 years and 18 months) to the Islamic faith, but the said application was made in the children's absence. In 2010, the Court granted custody of the children to Indira. Thereafter, the matter proceeded to full trial on the children's conversion to Islam. Recently, the court nullified the religious conversion of their three children in 2009. The judge had declared the conversion 'unlawful and unconstitutional' as it was done

without the mother's consent, breaching the following Articles 3, 5 and 11 of the Federal Constitution:

- Article 3 states while Islam is the religion of the Federation of Malaysia, other religions may be practised in peace and harmony in any part of the Federation;
- Article 5 states no person shall be deprived of his life or personal liberty, save in accordance with the law; and
- Article 11 states that every person has the right to profess and practise his or her religion.

The Court also applied the *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832 on Malaysia's ratification of the UN Convention on the Rights of the Child, and the UN Convention on the Elimination of All Forms of Discrimination Against Women, imposed on Malaysia a legal obligation to give effect to the rights set out in those Conventions.

This is a welcome and historic decision which lauds well for multi-ethnic and multi-religious Malaysia. The judge's pronouncing judgment said:

> 'This decision is not a victory for anyone but a page in the continuing struggle of all citizens to find that dynamic equilibrium in a country of such diverse ethnicities; pursuing peace in less than a homogeneous society, giving space to one another where religious sensitivities are concerned, tolerance and respect to our neighbours in pursuit of the Truth and Reality. Let God be God and let him work sovereignly in the lives of our children; let our children be our children and the adults they will soon become in the fullness of time. Let them take responsibility for their actions in seeking and finding him though as the poets say, he is not far from each one of us. Whilst we may be confident of the journey we have taken, for faith is the assurance of things hoped for and the conviction of things not seen, yet we must appreciate that others may take a different path. That aside love, peace and harmony should reign supreme in our hearts and in our homes knowing that our differences need not divide us and that in seeking the divine, we must also seek to understand our neighbours better, confident of the fact that there is no compulsion in religion and that whatever faith we belong to, we shall always have the highest regard for another and desire their greatest good.'

Following from this, the Malaysian Bar Council has called upon the various state governments to repeal unconstitutional provisions for unilateral conversion in their respective state enactments. The relevant enactments should clearly state that the Sharia court has no jurisdiction to hear any matters relating to a civil marriage. In Shamala's case, there were conflicting orders issued by the Sharia and civil courts to the respective spouses.

There is also an urgent need for the Law Reform (Marriage and Divorce) Act 1976 to clearly provide for all issues relating to the marriage to be determined under the civil law based on the religion of the parties at the time of solemnisation of the marriage.

Clearly now, with the Indira Gandhi case, if the parents cannot jointly agree on the child's religion, the status quo before the parent's conversion should be maintained. As Malaysia has also ratified Article 8 of the UN Convention on the Rights of the Child, this protects the child's right to preserve his or her identity, until such time that he/she reaches an age to decide.

Note

1 See also, *Subashini Rajasingam v Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 Federal Court.