

Title	Custodial Right and the Welfare Principle in Myanmar
All Authors	Dr Khin Khin Oo
Publication Type	Local publication
Publisher (Journal name, issue no., page no etc.)	Universities Research Journal 2010, Vol.3, No.7
Abstract	Child custody is the legal term used to describe the legal and physical relationship between a parent and child; it comes into question in proceedings involving dissolution of marriage, annulment and other legal proceedings where the residence and care of children are concerned. In most jurisdictions child custody is determined by the best interests of the child standard.
Keywords	child custody, welfare of the child, paramount consideration, natural guardian, right to be heard.
Citation	
Issue Date	2010

## **Custodial Right and the Welfare Principle in Myanmar**

**Khin Khin Oo**\*

### **Abstract**

Child custody is the legal term used to describe the legal and physical relationship between a parent and child; it comes into question in proceedings involving dissolution of marriage, annulment and other legal proceedings where the residence and care of children are concerned. In most jurisdictions child custody is determined by the best interests of the child standard.

Key words: child custody, welfare of the child, paramount consideration, natural guardian, right to be heard.

### **Introduction**

Divorce under Myanmar customary law raises problems of partition not of the properties alone but of the children as well for there is no compulsory court intervention. Under the customary law, the rights of children of a divorced couple seem to depend upon the arrangements made by their parents at the time of divorce as to which branch of the two families they shall belong to. Yet if there were any questions regarding the custodial right, or the parties cannot reach an amicable end by themselves, one has to refer to the Guardians and Wards Act and not to the Myanmar customary law or any other personal law to which the parties are subject. The court will not support the father's or mother's rights against the interests or welfare of the child, and the wishes of the minor, who is old enough to form an intelligent preference, are paramount. Although it is possible for persons other than the parents to be given custody or to be appointed guardian of the children or their property or both, the present study is concerned with custody orders relating to the children of the marriage terminated by a divorce where the choice made by the court is, almost always, between the two parents or one parent and other nearness of kin to the child.

---

\* Lecturer, Dr, Department of Law, Taungoo University.

### **Custodial right under Myanmar customary law**

Family tie is severed by divorce. There are several grounds for divorce in Myanmar customary law, most of which are universal; e.g. cruelty, desertion, adultery. One special feature of Myanmar family in this matter, however, is that mutual consent can bring the marriage to an end. In such a case, they can end the marriage without resort to the Courts or the administrative authorities. When serious matrimonial faults or offences are put forward as grounds for divorce, the parties either accept a settlement, under arbitration of elders and friends, for partition of property and children, and part or they may go to the Courts for a decree. Only in such case, there will be court's intervention.

According to the Dhammathats, where there has been a divorce by mutual consent, the husband is entitled to the custody of the sons and the wife to that of the daughter. Myanmar customary law thus treats the father as the natural guardian of his sons and the mother as the natural guardian of the daughters. But if a son is so young that he cannot be separated from her, he should be left in the custody of the mother until they are sufficiently grown up. Myanmar children are usually bound by the arrangements made by their parents at the time of divorce regarding the custody of children. The Myanmar parents usually use their parental rights and discretion to arrange this matter in any way they please in most cases, but their paramount consideration is always for the welfare of the child.

Where a divorce is adjudged for the fault of one party, the Dhammathats do not say in clear terms who should have the custody of the children. But it says that the guilty spouse is to leave the house with only a suit of clothes and the innocent spouse should have all the animate and inanimate properties of the couple. Hence it may be inferred from this provision that the innocent party is entitled to the custody of all the children. It seems only reasonable that the other parent that in is in the eye of law morally unfit to take charge of his or her own offspring, should forfeit the right to claim the custody of them and although he or she cannot cease to be their natural parent in fact,

the latter has lost the right to the guardianship of the children by his or her gross misconduct. But it is not a strict rule as every faultless parent cannot always have the custody of the child against the interests of the child.

If there were any questions regarding the custodial right or the parties cannot reach an amicable end by themselves, one has to refer to the Guardians and Wards Act and not to the Myanmar customary law or any other personal law to which the parties are subject as questions of minority and guardianship are not mentioned in section 13 of the Myanmar Laws Act among the subjects to which personal law is applicable. In such cases, the court will not support the father's or mother's rights against the interests or welfare of the child, and the wishes of the minor, who is old enough to form an intelligent preference, are paramount.

### **The Guardians and Wards Act**

Guardianship of the person, or the property, of minor children is governed by the Guardians and Wards Act. The Act uses the term 'minor' instead of using the word 'child'. For the purpose of custody of children, section 4 (1) & (2) of The Guardians and Wards Act defines that a "minor" is a person who, under the provisions of the Majority Act, is to be deemed not to have attained his majority, and "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. The Majority Act section (3) provides the age of majority of persons who domiciled in the Union of Myanmar. According to this section, a person shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before, and, a person for whom a guardianship is appointed by the court, shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before.

Therefore it can safely be said that a minor for the purposes of this Act would mean a person under the age of twenty one years.

## **The welfare of the child**

The Guardians and Wards Act is the place one can find the word of the welfare of the child which has same meaning of the principle of best interests of the child elaborated in Article 3 of the Convention on the Rights of the Child to which Myanmar is a State party.

It is laid down in section 7 of the Guardians and Wards Act that the guiding consideration should be the welfare of the minor. Section 7 (1) provides that “Where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be a guardian, the court may make an order accordingly”.

In fact, though the welfare of the minor, which should be the court's paramount consideration in granting the custodial order of a minor, is made the watchword in almost every section in the Act, the law does not give any insight definition of the welfare of the child. As a matter of fact, the welfare of the child should be viewed not only from a short-term but also from a long-term perspective with most possible predictability although no one can foresee the future. Hence, to achieve this, the law operating with an open term requires specific interpretation for the individual instance. In this way it may be adapted to each child and each situation.

The welfare of the child generally means its health, education, cultivation of good characters and proper living and which are also the criterions for division with whom the child should be allowed to live. (Daw Chaung Kan Yoke vs. Minor child Ngut Kway)

The word "welfare" must also be taken in its widest sense, including moral, mental, religious, physical, and well-being and cannot be therefore measured by money or by physical comfort only. Thus the question of the welfare of the child must be regarded as question of facts. (Mg Po Thu Daw vs. Ma Than Kyi)

Each case is to be considered according to its fact under the law and previous judicial decisions are to be taken only as guidance. Dr Maung Maung observed on this point in *Ma Tin Nyunt vs. Ko Aung Thein*, case that "In this kind of application, the rulings of the Higher Court should be used as guidance. But the most important criterion in this sort of application is the welfare of the child".

Section 17 again explicitly raises the standard of welfare of the child' to the "first and paramount consideration". According to the section 17 (1) of the Act, the personal law to which the minor is subject should be the guide in the appointment of a guardian. But even this personal law is subject to two limitations. It is subject to the provisions of this section and the welfare of the minor. If consideration of the welfare of the minor or the conclusions arrived at as a consequence of the guidance in the section itself make it impossible to follow the guidance of the personal law then the personal law may be abandoned and steps most conducive to the welfare of the minor and consistent with the provisions of this section have to be taken. If the personal law of the minor is not inconsistent with either the provisions of this section or the welfare of the minor then it should be followed. Thus it is the personal law that should guide subject only to the welfare of the minor.

The court took into consideration the welfare of the child based upon the idea of personal law on this issue in *Tan Shwe Kyu vs. Chan Chain Lyan* case. In this case, a Chinese Buddhist mother Chan Chain Lyan, after the death of husband, made a gift of some property to her minor children and then remarried, and an application was made by a major eldest sister Tan Swee Kyu for the guardianship of the persons and property of her younger sister and younger brother who are minors being only 14 and 13 years of age respectively. Taking into consideration that introduction of a stepfather in Buddhist family is a disintegrating element and his influence may be detrimental to the interest of the children and that under the circumstances of the present case, it was to the welfare of the minors that their eldest sister with whom the minors were living happily should continue to be in charge of the minors, the court appointed the eldest sister both the guardian of person and

property of the minors to take the place of the mother, whose interest are adverse to those of the minors, in accordance with the well-known Myanmar saying in Myanmar characters "The eldest sister is in the position of or should be regarded as the mother". The court also held that she must allow her mother and her brothers and sisters to come and see the minors from time to time.

However, the recognized rights of guardianship under the law to which the minor is subject must, when and where necessary, be assigned a relatively subordinate position, or as has sometimes been said, propinquity must yield to fitness. The fundamental point to be considered is what is for the welfare of the particular minor. It can be studied in *Sweyada Rahman (a) Maung Tha Tun vs. Ma Noor Nahur and two others* case. The mother was appointed as a guardian despite the fact of her subsequent marriage. Under the Mohammedan Law, although the mother may have lost her right to guardianship by the reason of her subsequent marriage, she cannot be in a worse position than a stranger, and there is no provision under the law which forbids her appointment as guardian, if the court cannot find a more suitable person. Hence the mother was appointed guardian despite the fact of her subsequent marriage by observing that she is certainly a better person than the father.

Also in *Mohammed Hanif Khan vs. Miron Nisa* case, it was held that it was undisputed fact that under the Mohammedan Law if the mother married another person, she lost the rights of the guardianship of the child. But under the provisions of the Guardians and Wards Act, the criterion for deciding who should be the guardian is not within the purview of personal law. But such must be decided in accordance with the Guardians and Wards Act according to which the best interests of the child is given precedence.

Section 17 (2) gives the lead to the Courts. "In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property."

The decision of *Daw Chau Kam Yoke vs. Minor child Ngut Kwe* mentioned that “in considering the appointment of a guardian in such a case, the sex and age of the minor child, the character and status of the guardian and how the relation was between the guardian and the ward should be taken into consideration”.

*Tan Shwe Kyu vs. Chan Chain Lyan* case also pointed out that "in making orders appointing guardian for the persons of minors, the most paramount consideration for the Judge ought to be what order, under the circumstances of the case, would be best for securing the welfare and happiness of the minor, with whom will they be happy and who is the most likely to contribute to their well being and look after their health and comfort”.

In an unreported case of *Daw Mi & 2 others vs. Ma Tin Thein*, it was decided that "the child was only 2 years of age and it is difficult to know the wishes of the child. In such a case, the welfare of the child must be given precedence and this practice was followed throughout. Blood relation is generally taken into consideration, but education, health and social welfare of the child must be given priority. According to some customary laws, the mother of the children who married after being a widow lost the right of guardianship. But in considering suitable guardian for the children the question of guardianship is not decided according to the customary law itself. Priority is given to consideration of the best interests of the child in deciding guardianship. Hence if the child is placed under the guardianship of paternal aunt than the maternal grandmother, and it will serve the best interests of the child, the child should be placed under the guardianship of paternal aunt”.

### **Natural guardian**

In all laws the father is the natural guardian. Section 19 of the Act treated the father as the natural guardian, unless he is unfit to be such person, not requiring appointment. He needs no certificate for acting as such. Without such a certificate he can act as effectively as the certificated guardian. This point is contemplated by section 19 that if the minor has a father, who is living

and is not unfit to be the guardian of the person of the minor, the court has no authority to appoint any person, not even the father himself, as guardian of the person of the minor. In this place, the idea of Myanmar customary law which treats the father as the natural guardian of his sons and the mother as the natural guardian of the daughters must not be confused with the idea of a "natural guardian" as contemplated by the Guardians and Wards Act.

In the case of minor child Ngut Kway, the court observed as that "Naturally, the father was the custody of the child. Under the provision of section 19 of Guardians and Wards Act, if the natural father of the minor child is alive, and if he is considered not suitable to act as a guardian, other person cannot be appointed guardian of the minor child. Since the father is the natural guardian of minor son or daughter, the court has no jurisdiction to appoint other person as a guardian. If he wants custody of his child he can have it, without being appointed a guardian, by filing an application under section 25 of the Act."

Also in the case of U Tin Myint vs. Daw Khin Myint and one, the applicant U Tin Myint was father of the minor Ma Ei Ei Phyo Myint and also a Deputy Planning Officer of Shwebo Township Planning Office. When the mother was dead, the duty of looking after the child fell upon the father. The father was the natural guardian of the child. The decision of the lower court, in holding the view that the eldest brother of the natural mother and the grandmother had more love and affection than the paternal father is obviously against the natural law and justice. For these reason the applicant U Tin Myint was appointed guardian of the young daughter.

The father of an illegitimate child, however, cannot be said to have a legal claim to the custody of such minor which would not be in the welfare of the minor. So a putative father has no right to the guardianship of his illegitimate offspring. (U Maung Maung vs. Ma Aye Bu)

On the one side, according to the interpretation of the section 19 which relates to the appointment of the natural guardian, the court has no jurisdiction to appoint a guardian to the person of a minor if the husband or father is not

unfit. On the other side, in this aspect, section 17, gives a much wider discretion to the court and whenever the court is of the opinion that is for the welfare of the minor, that a certain person should be appointed guardian, the court can exercise its jurisdiction and appoint such a person as the guardian. Hence section 17 has to be read entirely different from section 19 and it cannot be interpreted in the sense that unless the guardian under the personal law is unfit to be appointed a guardian of the minor the court is bound to appoint him. Consequently the observation that section 19 is controlled by section 17 of the Act. Hence, while applying the welfare principle, the court should take into account all the circumstances of the each case and come to a decision on the issues concerning the child, always bearing in mind that the welfare of the child should be given first and paramount priority.

The court clearly takes into consideration this point of view in deciding *Ma Nyein Me vs. Maung Kyaw* case. Where the minors were girls aged 8 and 6 years respectively, and the father, resisting a claim for their maintenance, asked for the custody of the daughter, the court held that, since the children were females of tender years, even if the Magistrate had the discretion of determining the guardian, it would be improper to take them away from the mother.

Also in the case of minor child *Ngut Kway*, the court observed as that "Naturally, the father was the custody of the child but here in this case, the father took no interest in *Ngut Kway* and he even had 14 children by his two wives. So, there was reason to consider that he should not be appointed custody for the child. If a custodian was appointed for the child, he or she must be taking the best interest of the child at heart, considering a character, strength and relationship for the one who would like for custodianships and in consideration of the child's wishes if the child is of sensible age".

*Mohammad Hanif Khan* and *Miron Nisa* were married in 1958 under Mohammedan tradition. They gave birth to *Muna* in 1959. When the child was about one year old, the wife sued for child expenses. The husband in 1963 gave 3 talak and kyats 20 monthly as expenses. In 1967, he failed to pay this child

expense and so the wife sued him again to get it. The husband asked the Court to give custody of the child to him. It was considered because he did not want to pay the child expenses. It is true Mohammedan Custom says that normally the husband is the natural custodian when the woman marries again but in this case, it was considered that that was taken as evidence in his appeal case. The child did not even recognize the father when he was shown to her. It made it clear that the father left her without making any contact whatsoever. So, the judge turns the husband's application down.

In an unreported case of Maung Tin Win vs. Ma Soe Soe Oo, the father had taken away the building, land and other property and gave the child to the mother and 4 years after, he applied for the guardianship of the child on the ground that the wife had remarried who was not proper. But the father could not furnish proof that because of the mother's second marriage, the child's health, education and happiness were impaired. So it was hoped that the best interests of the child would be more served if the child lived with his mother.

In U Aye Maung vs. Daw Aye Aye Shwe, when the applicant had many other wives and children and was practicing some supernatural feats as a bigot accompanied by ill-treatment of the respondent with an inclination to rape young girls, he could not be considered to be fit man to have the custody of the children. His character as disclosed in the affidavits does not warrant that the welfare of the children would be best served if he was given the custody of the children. The paramount consideration in the matter of custody of a minor of tender years was the interests of the child, rather than the rights of the parents.

Moreover, it is only a natural conclusion that, by reason of very tender, young age, the infant would be most dependent on his mother for his physical and psychological needs. The age of the child is an important factor to be taken into account when making the award of care and control. The younger the child, the more likely he is to need the mother's daily care. Mothers who are still breastfeeding their very young infants are clearly the best candidates for caring for the child on a daily basis. If a young infant is dependent on the

mother for his physical needs, the award of care and control to the mother fulfils his needs.

The decision of *Maung Aung Khin vs. Ma Saw Hla* says that "No doubt the father is prima facie guardian of his children according to Myanmar customary law, but I have been unable to discover any rule which would make it compulsory on a court to remove children of tender years from the custody of the mother, and hand them over to the father. Accordingly in dealing with an application of the custody of the child, the welfare of the child is of paramount importance and outweighs any other considerations.

In *Ma Tin Nyunt vs. Ko Aung Thein* case, the applicant Ma Tin Nyunt applied to the court to have chance to care for the 10 months old child. As her husband suspected the wife of not caring well for the child because of difficulties in delivery, the child was left with her husband Ko Aung Thein when they were separated. Dr. Maung Maung observed that "in this application, the child is of tender age and the mother is more suitable for looking after the child than the father. Naturally, if the mother is not a woman of bad character or she is deficient in necessary qualifications for looking after the child, it is better to place the child with the mother. This is also the natural law observed by all other countries".

But the award of custody need not be given solely to the mother. The following two cases well illustrate that a father may sometimes be the better person than the mother to have custody of even a young child.

In the case of *Mrs. Protima Gosh vs. Minor*, a civil miscellaneous litigation case of a wife against her husband for guardianship of their children at the Supreme Court, it was held that although the husband had done grievous hurt to the wife, there was no evidence of such grievous hurt of the father on the children. A man who did not like his wife did not necessarily mean he did not like the children. It was difficult to conclude that one who was cruel and rash against his wife was not fit to be the guardian of the children. In this case, the wife could not deny that the husband had cared for the children from tender years up to this day. It was also undeniable that the wife had no power to act as

guardian of the children. The children are now studying in India and the husband had relatives there. So on the whole the wife was not fit to be the guardian. They should be left under the guardianship of the husband. In that case, the respondent Mr. Gosh agrees before the Court that he will not prohibit the applicant Mrs. Gosh from seeing and talking to the children at whatever place and time.

In a case decision in *Daw Ni Ni Lay vs. Mr. Luc de Waegh*, the learned justice of the Supreme Court carefully took all into consideration for the best interests of the child and decided in favor of father of the minor even though he is a citizen of Belgium.

Mr. Luc de Waegh 1999 filed a suit against Daw Ni Ni Lay requesting the court to return the minor girl child under Section 25 of the Guardians and Wards Act.

Daw Ni Ni Lay and Mr. Luc de Waegh were married under the Myanmar Buddhist Women's Special Marriage and Succession Act of 1954 in the presence of the Bahan Township Judicial Officer on 30.12.96. Their daughter Ma Inngyin May (a) Leila Akexander was born on 11-6-97. Ni Ni Lay was a vocalist who, for various reasons, went out at any time and she committed adultery with a man known as Sonny Disp from February 1999. Moreover, she committed adultery with a person known as Aung Myo at the house on the University Avenue on 12-7-99 while Mr. Luc was abroad. Daw Ni Ni Lay went to places where a Myanmar married woman should not go and also took the minor away from the father. Mr. Luc filed suits at the Bahan Township Court against Aung Myo and Sonny Disp under Section 497 of the Penal Code.

Ni Ni Lay went to hotels and restaurants with men almost every evening and came back home at about 3 or 4 am. During the custody of Daw Ni Ni Lay, although Ma Inngyin May was reading at the French Language School in Yangon, her mother did not send her to school. She did not look after her well. She did not even keep her properly fed. She had no regular income to raise Ma Inngyin May. These compelled Mr. Luc to apply under Section 25 of

the Act, for placing her back under his custody and he was the only person who could take good care and if she were under his custody he would be able to take good care of her health, education and social needs and aspirations.

The original court of Yangon Division Court (Western District) considered that placing Inngyin May under the custody of Mr. Luc would be of greater benefit to the health, education, morale and formation of moral character of Inngyin May than placing her in the custody of Daw Ni Ni Lay and the court decided to award guardianship and custody of Inngyin May (a) Leila Alexander to Mr. Luc de Waegh. Daw Ni Ni Lay refused to accept the order and tendered this civil general appeal to the Supreme Court.

According to the consideration of the Supreme Court, the father is the natural guardian of his minor sons and daughters. It cannot be said that a father is not a natural guardian of the child as he is a European Christian. If so, this will be against the principle of natural justice since the status of a father cannot be changed on the grounds of his religious faith or nationality. For these reasons, Mr. Luc is natural guardian of minor Ma Inngyin May and he is also a fit person to be a guardian. In these circumstances Mr. Luc did not need to apply for guardianship under Section 7 of the Act and he has the right to apply, under Section 25 of the Act, to replace his daughter Ma Inngyin May, who was taken away from him, under his custody. Hence the issue to be settled is whether the court should hand over minor Ma Inngyin May (a) Leila Alexander to Mr. Luc de Waegh and place her in his custody under Section 25 of the Act. In this regard the court must take into consideration the best interests of the child such as her health, education, social and moral development for her future well being as well. The testimonies made and evidence produced in the original court indicated that Daw Ni Ni Lay committed adultery and she did not care for the education of the child and did not even get her attend the school her father had got her enrolled and that she had no regular income. These are the same reasons upon which the original court considered and made Ni Ni Lay to return the minor to the custody of her father under Section 25 of the Act. There was nothing wrong in the observation of the original court that Mr. Luc de Waegh had a good regular income and

was one who could give his daughter a decent life and bring her up well. Accordingly the Supreme Court dismissed the appeal with costs.

### **Child's right to be heard in custody proceedings**

Section 17 (3) of the Guardians and Wards Act provides that in selecting a guardian if the minor is old enough to form an intelligent preference, the court may consider that preference.

Article 12 (1) of Convention on the Rights of the Child requires States to assure that any child capable of forming a view has the right to express views freely in all matters affecting him or her; that the child's views are given due weight in accordance with age and maturity. Paragraph 2 specifically provides the child with the right to be heard in any judicial and administrative proceedings affecting him or her.

Section 13 of the Child Law 1993

- a. Every child who is capable of expressing his or her own views in accordance with his age and maturity has the right to express his own views in matters concerning children.
- b. The views of the child shall be given due weight in accordance with his age and maturity, by those concerned.
- c. The child shall be given the opportunity of making a complaint, being heard and defended in the relevant Government department, organization or court either personally or through a representative in accordance with law, in respect of his rights.

If the child is a minor, but he has the capacity for rational thinking, the wish of the child must be taken into consideration. But the most paramount consideration for the judge is to consider what order would be best for securing the welfare and happiness of the minors. With whom will the minor be happy? Who is most likely to contribute to their well-being and look after his health and comfort? Here again the question of welfare of the minor is of such paramount consideration.

In *Tan Shwe Kyu vs. Chan Chain Lyan* case, minor children ran away from their mother's house two months after their mother's remarriage and stayed at their eldest sister's (Petitioner) house. In this connection, the court asked the minors themselves and they said that they ran away from their mother's house on their own accord, that it is not true that the petitioner or anybody else called them away from that house to the petitioner's house. They have also added that they went away from their mother's house as they could not live with her there any longer. In answer to the question "Why did you go there at all?" the minor daughter has stated "Because my mother remarried; she would care for her husband only; she would not give us treatment when ill; she would not apply medicine to our sores; she would not look after our teeth when we got teeth trouble and she would leave us alone without caring us". The minor son has also stated "We were ill treated in the house since the arrival of the stepfather and our mother was not very fond of us, so we ran away". Under these circumstances, it was held that the minors ran away from their mother's house on their own accord as they did not want to live there any longer. Accordingly, the court grants the guardianship authority to the minor's eldest sister, in preference to mother who has remarried. The court also suggested in that case that "It is highly desirable in the particular circumstances of this case to examine the minors of a reasonable age and other witnesses with a view to ascertain whether it would be for the welfare of the minors to return to the custody of their father".

Also in the case of *Sweyada Rahman (a) Maung Tha Tun vs. Ma Noor Nahur* and two others, the court interviewed the child and it was also in evidence that she has, since her birth, lived together with her mother and also as a protegee of her maternal grandfather who was no other than a person responsible for the education of the appellant himself. The lower court has also gone to the extent of examining the minor with a view to find out her wishes. In her examination it was made out that her attitude towards her father was that of the stranger. It must naturally be so for there is nothing on the record to indicate the existence of close ties between the minor daughter and her father since his divorce with her mother. The court after a careful scrutiny of the

evidence adduced by the parties came to the finding that the father was not a suitable person to be appointed the guardian.

Yet, although the child makes the preference to the person who is closely related to the child, if it is not the best interests of the child in the opinion of the Court, such person should not be appointed as a guardian.

Daw Chau Kam Yoke vs. Minor child Ngut Kwe 1967 BLR 214 case clearly pointed it out. Ngut Kwe was daughter of Ah Lwee (a) U Maung Maung Gyi and Mi Shu. She was born after her parents were divorced. After her birth Mi Shu sued his husband for the child's expenses. U Maung Maung Gyi settled the case out of Court paying her kyats 3000 as a lump sum. The mother later went to Hong Kong. Her father had since their separation married two women and had 14 daughters by them. The child lived alternatively with her maternal grandmother Daw Chaun Kan Yoke and an acquaintance named Lai Lam Mu who looked after her. In this case, Ngut Kwe expressed her wish to have Lai Lam Mu as custodian because she could come and go as she pleased in day time whereas she would have to stay indoors at top floor if she had to stay with Daw Chau Kam Yoke. Her wish was considered as not sensible but prompted by those close to her. If she was placed under her grandmother as custodian, she would get a good education and she would also be disciplined in her going here and there, and there was no reason to doubt that she would get more love and kindness than she stayed with one who was not related at all. So, the Learned Judge appointed Daw Chau Kam Yoke as custodian of Ngut Kwe under section 17 of the Guardians and Wards Act.

Hence the child preference should be taken into consideration, if the child can find intelligent division. But when the child expresses his wish for living together with a person, his preference should not be allowed if his preference is against its own interests.

## Conclusion

When divorce terminates a marriage, the children of marriage lose a fundamental cornerstone to their world of happiness. Children's entitlements from their parents and responsibilities of parents towards their children do not terminate when a marriage is dissolved. Children are entitled to have provision made for them on the dissolution of marriage. The term provision is deliberately broad in order to encompass a wide range of methods and forms of protection available including financial maintenance and access and custody.

As regards the child custody in Myanmar, in the case of termination of the marriage, the parents may decide that the child shall live alternatively with both parents or with one parent. In the latter case, the other parent usually has a right to visit the child at certain times. There is no compulsory court intervention in every divorce case and parents may decide on these matters by a mutual agreement. When the court has to be resorted to, one has to refer to the Guardians and Wards Act, and not to the Myanmar customary law or any other personal law to which the parties are subject. Myanmar courts may decide single custody for one parent and the other parent will be granted reasonable access right during certain periods which will promote the best interests of the children.

The Guardian and Wards Act provides for paramount consideration of the welfare of the child in custodial proceedings and therefore links to the concept of the child's best interests of the child mentioned in Article 3 of the Convention on the Rights of the Child, which states that the best interests of the child shall be a primary consideration in all actions concerning children. In fact the best interests of the child is the legal standard used by most courts in determining issues of child custody, child support and access in regard to the child or children's parents or legal guardians.

The Guardian and Wards Act takes into great consideration a welfare principle for the well being of children in the whole context of the law without giving any definition. In fact the welfare of the child includes the general well being of the child and all aspects of his upbringing, religious, moral as well as

physical. His happiness, comfort and security also go to make up his well-being. It is not measured in monetary terms only. The rights and wishes of parents must also be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relative to that issue.

Under the Articles 9 (2) and 12 of the Convention, right to be heard in legal proceedings has given the children the possibility to participate in divorce proceedings of their parents. Myanmar Courts also take into consideration and give the child preference in custodial proceedings, if the child can find intelligent division. But when the child expresses his wish which would not be the best interests of the child, his preference should not be allowed.

Myanmar Supreme Court awarded custody of minor daughter to the European Christian father instead of Myanmar Buddhist mother. The court accepted that, amongst other things, immorality of the mother would reduce her ability to contribute to the child's welfare. This case well illustrates that Myanmar judges will not support the father's or mother's rights against the interests or welfare of the child, and only the best interests of the child are paramount consideration.

By observing the above mentioned provisions, leading cases and not leading but prominent cases, it can therefore be seen that, in deciding the custodial cases, Myanmar courts and presiding judges use the discretion conferred by the statute according to the particular circumstances of each case. In fact parental custody and guardianship is an important area which can impact on child life and rights. Custodial right of the child given by enacted law and customary law are quite comprehensive and they are also keeping with the best interests of the child.

### **Acknowledgements**

I would like to express my deepest gratitude to Dr. Aung Thu, Rector of Taungoo University. I am also grateful to Professor Dr. Khin Chit Chit, Head of Department, Department of Law, Taungoo University for her encouragement and advice on the topic.

## References

### Acts and Laws

- Guardian and Wards Act (1890).
- Majority Act (1875).
- Myanmar Customary Law.
- Myanmar Laws Act (1898).
- The Child Law and the Rules related to the Child Law (1993).
- United Nations Convention on the Rights of the Child (1989).

### Books

- Chan Toon. (1894). *The Principles of Burmese Buddhist Law*. Rangoon: Myles Standish & Co.
- E Maung. (1937). *Burmese Buddhist Law*. Rangoon.
- K. R. Ramaswamy Iyengar. (1953). *The Guardians and Wards Act and Indian Majority Act*, Allahabad, Law Book Co.
- M. T. Gywe. (1919). *A Conflict of Authority in Buddhist Law*, Mandalay.
- Maung Maung, Dr. (1963). *Law and Custom in Burma and the Burmese Family*. The Hague: Martinus Nijhoff.
- May Oung. (1914). *A Selection of Leading Cases on Buddhist Law*, Rangoon, British Burma Press.
- Mya Sein. (1993). *Myanmar Customary Law*, 8<sup>th</sup> edition, Yangon: Sittthetaw Publishing House.
- S.C.Lahiri. (1939). *Principles of Modern Burmese Buddhist Law*, 4<sup>th</sup> edition, Calcutta, Eastern Law House.
- Tin Aung Aye, Prof, Dr. (2004). *Interpretation of Statute Law and Treaty*, 1<sup>st</sup> edition, Yangon: Cho Tay Than Publishing House.
- U Gaung. (1902). *A Digest of the Burmese Buddhist Law concerning Inheritance and Marriage; A Collection of Texts from Thirty-Six Dhammathats*, Rangoon, Hanthawaddy Press.

## Cases

Daw Chaung Kan Yoke vs. Minor child Ngut Kway , 1967 BLR.214.

Daw Mi & 2 others vs. Ma Tin Thein, 1995 Civil Miscellaneous Appeal Case No 62 (15.3.96).

Daw Ni Ni Lay vs. Mr. Luc de Waegh, 2000 Civil General Appeal Case No.59 (SC).

Ma Tin Nyunt vs. Ko Aung Thein, 1962 BLR 289.

Maung Aung Khin vs. Ma Saw Hla, 1958 BLR.311 (HC).

Maung Tin Win vs. Ma Soe Soe Oo, 1995 Civil First Appeal Case No. 201.

Mg Kyaw Win vs. Ma Hla Kyi, 1965 BLR 173.

Mg Po Thu Daw vs. Ma Than Kyi ,1968 BLR 48.

Mohammad Hanif Khan vs. Miron Nisa, 1971 BLR 10.

Mrs. Protima Gosh vs. Minor 1966 BLR 389.

Sweyada Rahman (a) Maung Tha Tun vs. Ma Noor Nahur and two others, 1965 BLR 1035.

Tan Shwe Kyu vs. Chan Chain Lyan, 1947 BLR p.119.

U Aye Maung vs. Daw Aye Aye Shwe 1965 BLR 465.

U Maung Maung vs. Ma Aye Bu, 1952 BLR 406.

U Tin Myint vs. Daw Khin Myint and one, 1992 BLR 65.