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# A COMPARISON OF THE RIGHT TO VISIT CHILDREN AFTER DIVORCE

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## ABSTRACT

Children's development often mainly depends on their parent's behavior and relationship. As a result, when parents' divorce, the parenting role will be divided and changed in the legal and implementation aspects. One of the solutions provided by law to contribute to "narrowing" the gap after the divorce between parents and children is visitation rights. Albeit clear and specific legal provisions, when applied in practice, visitation rights are not easily exercised and even, in many cases, are obstructed by the custodial parent. Within the scope of the article, the author will analyze and clarify the contents of the visitation privilege of policy established by Vietnam and other regions across the globe. The research emphasizes on the visitation rights and divorce of mother and father from a human rights perspective, granting of custody, change of custody, and recommendations for improvement of the law on visitation rights. Thereby, new directions will be suggested to improve this issue.

**Keywords:** Marriage and family, human rights, child's rights, visitation rights, personality right.

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## Introduction

### Background

A good relationship between parents and their children is crucial to their development. Parents have both responsibilities and rights that they can exercise over their children. Michele Waldron writes, "Parents have legal rights and responsibilities towards their children. It is critical for parents to give their children with basic essentials such as clothes, food, housing, medical care, and education until they are old enough to fly on their own. Furthermore, they emphasize social and emotional nurturing so that their children can grow to be empathetic and responsible

members of society. It is the primary obligation of both the mother and father, whether they live separately or together, depending on the customary arrangement. In addition to visiting rights, each party must do specific tasks to support the children. As per this argument, for a parent to meet their responsibilities and exercise their parental rights, it is necessary to uphold the non-custodial parent's visitation rights.

It can be affirmed that the provisions on the rights of parents after divorce, in general, and the visitation rights, in particular, are, in fact, a concretization of the requirements and principles

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of human rights in international law and treaties in which Vietnam is a signatory. In terms of legal reasoning, first of all, visitation rights are first approached from a human rights perspective. Based on the office of the OHCHR, the privileges and privileges for human are universal legal guarantees to effectively protect groups and people against the omission or act which harm human dignity and fundamental freedoms ..In the above documents, almost as of the standpoint of individual privileges, provisions embrace the rights of parents and children, such as the 1989 (CRC)".

It is recognized as the initial legally obligatory global instrument which make sure that world effectively recognize that children also have certain level of human rights: It is found that states parties need to make that that each children must be separated by her or his parent's based on their will, according to legal procedures and regulations. The division is necessary for the child's well-being or their greatest benefit. These kind of purpose strength be necessary in specific cases such as neglect of a child or abuse by the patent and situation in which parent live separately. This condition will require law to make decision in best interest of the children. It is suggested that the decision should be made based on the child's place of residence or other parents location to manage personal relation so child can positively constant and meet with the parents on regular basis, expend it is being contrary to great advantage of a kid.

Moreover, the UNCRC Article 9(3)highlighted that different parties from states need to respect and ensure the accurate of the kid that is alienated from one mother or both. This would support in managing the direct contact and personal relations with both parties, except if it is contrast to the advantage of a youngster.consequently, the "CRC upholds the privilege for both parents to preserve contact with their children. This is in recognition of the decisive part parents participate in the development of their children. However, the article also recognizes that this right is not absolute. If it is determined that get in touch with either

parent might be damaging to the child's development, then the right is revoked.

In Vietnam, the term "human rights" was first mentioned in the 1945 Declaration of Independence by the President of Ho Chi Minh City. Currently, despite the lack of any clear legal basis to define the similarity between human rights and citizens' rights, assurance and domestic legislation is necessary to make certain the achievement and security of those privileges. Still, specific citizens' rights are prescribed in the foundation. It means the category of individual rights is defined and applied through citizenship. In particular, visitation rights are considered and classified into the group of civil-political rights prescribed as follows: Based on the "Socialist Republic of Vietnam, human rights and citizens' rights" related to the economic, civic, political, social and cultural aspects are determined, secured, measured and ensured according the law and constitution. In addition, citizen and human rights need to be limited when described by the law in towards the imperative situations for the national security, defense of nationality social order, well-being of the community and social morality.

With the analysis by the standpoint of individual rights in international law and Vietnam law, it can be affirmed that the constitutional rights of parents and children in general and the right to live with parents in any circumstances or the visitation rights, in particular, are the fundamental human rights of each child at birth without distinction of race or gender. It is obvious that, in exceptional cases, the separation is decided by the public authority for bringing concerned of a kid Convention is clear on the importance it attaches to a child knowing their parents. Both parents play critical and distinct roles in the upbringing of a child. In cognizance of this situation, it is important for parents to maintain contact with their children even after divorce.This right should only be taken away only if the presence of the "non-custodial "blood relation in the child's life is detrimental.

### 1.1 General principles for the development of a law on the visitation rights

It can be said that issues related to divorce and measures to alleviate its consequences have long become a common concern of the whole community because of legal and social matters. Therefore, the selection and application of key principles for the development of legal regulations on visitation rights are important, specifically including the following three principles:

Firstly, the principle of mother and child protection: From the nature of vulnerable groups, they also enjoy the rights prescribed in international and national law. However, due to their weak position, these groups are vulnerable to rights violations or difficulties enjoying rights. Therefore, this group needs more protection, especially in countries with oriental thoughts, such as Vietnam. Historically, women's legal rights and interests were hardly acknowledged after a property divorce or a visit to her children. As a result, eradicating the ideology of "male chauvinism" and inequality is also a matter of consideration. In addition to caring for women, children are also the object of protection. As children are the country's future generation, the construction of a comprehensive development environment is considered the government's primary concern, especially for children of divorce, who are at a disadvantage. As a result, the provisions of the legislation concerning the effects of divorce on children, which are being implemented by Vietnam law, have been promoting their role in defending the privileges of children, meeting the needs and wishes of society, and contributing to the construction of the "Socialist Law-based State".

—Secondly, the principle of equality between husband and wife: Based on the provision of

Article 16 of the 2013 Constitution: "Everyone is equal before the law, "by extension, after divorce, the husband (the father) or the wife (the mother) have equal opportunities in directly raising and caring for children. Accordingly, the husband and wife agree on the custodial parent, the rights and obligations of each person towards the child after divorce; if no agreement is reached, it is necessary to intervene from the Court. In addition, the husband and wife are equal in the visitation rights to their children after divorce. After divorce, if it is found that the custodial parent does not guarantee the interest and need of a child in all aspects, the other parent has the authority to ask for the Court to change custody to ensure advantage of a kid. The "non-custodial" parent has the permission to visit their children without prevention from anyone; they are similar in the right to request the alter of the custodial person after divorce.

Thirdly, the principle of respect for the rights of parents. According to the law, the parent and related rights are absolute personality rights and intimately linked to protecting the child's rights. Even after divorce, the family relationship's rights and obligations are respected rights respected. Typically, within the limits of the law, parents have basic rights to their children, such as the duty to look after for and nourish their youngsters; the opportunity to teach their kid; the option to shape their child; and the ability to hold ownership of their kid the authority to handle a child's possessions; the authority to dispose of property of their juvenile children/children without the capacity for civil acts, etc. Although these rights of parents are natural, in some cases, to protect children, parents have some rights restricted to juvenile children. Among the above rights, some contents are rights and obligations to be expressed reciprocally, showing the distinctive and specific

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<sup>1</sup>Read the rights and obligations of stepfather, stepmother and stepchildren living together in Article 79 of the 2014

Law on Marriage and Family

nature of conjugal and familial legally and social customs and ethical behaviour of the country.

## 2. LEGAL PROVISIONS ON THE VISITATION RIGHTS

### 2.1 How to exercise visitation rights and obligations after divorce

Issues related to father/mother/child relations are not entirely dependent on the marital status of the father/mother. After divorce, the parents still have to care for, nurture, and educate their children. This has contributed to ensuring that children always enjoy all their legitimate rights and interests without being obstructed by any objective factors. This is a new regulation from the Law on Marriage and Family 2000 meeting toil now to meet the development needs of society.

In the UK, when resolving a separation or divorce, the Court often encourages the parents to make their agreements on matters related to the common child's interests. If no agreement is reached, they have the authority to submit an application to the Judiciary issue a "child placement order." Under section 8 of the 1989 Children's Law, the Court's "placement order" will determine how the child will live when the parents separate or divorce based on the child's interests. A parent who does not live with their children has the right to meet them in person or contact them indirectly via phone, email, etc. Thus, according to this national law, parents can visit their children in various forms depending on the actual circumstances. Similar to the UK law, Article 38 of the China Marriage Law of 1980, amended and supplemented in 2001, also gives the parties the right to agree on the manner and time of visiting children. When the parents cannot approve, the Court will make a final decision. In France, Articles 1080, 1084,

and 1110 of the Civil Procedure Code promulgated in 1806, amended and supplemented up to 1998, stipulate that divorced couples shall do a detailed project. The Court only recognizes and adjudicates for divorce if the agreement contains the necessary conditions and guarantees regarding child care and allowances.

Currently, with legal documents of Marriage and Family in Vietnam, except for divorced couples without a common child, in relationships resolved after divorce, especially regarding parents and children, it is necessary to be considered and resolved with caution. However, it has not shown specificity and inclusiveness. Clause 3, Article 82 of the Law on Marriage and Family in 2014 only stipulates: "After divorce, the non-custodial parent has the right and obligation to visit and care for this child without being obstructed by any person. "Therefore, then on-custodial parent has the visitation right and obligation but does not specify how and when to exercise this right and perform this obligation. In trial practice, most courts also declare that "the non-custodial parent has the right and obligation to visit and care for this child without being obstructed. "Concerning this issue, the legal regulations and the Court's settlement directions are not specific and are flexibly applied based on each case.

### 2.2 Identification of the custodial parent after divorce

According to applicable regulations, after divorce, husband and wife shall agree on the custodial parent and his or her obligations and rights toward the child . In case of failure to reach an agreement, the two revelry have the right to ask for the judiciary to resolve the child's assignment to a spouse who directly takes care of and nurtures the child. The Court shall rely on the grounds prescribed by law. The settings specified in "Article 81 of the Law on Marriage and Family" include:

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Ho Chi Minh City University of Law (2018), Casebook (Judgment Commentary) of Law on Marriage and Family, Hong Duc Publishing House – Vietnam Lawyers Association, p. 445 <sup>3</sup>Clause 2 Article 81 of the Law on Marriage and Family in 2014.

<sup>4</sup>Ho Chi Minh City University of Law, Vietnam Marriage and Family Law Curriculum (republished with amendments and supplements), Hong Duc Publishing House – Vietnam Lawyers Association, 2021, pp. 462 – 464.

Firstly, assigning a child to a parent shall be based on the "child's interests". To determine the best guarantor of the interests of the child, the Court will consider the actual conditions of the husband and wife, the moral status, the circumstances of the work, the economic conditions, the time that can be spent on the children of the husband and wife, etc. Accordingly, the custodial parent shall prove before the Court that they will offer the the majority positive situation for the progress of their child and contain all the circumstances to ensure mutually economic and spiritual satisfaction for the normal development of the child; the custodial parent shall prove that they have the material needs such as income, property, stable residence, etc. as well as spiritual conditions (spending time with the child, taking care of and raising the child, always put the child first, etc.). Then the child has a more stable and developed life when living with him/her than with the non-custodial parent. Based on such consideration, the Court shall assign the custody right to the parent with the actual situation to better come across, raise, care for and train the child.

It can be seen – and rightly so- that the regulations set in Vietnam as set out above comply with article three, from the UNCRC. The best interest or preference of the child should be the main focus and priority of all actions pertaining to the child, whether regarded from private or public social welfare organizations, administrative agencies, courts of law, or other legislative bodies. This is obvious in the fact that the laws explicitly state that when allocating a custodial parent, the needs of the kid come first. Articles 3(ii) and (iii) of the "United Nations Convention on the Rights of the Child" further stipulates that, The parties from States mainly consider ensuring that care and protection of the children is important for their well-being, considering into account the duties and rights of their parents who are their legal

guardians are accountable for child care and therefore it need to consider all suitable legislative along with administrative actions.

The parties from the state should ensure that institutions, facilities, and services are primarily accountable for the security or care of children, which must be consistent with the principles proposed by various competent authorizes, particularly in areas of safety and health, number of suitability of staff, and competent supervision.

The regulations regarding assigning a custodial parent in Vietnam are also in line with (ii) and (iii) above. The interests of the child when assigning a custodial parent are looked into in terms of the financial constancy of parent. This will make sure that the child will be provided with basic needs. The moral status of the parent is also looked into, for they are expected to be a role model to the child. Also, the issues regarding the child's health, safety, and proper upbringing a looked into carefully in Vietnam.

Secondly, if a child is full 7 years or older, his/her desire shall be considered. When the Court settles the assignment of a child to the custodial parent, if the child reaches the age of 7 or older, the Court must consult the child on whether the child wishes to live with either parent. This is a provision of law that the Court must comply with when transferring a child to the custodial parent. However, the child's desire is not decisive because it obliges the Court to comply. Views of children aged 7 and over are only relevant when the Court transfers the child to the custodial parent. The issue of "considering the desire of children from the age of 7", i.e., the judge in charge of the divorce hearing is competent to collect opinions from children from the age of 7 and over on whether they want to live with their father or their mother in the process of deciding the custodial parent after the divorce. When collecting views of children, the provisions of Clause 2, Article 208 of the

<sup>5</sup>Nguyen Phan Nam, Custody of Children after Divorce and Legal Provisions, Electronic Journal of People's Courts,

Provisions, Electronic Journal of People's Courts, <https://tapchito.csquyen-nuoi-con-khi-ly-hon-va-cac-quy-dinh-cua-phap-luat>, [accessed on July 22, 2019].



Civil Procedure Code in 2015 shall be complied with, following the child's psychology, age, maturity, and cognitive ability to ensure the legal civil rights and wellbeing of the kid. In particular, during collecting opinions, the child's confidentiality shall be preserved. Answer No. 01/2017/GD-TANDTC dated April 7, 2017, of the Supreme People's Court at Point 26, Section IV also guides the regulation mentioned above as follows: "The method of collecting opinions shall be child-friendly. However, the court must base on the child's interests in all aspects of to decide the custodial person". The child's opinions are often only oriented, referenced, and partly, for the Court to consider to come to a decision, not fully decisive. The principles outlined above are also in line with Article 12 of the UNCRC it is highlighted that parties from state must ensure that child who is able to develop his or her opinion and perspective the freedom to express oneself freely in various topics impacting the kid and the viewpoint of a youngster which is being expressed provided because of the weight based on maturity and age of them. Matters regarding the breakup of a family through divorce are not just emotive to the parents, but they also affect children directly. Article twelve mentioned that for this objective, the child need to be offered with the significant opportunity to be earned in the administrative and judicial proceeding influencing them, directly or indirectly, with representative or suitable body in order to reliable by national law. As noted above, the regulations regarding granting of custody require courts to put this into consideration when adjudicating on the matter of the custodial parent.

Thirdly, the child who is less than or under 36 months need to handover to directly to mother unless mother is not eligible to provide care, educate and raise child property. This parents or children should have additional agreements following the child's interests. A

child under 36 months old needs to live in the care and nurturing of the mother. Motherhood helps the mother to take care of, nurture, and care for her children at a young age better than any other person. For that reason, the law has the regulations mentioned above. However, in exceptional cases, the mother cannot take care of, care for and raise the child as she is within the time limit for execution of the prison sentence; the mother is addicted to drugs, the mother has a depraved lifestyle, etc. In these cases, even though the child is under 36 months old, the Court still assigns the custody right to the father to make sure the concern of a kid in different aspects. The law thus stipulates the requirement to ensure the right to enjoy the full rights of a child. Although the custody assignment of the child under 3 years old to the mother is the default, if the father can prove that the mother is not qualified to raise the child directly, the Court may still assign custody of the child to the father.

Regulations on visitation rights have created conditions for children to enjoy the "love and care of their parents". The author now assesses that the issue is comprehensively regulated on aspects affecting children, including relatives, and should be considered to suggest new directions in Vietnam. In summary, it can be said that for the non-custodial parent, this right somewhat alleviates the psychological consequences of their divorce. This also contributes to limiting or minimizing the negative effects of divorce on their later development. The direction of the "UAMD Act" is generally delegate. It specifies and provides more new grounds for the Court to consider when assessing the best possible needs and expectations of the child as follows (1) the desires of the children, mother and father as to safekeeping (2) the demands or wishes of their child to guardianship (3) the interaction along with relationship of parent with child and other siblings and person who might directly influence the possible concern of a kid,

<sup>6</sup>Siam Legal, Child Custody Law in Thailand (n.d) available at [https://www.siam-legal.com/legal\\_services/Child-](https://www.siam-legal.com/legal_services/Child-)

Custody-in-Thailand.php (last visited November 25, 2022)

the alteration and resolution of a child to his home, community and school (5) The overall physical, social and mental health of all included.

The issue of child custody is a matter that comes up during divorce in Thailand. Child custody may be triggered by a decision by a couple who seek divorce or separation. Under Thai law, if a couple agrees to an uncontested divorce, they can come into a consensual arrangement regarding how they share custody. The said agreement may also stipulate child visitation rights and support.<sup>6</sup>

Moreover, there are instances where divorces are contested and have to be determined by a court of law. In such instances, the judge rules on child custody. Sometimes, the Court's awards custody to a third party (guardian) instead of the biological parents. For a Thai court to come to this decision, it usually considers the happiness and interest of the child. However, the same may be revoked during the divorce proceedings or later if the Court is convinced that the person granted custody is incompetent, has abused parental power, or has evidence of misconduct. To trigger this action, the parent without custody or the public prosecutor may file a petition to change custody on behalf of the child.<sup>7</sup>

Thai family Courts use the "Happiness and welfare of the kid as the first and dominant deliberation" while granting custody or parental power. Thailand's courts use 8 basic principles when determining custody.

i) Young Children need a mother- In the event of a contested divorce, and a minor is still nursing, the Court grants custody to the mother so that she may continue breastfeeding. Notably, for girls who are not nursing, custody is granted to the mother, while the custody of boys who are not nursing is granted to their fathers. It should be noted that a parent's wealth or thereof is not a consideration while granting custody

ii) Continuation of care for child custody or parental power- when granting custody, Thai courts endeavor not to destabilize a child by moving them from their current residence unless it's absolutely necessary. Only in dire situations like the imprisonment of a parent or drug addiction that may lead to a minor's mental instability or shame a child in the public eye may inform a court allow a change of residence.

iii) keeping children together- Children of broken families undergo psychological trauma. Thai courts understand that siblings would support each other in such situations. As a result, courts strive to keep siblings together while granting custody.

iv) Feelings and wishes of the child- There are situations whereby Thai courts seek to determine children's wishes regarding the parent they would like to live with. Thai courts sometimes seek children's indulgence if they are eight years and above. However, if the minor is 14 years and above, their wish regarding the parent they want to live with must be granted.

v) One's ability to guide the child to develop into an all-round and well-adjusted individual- Thai courts consider the party who is capable of guiding the minor into a well-rounded individual and grant custody to them.

vi) Ability to provide for a child's primary needs. -Thai family courts do not award custody blindly. A case in point is when a mother struggles to feed the children, cannot clothe them adequately, and does not provide suitable housing. On the other hand, the father has a stable job and provides adequately for the children. In this case, custody is awarded to the father.

vii) Existing environment- Thai courts also consider the period that a child has lived in a certain environment. If a child is happy within the current environment and school, the courts

<sup>8</sup> SIAM ATTORNEY, Child Custody or parental Power Under Thai Family law, (n.d), available at

<https://siam-attorney.com/child-custody/>

don't change the environment.

viii) The relationship between the minor and each party- Thai courts will grant custody to the party who proves to have a healthy relationship with the minor. If a party had an abusive relationship with the child will not be granted custody.<sup>8</sup>

As seen in the argument raised above, when granting custody to either parent, Thai courts place a lot of importance on the child's interests. As noted, the critical points of consideration while granting custody are: (i) Young children need a mother and should not be separated unless necessary. (ii) Environmental stability is essential, and therefore children are not moved from their current area of residence unless it cannot be avoided (iii) Siblings should be kept together because they support each other (iv) Regarding the choice of a custodial parent, the feelings and wishes of children aged eight and above are sought. In contrast, those of children aged fourteen and above must be adhered to (v) The ability of a parent to foster healthy moral and emotional development of a child, (vi) A custodial parent's capability to convene the child's essential desires (vii) The duration a child has stayed in the current environment and (viii) The relationship between the minor and each of the parents.

These considerations are in line with UNCRC Specifically, Article 3 (i) Stipulates that all decisions undertaken by regarding a child should have the child's welfare as the foremost consideration Article 3(ii) states that The child must be protected by considering relation the privileges and responsibility of a parent and 3(iii) Children must be placed in an environment that ensures their safety and physical condition.

Also, the regulation conforms the CRC which necessitate that kids who can form their views

should be allowed to express them. And Article 12 (ii) stipulates that in judicial and administrative dealings, a child should provide with chance to convey their position in substance affecting them.

In Malaysia, when there is breakdown of any marriage the child's parent or other relative along with welfare association or suitable personal could applicable for custody of a child for marriage. The marriage of a child need to comprise of one other party both illegitimate or legitimate or adopted which his approved as one by the family member from other party to the marriage. Regarding visitation rights in Malaysia, it is remarkable that whilst ruling on guardianship, the Court might present for visitation or access to a child for that parent who does not have legal custody. It is commonplace for courts to grant custody prayers for:

- I) "Alternate weekends.
- II) One-half of the school holidays.
- III) Alternate public holidays.
- IV) Birthdays and important festivals."

Also, in the Malaysian case, the regulations are in line with the UNCRC As seen in Malaysian when the decision about custody is being made, the welfare of the child is the most important aspect. This agrees with UNCRC" Article three" (1) that specify that in all judicial matters, the welfare of the child shall be the top most priority. Also, Malaysia has a regulation that while ruling on custody, the courts may grant non-custodial parent visitation rights. (see note 23). This regulation complies with the CRC ,which grasp that a kid who is separated from both or one parent has the right to maintain personal relations with his parents unless the continued contact would be detrimental to the child. Therefore, the regulations in Malaysia acknowledge the importance of the relationship of kid with mother and father in nine article of CRC.

<sup>8</sup>Ngo, F. T., & Dhaliwal, K., Family Law in Malaysia: Overview,, (October 18, 2019) available at

[https://uk.practicallaw.thomsonreuters.com/1-570-7827?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-570-7827?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited on November 27, 2022)



Moreover, the "LRMD Act 1976 Section 89- orders focus to situation states that, the order about any custody might be established to different conditions where the court could assume fit to execute and subject to various conditions in addition as it might be with time execute the need to comprise of the person offered with custody to mainly decide for the questions relating to the growing kid education. The position in which the child is to live, having privilege to access about parent deprived of custody, restrict individual provided with custody with considering the Child from Malaysia. In case of a change of the custodial person

When applied in practice, it is not easy to consider and select the custodial parent for children after divorce. Both husband and wife are typically qualified to physically and mentally care for their children. Or on the other hand, both parents of the child have to work far away and do not have time to care for and raise the child directly. If they are empowered as the custodial, they will "forward" the child to others. At the same time, collecting evidence is quite difficult due to mostly being within the family, so the authenticity verification process often takes a lot of time and effort. As a result, it is more difficult for a person with a claim to change the custodial person to produce evidence that is more "solid" than those previously provided by the custodial person. Legally, the custodial parent's rights are not absolute because the issues after the divorce are all considered on the basis of putting the defense of the privileges and interests of the child first. Therefore, in case it is necessary to change the custodial parent, the Court can consider and make a decision to directly alter the custodial one based on the subsequent legal grounds:

There is agreement by the parent about change of person directly raising the child based on the best interest

- The custodial parent no more has suitable situations to directly consider, take care and

<sup>10</sup>Ho Chi Minh City University of Law, Vietnam Marriage and Family Law Curriculum (republished with amendments and supplements), Publishing House. Hong Duc – Vietnam Lawyers Association, 2021, p. 466.

educate the child

- Based on the change of an individual raising child aged 7, this child wishes need to be considered

- While considering the both parents not delivering care or education to child, the court will ultimately decide to assign the guardianship of a child based on Civil Code.

In another case, the change of the custodial parent is decided when he/she does not guarantee the child's happiness in all feature. Accordingly, the failure to ensure the child's interests in all aspects, in this case, is understood as the custodial parent cannot meet the child's care, nurturing, care and education. Specifically, the current custodial parent suffers from serious illness, is unemployed, cannot generate income, executes prison sentences with incarceration, disappears, loses civil act capacity, etc. To change the custodial parent, both spouses or one spouse shall apply to the Court for settlement. The Court shall issue a decision to change the custodial person based on one of the grounds mentioned above, but it is difficult to prove and consider. For example, Ms. Mac This H. and Mr. Ngo Van Q. divorced under the Decision on recognition of no-fault divorce and the agreement of the involved parties No. 453/2017/QDST-HNGD dated July 20, 2017. According to this Decision, Ms. H. and Mr. Consented that Mr. Q is the custodial parent of the common child named Ngo Nhat M. However, during the period of child custody after the divorce, Ms. H found that she can have economic conditions, stable income, time conditions to care for, nurture and educate, as well as ensure the rights and full development of psychophysiology for her child.

Meanwhile, Mr. Q was a pleasure-seeker and did not spend time raising his child. He often left his child for his parents to directly take care of the child. Also, he is a person with no stable

<sup>11</sup>Judgment No. 735/2017/HNGD-ST of the People's Court of Thuy Nguyen District, HaiPhong City dated November 15, 2017 on "Disputes over change of the custodial parent after divorce".

income. Mr. Q and his family obstructed the visit, care, nurture, and education of Ms. H to her child, so she requested the Court to assign the custody of Ngo Nhat M to her. However, in his self-declaration, Mr. Q had all the conditions of time, economy, and stable income. At the same time, his parents and siblings supported the care and nurture of a common child. He presented a consistent agreement after the divorce between Ms. H and him that Ms. H was not entitled to visit her child and take the child out within 3 months after the divorce, from July 20, 2017, to October 20, 2017. Therefore, his family and hers limited the arrival of Ms. H to visit the child. From the above case, it can be seen that despite stringent regulations, when applied in practice, there are many gaps, especially in exercising the right to limit visits and proving the violation of the custodial person.

Malaysia, too, has had its share of child custody-related issues after divorce separation. The judicial system in Malaysia provides for an interested party (not necessarily a biological parent) to initiate proceedings for the change of custody. The fact that this is possible in Malaysia shows that the country has a high regard for the welfare of children. The critical grounds for the change of the custodial parent are hinged on the values espoused in the "United Nations, CRC to transform the custodial parent for the interest of the child. This could be in line through the convention for the privileges of kid. According to article three. The articles mention about the parties to make sure that kid benefits are ensured at top priority in various judicial issues. Therefore, in Malaysia, both mother and father could agree to transform the custodial parent to secure the desires of the child. (ii) When the custodial parent cannot adequately receive care of the core needs of a kid. The policies could be effectively placed squarely based on the CRC Article twenty seem of two. (1) The parties within stage should determine the right of each child to the principle of living

sufficient and suitable for the physical, mental and social development of the child

(2) The parent along with other accountable for the core responsibility of the child need to ensure the security within their financial capabilities and the situations of living important for the development of a child.

The articles stress the importance of giving children a comfortable life. In Malaysia, if the custodial parent is no longer capable of giving the child a comfortable standard of living, an application can be made to change the custodial parent. (iii) When changing a custodial parent, if the child affected is seven years and above, their opinion must be sought. This regulation falls within the purview of the CRS Article twelve and two reticle Holds that children who are capable of forming and expressing their views must be allowed to do so in matters affecting them, and the views must be given weight as per the child's age. (2) in judicial matters being adjudicated regarding custody, the opinion of the child shall also be sought. (iv) Change of custody might also be initiated if both parents cannot adequately care for kid. The CRC of Article 9 offers for for this contingency. According to Article nine, it is mentioned that parties within states should ensure that child should not be separated by her or his parents against their will, except while complement authorizes subject to the juridical assess through suitable law and process, which such separation is important for the concerns for the child. These determinations might be important in certain situation such as one engaging in neglect or abuse of the child from parent or individual where both parents live individually and decision need to be prepared based on the kid's place. This article clarify that child need to be separated from their parents. However, it provides for situations where children can be taken away from their parents. This is only when the action is being undertaken to maintain the kids greatest wellbeing. In this case, this provision found within Malaysia's

<sup>12</sup>Supra, note 13

<sup>13</sup>Supra, note 18

custody regulations upholds Article 9 (1) CRC. Changing custody of a child in Thailand is possible by challenging it in a Thai court of law. There are situations where one parent or both hold joint custody, but a need arises to change custody. Thai constitution, the Civil and commercial court section 1521, is alive to this possibility. Regarding the happiness and interest of the child, Thailand the civil and commercial code section which highlighted that if it includes the individual practicing the parental power of the guardian based on section 1530 behaves herself or himself not properly or there is change is situations after the appointment the court has the authority to provide order appointing the new guardian through considering the concerns and happiness of children.

This scenario is implemented in both cases of "uncontested and contested divorce." For the Court to intervene in changing child custody, a party must file a petition in Court. The petition must detail the benefits the minor will derive from the change of custody if the Court grants your prayers. Also, it is noteworthy that the parties cannot legally agree on the designated custodian without a court order. This is to say that a Thai court of law can only effect the change of a legal custodian.

The law reform in Malaysia is MandD Act 1976" "LRA" Section 96 on the power to diverge instructions for supervision or continuation states that " the court might require an specific time and from time to time difference or might rescinded any order for other custody or management of the child on application of the interested person where there is an satisfaction about the order which was depend on any misrepresentation or issue of the fact in which there has been material change in the situations.

The welfare or security of the child of paramount significance no limitations need to be

placed on the courts power to prepare an order which would best encourage the welfare of the child.

Additionally, the Law and Reform proposed by Malaysia towards the marriage and divorce act 1976 mentioned that the authority for the court to different agreement custody or management states which the court might at any time of type time to time different the situation of any arrangement based on the management or custody of the child made after or before appointed data, not with holding any situation or provision to the contrast in any agreement in which it is satisfied that it is suitable for the happiness of the child.

### **3. RECOMMENDATIONS FOR IMPROVEMENT OF THE LAW ON VISITATION RIGHTS**

Firstly, add provisions to define the manner, time, and place to exercise visitation rights. As analyzed, the development trend of the law in all countries recognizes the mechanism to determine the way, time, and location of the non-custodial parent visiting children. This contributes to a comfortable mentality for the child and the parent who enjoys this right. At the same time, the agreement documents are also a solid basis for settling disputes on the issue of obstructing visitation rights in practice. Meanwhile, the applicable law on Marriage and Family of Vietnam recognizes the mechanism of rights and obligations to visit children of the non-custodial parent but does not specifically prescribe the determination of the manner, time, and place of seeing children. Therefore, according to the author, it is necessary to supplement the provisions of Clause 3, Article 82 of the Law on Marriage and Family in 2014 in the following direction: "The manner, time and place of visiting children shall be agreed by the parties based on children's rights and be recognized by the court or decided

<sup>14</sup>Ministry of Justice - The Institute of Legal Science: Law

Dictionary, Judicial Publishing House, 2006, p. 168.

by the court in case the agreement cannot be reached.”

Secondly, the procedures for cases involving consultation of children aged 7 and over shall be prescribed. Article 12 (“CRC”) clearly emphasized that member states guarantee there is privilege for a child to express their opinion in matters influencing their health. The mature of the kid considers the child's views. Therefore, CRC emphasized the right of children to respect their views. In which adults make decisions which directly influence children as they have privilege to mention about their thinking and have their opinion considered into account. In this case, for children who are old enough to express their views about whether to live with their father or their mother, it is not simple to have accurate results but not injure them. In many cases, the custodial parent and grandparents put mental pressure or give incorrect information, instructing them to declare according to adults' will. As a result, to ensure effectiveness and objectivity, the Court should add the participation of experts if necessary.

Thirdly, the scope of the provisions on visitation rights to illegal children should be extended. According to the Law Dictionary, “An illegal child is the one conceived and born during the period when the mother does not exist in a marital relationship (no husband). In some cases, an extramarital child is conceived or born during the marriage period (being married), but the husband has been proved before the Court and decided by the Court that the husband is not the father of the child” . However, for these children, the interests are clearly defined in the law as privilege to determine the recognition for youngsters and opportunity to recognize parents (Articles 89 and 90 of the “Law on Marriage and Family” in 2014) without regulations on the issues of dispute resolution on child custody after adoption. With the principle that children’s privileges and obligations often no

based on the marital position of parents, to have an evident legal basis for solving the issue in case of a dispute over child custody, lawmakers should extend the visitation rights for illegal children.

Fourthly, the implementation of legal propaganda policies contributes to raising the awareness of the people in general and parents in particular on the issue of exercising visitation rights based on putting the rights of children first. The case related to visitation rights is a new provision that emerged from the Law on Marriage and Family in 2000. Still, it is stringently prescribed to ensure the rights of those who do not directly raise children and children. However, when applied in practice, in many cases, the parent after divorce has been obstructed the visitation rights by those who directly raised children or relatives. Therefore, introducing policies and laws to the people will help them understand and respect each other's rights and obligations, avoiding major impacts on the psychology and development of children. In Malaysia, besides visitation rights, the law also proposes more ways to help parents be closer to their children.

In some cases, the Court will provide an action plan that includes taking parenting classes or other steps to recover. Therefore, judges will only allow to restrict or deny visitation rights in very few circumstances. In my view, this is a new direction in the future that evokes the development of policies and activities that help parents to correct past mistakes./. Parents work together to develop a workable visitation schedule in the children's best interests. It is essential and contributes to parents having the opportunity to correct their mistakes and be close to their children.

## References

- [1] Bui Minh Giang, Rights and obligations of parents after divorce, Master of Law's thesis, Vietnam National University, Hanoi, 2013.
- [2] Commonly., Malaysian Legislation, (nod) available at [http://www.commonlii.org/my/legis/-consol\\_act/lrada1976272/](http://www.commonlii.org/my/legis/-consol_act/lrada1976272/) (Last visited on November 25, 2022)
- [3] Constitution of the Republic of Vietnam Convention on the rights of the child, (1989) Treaty no. 27531. United Nations Treaty Series, (1989) Available at: [https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf) (Last Visited on 28 December 2022).
- [4] Dale leer Kaur Randhawa - Sheela Jayabalan - Faridah Hussain, Visitation Rights under Family Law: Do Children Have a Right of Refusal, SciTePress- SCIENCE AND TECHNOLOGY PUBLICATIONS.
- [5] Ho Chi Minh City University of Law (2018), Casebook (Judgment Commentary) of Marriage and Family Law, Publishing House. Hong Duc - Vietnam Bar Association.
- [6] Judgment No. 735/2017/HNGĐ-ST of the People's Court of Thuy Nguyen District, Hai Phong City dated November 15, 2017 on Disputes over change of the custodial parent after divorce
- [7] Matthew M. Stevenson, Sanford L. Braver, Ira M. Ellman & Ashley M. Votruba, Fathers, Divorce, and Child Custody, Handbook of Father Involvement: Multidisciplinary Perspectives (2nd ed. Ed.), New Yor: Psychology Press.
- [8] Ministry of Justice - The Institute of Legal Science: Law Dictionary, Judicial Publishing House, 2006.
- [9] Ngo Khanh Tung, Rights and obligations to visit children after divorce, Electronic Journal of the People's Court, available at <https://tapchito.csquyen-va-nghia-vu-tham-nom-con-sau-ly-hon/>, (last visited on October 18, 2019)
- [10] Ngo, F. T., & Dhaliwal, K. (n.d) Family Law in Malaysia: Overview(n.d) available at [https://uk.practicallaw.thomsonreuters.com/1-570-7827?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-570-7827?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited on November 27, 2022)
- [11] Nguyen Phan Nam, Custody of Children after Divorce and Legal Provisions, Electronic Journal of People's Courts, <https://tapchito.csquyen-nuoi-con-khi-ly-hon-va-cac-quy-dinh-cua-phap-luat/>, [last visited on July 22, 2019].
- [12] SIAM ATTORNEY, Child Custody or parental Power Under Thai Family law (n.d) <https://siam-attorney.com/child-custody/> (last Visited on November 27, 2022)
- [13] Siam Legal, Child Custody Law in Thailand (n.d) available at [https://www.siam-legal.com/legal\\_services/Child-Custody-in-Thailand.php](https://www.siam-legal.com/legal_services/Child-Custody-in-Thailand.php) (last visited on November 25, 2022)
- [14] The 1989 International Convention on the Rights of the Child
- [15] The 2014 Law on Marriage and Family
- [16] United Nations, Human Rights: Questions and Answers, New York and Geneva, 2006.
- [17] W.S., Heng, C. J. & Phang, D., Changing Maintenance and custody orders after divorce, (2021) Available at <https://mahwengkwai.com/wp-content/uploads/2021/05/2021-04-23-T13-Changing-Maintenance-and-Custody-Orders-after-Divorce.pdf> (Last visited on November 27, 2022)
- [18] Waldron, M. ,A Complete Guide on Parental Rights and Responsibilities, (13 December 2022) <https://www.stylecraze.com/articles/parental-rights-responsibilities/> ( last visited on 29 December 2022)

