



Legitimacy and Legitimation of Children

Civil Family Law (Universiti Teknologi MARA)

Legitimacy and Legitimation

Common Law:

- A child is legitimate if the parents are married at the time of the conception or at the time of birth (conceived during a lawful wedlock)
- A child is legitimate if a mother conceives him prior to a valid marriage; is subsequently born during that valid marriage; or if he is conceived during a valid marriage, after which the parents were divorced.
- However, a child who is born illegitimate shall be considered as *filius nullius* (son of nobody)

Malaysia:

- Sec. 112, Evidence Act 1950: A child is presumed to be legitimate if he is born during the continuance of a valid marriage or within 280 days after its dissolution, the mother having remained unmarried.

There are **three ways** in which an illegitimate child may become legitimate (legitimation):

- **Under the LRA**
 - Sec. 75(1): A child of a **voidable marriage** shall be deemed to be born legitimate.
 - Sec. 75(2): A child of a **void marriage** shall be deemed to be born legitimate if at the time of the marriage one or both parties reasonably believed that the marriage was valid.
 - *Yeoh v Chew*: The legitimacy of a child is not affected by the invalidity of the marriage as the parties had reasonably believed that it was a valid marriage.
- **Under the Legitimacy Act 1961** (Legitimation by subsequent marriage)
 - Sec. 4: The marriage of parents to an illegitimate child, before or after the prescribed date, will render the child, if living, legitimate from the prescribed date or from the date of the marriage, whichever later, provided that the father was at the date of the marriage domiciled in Malaysia.
 - Sec. 2: Prescribed date –
 - Perak, Selangor, Negeri Sembilan, Pahang: 1st January 1933
 - Johore, Malacca and Penang: 1st July 1936
 - Kedah, Kelantan, Terengganu, Perlis: 23rd March 1961
 - Sabah and Sarawak: 1st January, 1972
- **Adoption Act 1952** (Legitimation by way of adoption)
 - **Sec. 9(1)**: Upon a court order for adoption, all rights, duties, obligations and liabilities of the parents or guardians of the adopted child, with regards to the custody, maintenance and education of the adopted child shall vest on the adopter as though the adopted child was born to the adopter in lawful wedlock.

There exist **two statutes** governing adoption in Malaysia: **Adoption Act 1952** and **Registration of Adoptions Act 1952**. There are several differences that can be seen in regards to adoption under both statutes:

Application:

- Registration of Adoptions Act
 - Applicable to **Muslims** and **non-Muslims** (no restriction in the statute)
 - Sec. 1(2): Applicable in West Malaysia only
 - Sec. 10(3): Parties must be ordinarily resident in **West Malaysia**
- Adoption Act
 - Sec. 31: The Act is applicable to non-Muslims only, thus non-Muslims are disallowed from adopting a Muslim child.
 - Sec. 4(3): Parties must be **ordinarily resident** in Peninsular Malaysia.
 - *TPC v ABU*: The respondents were Australian nationals who had lived in Penang for three years prior to the petition for adoption, and intended to return to Australia upon its completion. Held: The learned judge was satisfied that the respondents were at the material time ordinarily resident in Peninsular Malaysia.
 - 'Ordinarily resident': A person's stay in the country has to be of **sufficient duration and continuity** to satisfy the requirement. One must go further and show that he is actually living in this country and has a place of work even though he does not intend to live here permanently. However, he need not show that he has no immediate intention of residing anywhere else.

Manner of registration:

- Registration of Adoption Act
 - Sec. 6(1): Application for legal adoption through registration by the Registrar.
- Adoption Act
 - Sec. 3(1): Application for legal adoption through a court order.

Age of applicant:

- Registration of Adoption Act
 - Sec. 10(2)(a): One of the spouses must have attained the age of 25 years old and is at least 18 years older than the child.
 - Sec. 10(2)(b): If the adopter is a relative, must have attained age of 21.
- Adoption Act
 - Sec. 4(1)(a): One of the applicants must have attained the age of 25 years old and is at least 21 years older than the child.
 - Sec. 4(1)(b): If the applicant is a relative, at least 21, unless the court is satisfied that there are special circumstances for making that order.

Age of the child:

- Registration of Adoption Act
 - Sec. 6(1): The child must be under the age of 18 and has never married.
- Adoption Act
 - Sec. 2: The child must be less than 21 years and can be a male, female or female divorcee.

Restriction as to the sex of the applicant:

- Registration of Adoption Act
 - The statute is silent about this matter.
- Adoption Act
 - Sec. 4(2): If the sole applicant is a male, the child adopted must be a male unless the court is satisfied of any exceptional circumstances.

Effect of adoption:

- Registration of Adoption Act
 - There is no legal link between the adopted child and his adopter as the relationship between the adopted child and his natural parents is not severed (detached).
- Adoption Act
 - Sec. 9(1): The child becomes the legitimate child of the adopter. Hence, the legal link between the child and his natural parents is severed.
 - Sec. 9(2): The child may inherit property of the adopter as if the child were his own.

Prohibited degrees of marriage:

- Registration of Adoption Act
 - Due to the fact that the adopted child does not acquire the status or rights of a natural son or daughter, there is no prohibited degree of marriage between the adopted child and members of the adopting family.
- Adoption Act
 - Sec. 9(7): The adopted child is prohibited from marrying his siblings who are children of his previous or subsequent adopter.
 - The adopted child cannot marry his previous or current adoptive parents.

Requirement of continuous care and possession of the applicant:

- Registration of Adoption Act
 - Sec. 6: The child must be in the custody of the adopter 2 years continuously and immediately before the date of application.

- *Tan Kong Meng v Zainon Md Zain*: A child had been cared by a Malay couple since she was three months old. Despite the Registrar of Adoptions exercising her discretion in dispensing the father's consent, where the couple **failed to prove that they had been maintaining the child all the while**, the court found the registration to be *void ab initio*.
- Adoption Act
 - Sec. 4(4)(a): The child must be in the possession of the adopter for three consecutive months immediately before the date of the order.
 - *AL Annamalai & Anor v Chandrasekaran Thangavelu & Anor*: Where the child had been in the care and possession of the applicant for more than three consecutive months as required under the Act, thus, the adoption was granted.

Consent of the parents or guardian:

- Registration of Adoption Act
 - Sec. 6(1)(b): Express consent of the adoption must be given by the parents, or if both parents are dead, or neither of the parents are within West Malaysia, any guardian of the child, to the Registrar.
 - The Registrar may dispense with the consent of any parent if he is satisfied that it would be just and equitable for the welfare of the child.
- Adoption Act
 - Sec. 5(1): The adoption order shall not be made except with the consent of the parents of the child. The court may dispense with any consent required by this provision where:
 - (a) A parent or guardian of a child has abandoned or neglected or persistently ill-treated the child;
 - (b) A person who should support the child, but has persistently neglected or refused to contribute;
 - (c) A person whose consent is required cannot be found; is incapable to give consent or his consent is unreasonably withheld;
 - (d) Any competent authority has given permission or granted license authorizing the care and possession of the child to the applicant.
 - Sec. 5(3): Consent is unnecessarily withheld when the consent may be given without knowing the identity of the applicant, but is then **withdrawn on the ground that only the identity of the applicant is unknown**.
 - *Re Baby M*: The natural parents of an infant baby agreed to give her up for adoption to the proposed adoptive parents by signing a letter of consent. They then changed their minds and sought the return of their child, alleging that they had not given consent and that the letter was invalid. The court applied an objective test that is **whether it would be reasonable for the parents to withhold consent**. Held: The court after considering the totality of the

evidence (the serious neglect by the natural parents and the fact that the child was in need of medical attention) found that consent was unreasonably withheld by the natural parents, and should therefore be dispensed with.

- *Re SS*: Where the father of an illegitimate child refused to give his consent, the court dispensed with the requirement of consent as it found that consent was unreasonably withheld due to the fact that **the natural father proved to be completely unfit to continue the role of a father** of whom his child could ever be justifiably proud.
- **Exception under Sec. 8**: Persons who have custody of a child, brought up and educated by them under a *de facto* adoption (adoption by fact) before the commencement of the Act (25th June 1953), for a period of at least 2 years, may apply for adoption without requiring the consent of any parent or guardian.