



An Application of Children's Well-Being and Welfare to Parental Power Following Divorce under Civil and Commercial Code

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Abstract

Determination regarding custody of a minor child after a divorce is an important issue of the courts arising from the agreement of the spouse. There are two types of divorce in Thailand. First, uncontested divorce or divorce by mutual consent which the law requires the couple to enter into an agreement regarding the parental power. Nonetheless, in case that there is no evidence showing that the couples have settled the divorce agreement or unfortunately, the couple is unable to agree upon the issue on the sharing of child custody then these issues shall be brought to the court for deciding which party should be granted the child custody. Second, there is the contested divorce which is judicial or court divorce in which the judge in the divorce case will make decisions regarding a child custody based on the happiness and interest of the child. The phrase "the well-being and benefit of the child" has an ambiguous meaning thus if there is no rules or guidelines governing this concern provides to the courts in order to considering the case, it would induce the troublesome problems for the court in considering the case. Besides, there is no rules in regard to the well-being and benefit of the child principle clearly set out or adopted under Thai family law so in this circumstance, it imposes upon the judge to use its discretion in determining issue pertaining to the well-being and benefit of the child and deciding who should be granted the child custody. Thus, it can be concluded that there are no consistency criteria for deciding the case. This article presents a comparative legal research with the UK law and proposes that Section 1520 of The Civil and Commercial Code should be amended in order to bring the true happiness and interest to the minor child.

Keywords: Child Custody after Divorce, Well-Being and Benefit, Guardian, Family Law

Background

At present, the decision regarding child custody following a divorce makes this area one of the most controversial for the courts to deal with. This child custody issue arises from spouse agreement. Legally, there are two types of divorce in Thailand. The first type is uncontested divorce or divorce by mutual consent which the law requires the couple to enter into an agreement regarding the parental power. Nonetheless, in case that there is no evidence showing that the couples have settled the divorce agreement or unfortunately, the couple is unable to agree upon the issue on the sharing of child custody then these issues shall be brought to the court for deciding which party should be granted the child custody. The second type is the contested divorce which is judicial or court divorce in which the judge in the divorce case will make decisions regarding a child custody based on the happiness and interest of the child.

In the divorce proceedings, both uncontested and contested divorces, there will always be consideration regarding custody of the child. That is to say, in the case of divorce by mutual consent, if there is no evidence that divorce agreement is agreed upon or the attempt of the couples to enter into a divorce agreement concerning how the custody shall be shared between them has failed, these issues shall be brought to the court for deciding which party should be granted the child custody. In most divorce cases, the petition for divorce is often accompanied with claims on child custody where the aggrieved party in the marriage asks the judge in the



divorce case to decide who should be granted the child custody along with the end of marriage. Thus, apparently, the court trial concerning child custody is most likely to occur. In addition, the judge will also make decisions regarding a child custody where the custody of the child has been taken away and the judge needs to appoint a third person as a guardian in place of parents or modify the child custody arrangement. In all these cases, the child's well-being and welfare shall be the court's paramount consideration.

On the ground that the phrase "the well-being and benefit of the child" has an ambiguous meaning, if there is no rules or guidelines governed, this concern would definitely make it hard for the judge to address the legal issue. Apparently, as there is no rule in regard to the well-being and benefit of the child principle clearly set out or adopted under Thai family law in this circumstance, it imposes upon the judge to use its discretion in determining and deciding who should be granted the child custody. As a result, Thai court rulings lack of consistency and coherence (Kumthornthip, 2004, p. 3). The laws of United Kingdom were reviewed and compared in this article in order to use the benefits as a basis for amending and improving Thai law so that it is more comprehensive.

Thai Laws

The purpose of this article is to examine the legal principles relating to child custody and the principle of "well-being and benefit of children", which are divided into the following sections:

1. The Civil and Commercial Code, Section 1566 states that "*A child is subject to parental power as long as he is not sui juris. The parental power is exercised by the father or the mother in any of the following cases;*

- 1) *the mother or the father is dead;*
- 2) *It is uncertain whether the mother or the father is living or dead;*
- 3) *the mother or the father has been adjudged incompetent or quasi-incompetent;*
- 4) *the mother or the father is placed in a hospital by reason of mental infirmity;*
- 5) *the parental power has been granted to the mother or the father by an order of the court;*
- 6) *the mother or the father have come to such agreement as provided by the law that it can be made."*

2. The Civil and Commercial Code, Section 1520 states that "*In case of divorce by mutual consent, the spouses shall make an agreement in writing for the exercise of parental power over each of the children. In the absence of such agreement or an agreement thereon cannot be reached, the matter shall be decided by the Court.*

In case of divorce by judgment of the Court, the Court trying the divorce case shall also order that the parental power over each of the children belongs to any party. If, in such trial, it is deemed proper to deprive that spouse of the parental power under Section 1582, the Court may give an order depriving that spouse of the same and appointing a third person as a guardian, by taking into consideration the happiness and interest of the child".

Meaning of Parental Power

In regard to the child custody arrangement, there are many Thai professors who have explained the meaning of the parental power, they have explained as follow:

Yut Saeng-Uthai (Kampusiri, 1988, p. 295) explains the meaning of parental power as it is the parental rights that parents have over their child. This is considered that the child is definitely incapable of taking care of himself, and therefore the child is subject to parental control of the parents. Fundamentally, it is the personal and traditional rights of parents that can be neither relinquished or transferred to others, nor appointed by the court.



Additionally, in case that any person wishes to exercise these parental rights, he has to petition for court appointment of a guardian of a minor first.

Professor Seni Pramoj (Pramoj, 1965, p. 307) refers to meaning of the parental power as the power given in order to raise and care their child, including assisting him grow up towards adulthood to be good person in the future. Nevertheless, the parental rights are not the independent power that everything can be done to the child freely. The primary right of a parent consists of the right regarding personal relationship the right for being legal representative of the child as well as the right to manage the child's property.

Professor Jitti Tingsaphat (Tingsaphat, 1977, p. 113) explains that parental power is about custody of the children and the right to manage the child's property. Normally, a person exercising parental power is the parents of the child, which is legally referred to as the custodian of a child. Nevertheless, in the event that other person exercises parental power instead of parents, the law is referred as guardians.

Prasopsuk Bundet (Boondech, 2021, p. 669) refers to the meaning of the parental power as it is the natural power of parents since the birth of a child. It is the power given and exercised for the benefit of raising and caring the child as well as assisting the child grow up towards adulthood. Ordinarily, neither the other person nor the courts can interfere with the exercise of this power due to the presumption that parents are always responsible for exercising the parental rights in furtherance of the benefits in large of the whole family, the overall interests of every child in the family or the interests of the individual person. Particularly, the father and mother must unconditionally convey their love, affection and care to their children and take great care of their children, and attempt to do everything for the interest of their children constantly.

In conclusion, the custodial power is the power that parents exercise in pursuance of raising the child until the child is legally determined to be an adult and is capable of taking care of himself. This parental power creates the rights and duties or responsibilities that parents have towards their children, that is, the father and mother must exercise the right of a parent by means of disciplining and educating the child as well as protecting and caring for their child in all aspects (Kumthornthip, 2004, p. 65).

Parental Rights under the UK Law

The author has researched the laws governing child custody in the United Kingdom as well as significant court decisions in order to profit from the benefits of such laws and to serve as a guideline for altering and strengthening Thai legislation to make it more relevant. The followings are the most essential points:

1. Decisions regarding a child's residence are of primary importance following parental separation. How parental power is decided largely depends on the circumstances of the parents' separation, and whether agreement can be reached through informal negotiations or by court order (Lawble, 2019).

2. With regards to divorce or separation, the welfare and best interest of the child will be considered the main priority for every person involved. By and large, this can leave parents at dilemma and they are incapable of agreeing on who should have child custody. So, much of the time, the disputes concerning child arrangements emerge and the court needs to get included to resolve this issue by always considering the wellbeing for the child when deciding the case (Nayyars Solicitors, n.d.).

3. In case that the divorce is inevitable and parents have children, they will need to come to an arrangement. Being parents makes that person responsible for health, safety in every facet and well-being for their child. It is preferable for former couple to attempt to come to an arrangement for parental power between themselves since this methodology can definitely resolve issues out of court and offer significant adaptability by taking into



consideration the well-being of the child (Lawble, 2019). In addition, this approach can usually avoid going to court hearings if you agree on where the children will live; how much time they will spend with each parent; when and what other types of contact take place; how the parents will financially support their children (Lawble, 2019; Divorce Aid, n.d.). Nevertheless, even though most parents agree about the arrangements for children although disputes do arise frequently, especially matters of finance.

4. In regard to child custody arrangement, there is a legal definition known as “access”, “custody” in which one parent being offered everyday “care and control” of the child nevertheless, these terms were canceled with the enactment of the Children Act of 1989 and supplanted with the terms contact, residence and parental responsibility (Legislation.gov.uk, 1989i). At present, the afore-mentioned terms are now more commonly referred to as “residency” or “child arrangements.” These terms refer to the arrangement relating to the location of the children’s main residence, specify the person with whom a child will live and with whom they will spend their time and allow the child to visit or stay with the other person named in the order, or for that person and the child to spend time with each other (Armstrong, n.d.; Dawson Cornwell, n.d.).

In this manner, it is comprehended that the courts will not intercede except it is for the greatest advantage of the child. Similarly, the child would incline toward the fact that his parents will go to their most extreme to put the child first and to see things through the eyes of their child (Divorce Aid, n.d.).

Likewise, the court does not need to consider arrangements for children of the family on an application for divorce. As a result of the father or mother, as the case may be must show that they have attended a family mediation information and assessment meeting to see if mediation is suitable for them before applying to a court. Any disagreements regarding child arrangements shall first be tended to through mediation. In case this is ineffective, parent could apply for a Child Arrangements Order under section 8 of the Children Act of 1989. (Child Law Advice, n.d.a).

The Children Act 1989 (Legislation.gov.uk, 1989i)

Overview

The current child protection framework is based on the Children Act of 1989 which is the enactment significant to safeguarding and promoting welfare of the child as well as attempting to fortify protections for children (Foster, 2020), the Act gave every child the right to protection from abuse and exploitation and the right to inquiries to safeguard their welfare. Moreover, the Act simply clarify and simplify the existing patchwork of legislation affecting children.

The 1989 Act centers on the idea and belief that children are best cared and looked for within their own families (Elvin, Evans, Feuchtwang, Jones, Thoburn, & Willow, 2019) with their parents participating in their lives. The afore-mentioned idea and belief is reflected to two important considerations: first, in the notion of parental obligation; second, the capability of father who was not married to mother of the child to share that obligation by consent to the mother either by registration the child at birth or by court order (Child Law Advice, n.d.a).

The Act emphasizes that the child’s welfare shall be the court’s paramount consideration when making decisions about their upbringing or the administration of children’s property or the application of any income arising from it. Furthermore, their ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding; their physical, emotional and educational needs; the likely effect on them of any change in their circumstances; the harm the children have suffered or are likely to suffer and parent’s ability to



meet the children's needs were factors the court must take into account when considering that children's welfare. Since delays in making decisions are likely to have a negative impact so in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child. Last but not least, the Act also established the principle of "parental responsibility" (Legislation.gov.uk, 1989a) as well.

Key Principles Underpinning Children Act 1989 (HM Government, 2010; Legislation.gov.uk, 1989a)

First, the child's welfare shall be the court's paramount consideration and will be the court's main consideration when there is a family proceeding involving child custody, management of the child's property, or the use of any income derived from the child's property. In these cases, the court will make a decision in accordance with this law.

Second, there is an assumption that if the child's father or mother who can be involved in the child's life is the one who does not expose the child to hardships and harm, this arrangement will certainly further the child's welfare. This means that children are best looked after within their families, with their parents fully dedicating in their lives and it is more important than either parent's aspects, or the aspects of other persons involved in the child's life (Legislation.gov.uk, 1989d).

Third, there also is an assumption that with respect to a child, no order shall be made by the court unless the court considers that intervention in family life is necessary (Thomson Snell & Passmore, 2015), and it is better for the child for an order to be made (Department for Children, Schools and Families, 2008).

Forth, in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child (Legislation.gov.uk, 1989c).

The Welfare of the Child Principles (Department for Children, Schools and Families, 2008)

Section 1 of Children Act of 1989 makes very clear that the underlying welfare principle has to be applied in all proceedings under the Act so courts must have the child's welfare as their "paramount consideration" when making any decision about a child's upbringing and the administration of his property, the court must treat the welfare of the child as its paramount consideration. This principle applies to disputes that may occur between parents as it also does apply to care proceedings and emergency protection proceedings (Department for Children, Schools and Families, 2008; Legislation.gov.uk, 1989g) according to subsection 1(1) (Legislation.gov.uk, 1989b) of the Children Act of 1989 which provides that –

"When a court determines any question with respect to –

- (a) the upbringing of a child or*
- (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration."*

This principle sometimes called the welfare principle or the paramouncy principle. (Deed Poll Office, n.d.)

In addition, the Act further makes it clear that any delay in court proceeding in order to determine the issue about a child's upbringing and the administration of his property is likely to prejudice the welfare of the child (Legislation.gov.uk, 1989c) and harmful to the child. Progress of a case is controlled by the court in accordance with court rules and guidance to the judiciary (Department for Children, Schools and Families, 2008). Parties must ensure that they comply with any directions made by the court to ensure the progression of cases (Ministry of Justice, 2021).



Supplementary Factors to be Considered in Contested Cases (Legislation.gov.uk, 1989e)

On any occasion relating to contesting section 8 proceedings, special guardianship applications and in all care and supervision proceedings, when the court applies the welfare principle, the court should have regard to the following checklist of factors, which focuses not only on the needs of the child but also on his views and the options available to the court. In accordance with subsection 1(3) (Legislation.gov.uk, 1989e) of the Children Act 1989 which provides that —

“(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and

(g) the range of powers available to the court under this Act in the proceedings in question.”

The Act prohibits the court from making an order unless the court considers that doing as previously mentioned would be better for the child than making no order (Legislation.gov.uk, 1989f). So, there are three aims underpinning this principle. The first is to impede unnecessary court orders from being made. This aim is intended to reduce conflict and promote parental agreement and co-operation. The second aim is to ensure that the order is granted only where it is likely to improve the child's welfare (Child Welfare Information Gateway, 2020). The third aim is to prevent the unnecessary applications of the principle (Child Welfare Information Gateway, 2020).

The Major Concepts of Children Act (1989)

Parental Responsibility

The word parental responsibility replaces the old idea of custody, and supports the idea that parents have responsibility for their children, rather than rights, so parental responsibility enables a person to make decisions and the right to be consulted before making major decisions relating to the welfare, education etc. of the children and other important decisions which need to be made. To this extent, parental responsibility is underpinned by the concept that it is more than a bundle of rights and responsibilities. The Act also grants a status on the parents which is substantial both for the child and the parents (Hand Morgan & Owen Solicitors, 2007).

Meaning of “Parental Responsibility”

Parental responsibility is defined by the Children Act of 1989 as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child” (Nayyars Solicitors, n.d.; Hand Morgan & Owen Solicitors, 2007). It also provides the meaning to include that “the rights, powers and duties which a guardian of the child's estate (appointed by the court, before the commencement of section 5, to act generally) would have had in relation to the child and his property” (Legislation.gov.uk, 1989c).

In addition, the Act offers the further meaning of the term *parental responsibility* as “The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the



benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover” (Legislation.gov.uk, 1989e). Thus, the term *parental responsibility* apparently makes an attempt to center on the duties and responsibilities of the parents regarding their child rather than the rights over their child. (Child Law Advice, n.d.a).

As a matter of fact, ‘parental responsibility’ means the power to make important decisions in relation to a child and his property and about their care and upbringing. This includes the responsibilities to provide housing for the child, to protect and maintain the child’s welfare, to consider and consent the child’s medical treatment, to choose and provide for the child’s education, to decide the child’s name and to register his birth, to discipline the child, to look after the child’s property and last but not least, to represent the child in legal proceedings (Child Law Advice, n.d.b; GOV.UK, n.d.).

Parental responsibility is granted on the mother of the child since the mother is always listed on the birth certificate, so to underpin the point, a mother apparently has parental responsibility for the child from birth.

Acquisition of Parental Responsibility by Father (Legislation.gov.uk, 1989h)

In case that father and mother of a child were married at the time of the birth of the child, Section 111, subsection 2 (Legislation.gov.uk, 2002) of the Adoption and Children Act 2002 provides that–

“(2) In subsection (1) (cases where parental responsibility is acquired), for the words after “birth” there is substituted, the father shall acquire parental responsibility for the child if–

- (a) he becomes registered as the child’s father under any of the enactments specified in subsection (1A)
- (b) he and the child’s mother make an agreement (a “parental responsibility agreement”) providing for him to have parental responsibility for the child; or
- (c) the court, on his application, orders that he shall have parental responsibility for the child.”

Thus, the unmarried father will have parental responsibility in case that he and the mother have a child after 1st December 2003, and his name is registered on the birth certificate. On the other hand, if the father’s name is not registered on the birth certificate and a child was registered before 1st December 2003, fortunately, the father can re-register the child to include his name on the registration and thereafter the father will have parental responsibility (Brighton & Hove City Council, n.d.).

However, parental responsibility continues throughout the child’s minority. An unmarried father who has acquired parental responsibility by way of agreement or court order sometimes can have his parental responsibility removed by order of the court.

In re G (children) (FC) (UK Parliament, n.d.), Baroness Hale said at para 30:

[30] My Lords, the [Children Act 1989] brought together the Government’s proposals in relation to child care law and the Law Commission’s recommendations in relation to the private law. In its Working Paper No 96, *Family Law: Review of Child Law: Custody* (1986), at para 6.22, having discussed whether there should be some form of presumption in favour of natural parents, the Law Commission said:

‘We conclude, therefore, that the welfare of each child in the family should continue to be the paramount consideration whenever their custody or upbringing is in question between private individuals. The welfare test itself is well able to encompass any special contribution which natural parents can make to the emotional needs of their child, in particular to his sense of identity and self-esteem, as well as the added commitment which knowledge of their parenthood may bring. We have already said that the indications are that the priority given to the welfare of



the child needs to be strengthened rather than undermined. We could not contemplate making any recommendation which might have the effect of weakening the protection given to children under the present law.'

So, this opinion of Baroness Hale upholds the principle of child welfare that the welfare of each child in the family should continue to be the paramount consideration whenever their custody or upbringing is in question.

Examining and Analyzing Legal Issues Regarding the Principle of Well-being and Benefit of Children under Thai Law

The Civil and Commercial Code, Section 1520, paragraph 2 expresses that in case of divorce by judgment of the court, the court presiding the divorce case shall also decide and order who should be granted the child custody. If, in such trial, it is deemed proper to deprive that spouse of the parental power under Section 1582, the Court may give an order depriving that spouse of the parental power and appointing a third person as a guardian, by taking into consideration **the happiness and interest of the child**.

Nevertheless, the phrase "the well-being and benefit of the child" is not defined by the law, accordingly it has been interpreted and given meanings differently. No court rules, guidelines or regulations have been provided to the court which will be applied as a key consideration in family proceedings. Therefore, it is necessary to find out the true meaning and the spirit of law regarding this principle.

The study found that in Thailand there are many scholars who have commented on the principle of "the well-being and benefit of children". The details are as follows:

Special Professor Prasopsuk Boondej (Boondech, 2021, p. 495) comments that the phrase "the well-being and benefit of the child" has a broad meaning, and it does not mean only the physical well-being or the benefit in the term of the child's property, but also the child interest with regard to morality, religion, philosophy, sanitation and mental well-being as well as the love, affection, caring and bond between them. In contemplation of determining the well-being and benefit of the child, it is important to consider by taking the long view. Even though there will be obstacles or difficulties that stand in the child way for a short period, the child will deservedly earn happiness, wellbeing and benefits, higher than anticipated. Therefore, this long-term well-being and benefits must be chosen. At the same time, the past behavior of the husband and wife which constitutes the grounds for divorce shall not be taken into account unless such conduct affects the welfare and benefit of the child. It is an important principle that the happiness and welfare of the child shall be the court's first and paramount consideration.

Professor Dr. Pairote Kampusiri (Kampusiri, 2017, p. 878) analyses and comments on the judgment regarding whether the child custody should be given to the father or mother as "even if a woman or a man is a bad husband or wife but the court closed this eye. and opened the other eye and determined that this spouse might be a noble mother or father and bring maximum benefits for the child's future".

From the study of the judgments of the Thai Courts, it is clearly shown that Thai courts have applied "the well-being and benefit of children" principle as it has been applied under the UK law. The Thai courts use the following criteria to determine whether a child should be placed under the parental authority of the father or mother:

1. The consideration directly related to the child.
 - 1.1 Young children need mothers (Boondech, 2021, p. 495).
 - 1.2 Keeping the Children Together (Boondech, 2021, p. 496).



1.3 Children must receive love, affection, caring, comfort and feelings of emotional attachment between the child and the father or mother (Boondech, 2021, p. 500).

1.4 The ascertainable wishes and feelings of the child concerned, the emotional needs considered in the light of his age and understanding must be taken into account, especially a child who is old enough to have a mature conscience which is to know what is right and wrong (Boondech, 2021, p. 497).

2. The considerations related to father or mother.

2.1 The ability of each parent to provide education regarding academic education, profession, religion, morals as well as intellectual development for the child both at school and at home (Boondech, 2021, p. 498).

2.2 Each parent's ability to provide for the children's residence and medical care (Boondech, 2021, p. 499).

2.3 Any parent shall have appropriate behavior for being the person exercising parental power.

2.4 In case the child is already in the custody of any party, continuing the current custody arrangement will have the least negative impact on the child (Seramethakul, 2019, pp. 213-219).

3. Additional considerations the court must consider when deciding which parent shall have the right to exercise the parental power over the child in order to uphold the best interest of the child principle. (Seramethakul, 2019, pp. 213-219)

3.1 The child should be under the custody of the father or mother of the same sex as the child.

3.2 The child should live with the father or mother who does not have a new family.

3.3 The child should live in the same environment or country which the child is familiar with.

4. In order to apply the principles of UK law, the court should take into account the following aspects. (Legislation.gov.uk, 1989e)

4.1 The ascertainable wishes and feelings of the child concerned by considering age and comprehension of that child.

For instance, the court should ask a child who is old enough to express a reasonable preference whether he will be under the custody of his father or mother.

4.2 Physical, emotional and educational needs.

For instance, adolescent boys and girls are frequently more emotionally traumatized than children. As a result, a son may prefer to be cared for by his father of the same sex, who understands his emotions and needs better than a female mother. Similarly, a daughter may prefer to be cared for by her mother.

4.3 The likely effect on the child of any change in his circumstances.

For instance, changes in residence, environment, school, relatives and friends, and so on may cause the child to become stressed as he or she attempts to adapt to a completely new situation.

4.4 Age, sex, background and any characteristics of the child which the court considers relevant.

For instance, the baby should be with his or her mother. The son should live with his father. The daughter is supposed to be with her mother. The child should be raised by the father or mother who raised him or her in the first place.

4.5 Any harm which the child has suffered or is at risk of suffering.

For instance, a child who lives with a father or mother who is physically or mentally abusive to the child will endanger the child's life or the child is at risk of living with a parent who exhibits violent behavior or suffers from schizophrenia.



4.6 The ability of the father or mother or any other person considered by the court to meet the child's needs.

For instance, the ability to support and educate children, as well as the ability to pay for necessary nursing care.

Conclusion and Recommendations

From a comparative study of Thai law and the law of the United Kingdom as well as the impact of court decisions in the re G (children) (FC) cases in regard to the principle of the well-being and benefit of the child. As can be seen, Section 1520 of the Civil and Commercial Code does not specify the meaning of the word "the well-being and benefit of the child". As a result, this makes the implementation of this principle unclear causing difficulties in the court's application of the law.

The law of the United Kingdom, as well as the outcome of the court's decision in such cases, is based on the principle that

"whenever the custody or upbringing of the child is in question between private individuals. The welfare test itself should be able to encompass any special contribution which natural parents can make since it can meet the emotional needs and feeling of their child, in particular to his sense of identity and self-esteem, as well as the added commitment which knowledge of their parenthood may bring."

As a result, the author regards as a good principle that should be widely applied in Thailand.

Therefore, in order to determine which party will have custody of the child, a guideline should be created which will be beneficial to both married couples who agreed to register their divorce and the parents who are unable to reach an agreement on child custody and decide to seek a court order. Each parent should be required by the court to reach an agreement respecting the way to maintain the child welfare and submit to the court prior to the court proceeding. The afore-mentioned agreement would allow the court to acquire the complete information to support the court's decision for determining which party is entitled to parental authority. The court order is granted only by concentrating on the principle of the well-being and welfare of the child and it is not a decision based solely on evidence or information from the case.

For the reasons stated above, the author has proposed that the following words are considered appropriate to include as the last paragraph of Section 1520 of the Civil and Commercial Code.

"A court shall have regard in particular to:

1. *The ascertainable wishes and feelings of the child concerned by considering age and understanding of that child especially a child who is old enough to have a mature conscience in knowing what is right and what is wrong as well as interactions with others and the ability to control his/her own actions.*

2. *His physical, emotional and educational needs by considering that the child must receive love, affection, caring, comfort and feelings of emotional attachment between the child and the father or mother; young children need mothers and siblings should live in the same family; the child should be under the custody of the father or mother of the same sex as the child; the ability of each guardian to provide for residence and medical care; the ability of each guardian to provide education regarding academic education, profession, religion, morals as well as intellectual development for the child both at school and at home.*

3. *The likely effect on the child of any change in his/her circumstances so in case the child is already in the custody of any parent, continuing the current custody arrangement will have the least negative impact on the*



child; and the child should live with the father or mother who does not have a new family; the child should live in the same environment or country which the child is familiar with.

4. Age, sex, background and any characteristics of the child which the court considers relevant.

5. Any harm which the child has suffered or is at risk of suffering.

6. The ability of the child's father or mother, as well as any other persons deemed appropriate by the court, to inquire in response to the child's needs, in particular, the appropriate use of parental power by the father or mother.

In conclusion, in addition to the suggestion that Section 1520 should be amended, the author further proposes that the state should develop guidelines and recommendations that can be compiled into the application manual of "the well-being and benefit of children" principle for the general public. This will be beneficial to the spouse or child who is old enough to express a reasonable desire to be in the custody of his/her father or mother as well as lawyers, prosecutors, judges, and members of the general public interested in learning more about child custody. More than anything else, it is critical that everything is truly done for the best interest of the child.

References

Armstrong, E. (n.d.). *Children Law FAQs*. Retrieved from <https://www.burnetts.co.uk/personal/family-law/cases-involving-children/children-law-faqs>

Boondech, P. (2021). *Civil and Commercial Code (Family)* (25th ed.). Bangkok: The Thai Bar under the Royal Patronage. Retrieved from <https://24lawbook.in.th/หนังสือ/คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์-ว่าด้วยครอบครัวฯ-ศาสตราจารย์พิเศษ-ประสพสุข-บุญเดช-1>

Brighton & Hove City Council. (n.d.). *Parental Responsibility*. Retrieved from https://www.brighton-hove.gov.uk/sites/default/files/migrated/article/inline/downloads/jobs/childminding/parental_responsibility.pdf

Child Law Advice. (n.d.a). *Divorce*. Retrieved from <https://childlawadvice.org.uk/information-pages/divorce/>

Child Law Advice. (n.d.b). *Parental Responsibility*. Retrieved from <https://childlawadvice.org.uk/information-pages/parental-responsibility/>

Child Welfare Information Gateway. (2020). *Determining the Best Interests of the Child*. Retrieved from https://www.childwelfare.gov/pubPDFs/best_interest.pdf

Dawson Cornwell. (n.d.). *Parental Responsibility & Child Arrangements*. Retrieved from <https://dawsoncornwell.com/en/what-we-do/children/parental-responsibility,-child-arrangements.html>

Deed Poll Office. (n.d.). *The Welfare Principle (Subsection 1(1) of the Children Act 1989)*. Retrieved from <https://deedpolloffice.com/change-name/children/welfare/welfare-principle>

Department for Children, Schools and Families. (2008). *The Children Act 1989 Guidance and Regulations, Volume 1, Court Orders*. London: The Stationery Office (TSO). Retrieved from <https://dera.ioe.ac.uk/7030/>



Divorce Aid. (n.d.). *Children and the Law*. Retrieved from <http://www.divorceaid.co.uk/legal/children.htm>

Elvin, A., Evans, K., Feuchtwang, A., Jones, R., Thoburn, J., & Willow, C. (2019). *The Children Act 1989: 30 Years On*. Retrieved from <https://www.cypnow.co.uk/features/article/the-children-act-1989-30-years-on>

Foster, D. (2020, February 19). *An Overview of Child Protection Legislation in England*. Retrieved from <https://commonslibrary.parliament.uk/research-briefings/sn06787/>

GOV.UK. (n.d.). *Parental Rights and Responsibilities*. Retrieved from <https://www.gov.uk/parental-rights-responsibilities>

Hand Morgan & Owen Solicitors. (2007). *Parental Responsibility*. Retrieved from <https://www.hmo.co.uk/family-relationships/parental-responsibility/>

HM Government. (2010). *The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review*. Nottingham: DCSF Publications. Retrieved from <https://dera.ioe.ac.uk/734/1/DCSF-00185-2010.pdf>

Kampusiri, P. (1988). *The Family Law Includes Notes at the End of the Supreme Court Judgment of Professor Dr. Yut Saeng-uthai*. Bangkok: Thammasat University Press.

Kampusiri, P. (2017). Judgment of the Supreme Court No. 12502/2558 (Best Interests of the Child). *Tammasart Law Journal*, 46(3), 874-878. Retrieved from <https://so05.tci-thaijo.org/index.php/tulawjournal/article/view/198152>

Kumthornthip, A. (2004). *Considerations for Determining the Exercise of Parental Powers after Divorce: A Study of Judicial Attitudes in Court Judgements* (Master's thesis). Thammasat University, Bangkok. Retrieved from https://digital.library.tu.ac.th/tu_dc/frontend/Creator/personDc/108621

Lawble. (2019, January 8). *How is Child Custody Decided?* Retrieved from <https://www.lawble.co.uk/child-custody/>

Legislation.gov.uk. (1989a). *Children Act 1989, C. 41, Part 1, Section 1*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (1989b). *Children Act 1989, C. 41, Part 1, Section 1, Subsection 1*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (1989c). *Children Act 1989, C. 41, Part 1, Section 1, Subsection 2*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (1989d). *Children Act 1989, C. 41, Part 1, Section 1, Subsection 2a*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>



Legislation.gov.uk. (1989e). *Children Act 1989, C. 41, Part 1, Section 1, Subsection 3*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (1989f). *Children Act 1989, C. 41, Part 1, Section 1, Subsection 5*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (1989g). *Children Act 1989, C. 41, Part 1, Section 3*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (1989h). *Children Act 1989, C. 41, Part 1, Section 4*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (1989i). *Children Act 1989, C. 41, Part 1, Section 45*. Retrieved from <https://www.legislation.gov.uk/ukpga/1989/41>

Legislation.gov.uk. (2002). *Adoption and Children Act 2002, C. 38, Part 2, Section 111, Subsection 2*. Retrieved from <https://www.legislation.gov.uk/ukpga/2002/38/section/111>

Ministry of Justice. (2021). *Part 1-Overriding Objective*. Retrieved from <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01>

Nayyars Solicitors. (n.d.). *Who Gets Custody of a Child in Divorce in the UK?* Retrieved from <https://nayyarssolicitors.co.uk/2019/08/24/who-gets-custody-of-child-in-divorce-uk/>

Pramoj, S., M. R. (1965). *The Civil and Commercial Code on the Inheritance Family*. Bangkok: Chulalongkorn University Press.

Seramethakul, M. (2019). *Child Protection Principles under the Best Interests of the Child Concept* (Research report). Bangkok: October Print. Retrieved from <https://www.law.tu.ac.th/wp-content/uploads/2020/02/หลักการคุ้มครองสิทธิเด็กฯ.pdf>

Thomson Snell & Passmore. (2015). *A Brief Guide to the Children Act 1989*. Retrieved from <https://www.ts-p.co.uk/publications/a-brief-guide-to-the-children-act-1989>

Tingsaphat, J. (1977). Relationship between Parents and Children. In *Chulalongkorn Law Journal, Special Edition "Family Law"*. Bangkok: Aksorn Sampan Press.

UK Parliament. (n.d.). *Judgments-In re G (Children) (FC)*. Retrieved from <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060726/child-2.htm>