

MEDIATION IN CUSTODY DISPUTES: CHALLENGES AND PROSPECTS IN MALAYSIA

Nora Abdul Hak¹

Abstract

In dealing with custody disputes especially, mediation is generally considered as a process more humane than the confrontational approach taken in the adversarial system, (Pearson and Thoennes 1989). Mediation is claimed to not only avoid adversary settlement procedures, but also to be a 'family-friendly' intervention program employed in helping post-separating families deal with divorce and conflict (Emery et al. 2005). The focus of mediation is encouraging the parties to solve their conflict amicably. Moreover, according to Vincent (1996, p. 264), in mediation involving custody disputes, the decision about the children's future is shifted to their parent: the people who know them best. Other commentators, including Menkel-Meadow (1991), also maintain that the informal and flexible nature of the mediation process enables the parties to address issues that might not be raised in a more formal dispute settlement approach. The decision making process to legal matters, mediation accommodates to the prospective needs and interest of the parties, leading to a whole and more satisfactory resolution in most cases. Thus, the article focuses on the use of mediation in custody disputes looking at the nature of mediation, its advantages and disadvantages; and its challenges and future in Malaysia.

Key words: Mediation, Custody Disputes, Alternative Dispute Resolution, Law, Court

Introduction

The process of going through a divorce is both physically, mentally, and emotionally exhausting. The emotions of parents can be very intense and highly personal in matters involving their children. Sometimes, these emotions can lead to stress on the children and decisions that are not in their best interest. Mediation will keep intense emotions in check and help create a custody arrangement that is in the best interests of to the child. Many States in USA require parents to attend divorce mediation as a first attempt to work out their disagreements regarding child custody and/or visitation before the family court will issue orders in a litigated hearing.¹ For example, in the State of California, mediation is a mandatory step for parents which they must meet with a California divorce mediator before they can have their contested child custody and visitation issues heard by a judge. In international parental child abduction cases, mediation is probably one of the best methods to solve the problem. Mediation settles more issues in comparison to litigation in that the settlement

¹ Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia.

agreements often cover matters such as, where and with whom the child would live, long term contact schedules for the non-resident parent, health matters and financial support for the child. The article focuses on the use of mediation in custody disputes looking at the nature of mediation, its advantages and disadvantages; the present relevant law relating to mediation/*sulh* and its challenges and future in Malaysia.

Mediation of Child Custody

Child Custody Mediation is a common form of Alternative Dispute Resolution (ADR) that may be available to work out disagreements regarding child custody and/or visitation. It is considered as a process more humane than litigation in the court system. In a child custody mediation setting, a trained neutral person called a "mediator" will typically facilitate the communication between the parties with the intent of helping the parties successfully discuss and work out their child custody and visitation disagreements. Benefits of Mediation are among others as follows (Lawyers.Com, 2010):

1. Money is often saved as mediation fee is not expensive.
2. Animosity towards the parents is often reduced. Mediation is a system of resolving disputes that brings people together again. It is not just to end the dispute but to make the parties associates again.
3. Parents control of the outcome of their child custody case. It means that in mediation both parents will discuss further as to the best arrangement of the child, for example, visitation right of the non-custodian parent, the amount of time the child should spend with each parent and other necessary arrangement based on the needs and interest of the children.
4. Providing flexibility in child custody.
5. Less time than going to court as mediation takes less time to settle the dispute
6. Fostering cooperation between parents thus, they continue to be in good relationship even after divorce for the best interest of the child.
7. Giving a lot more power for parties to make a determination. Studies show the public is more satisfied with mediation than trial results.

However, it is not a realistic solution for everyone. Mediation does not work for all cases, especially cases that have a history of high-conflict and high degree of mistrust between the parties (Lawyers.Com, 2010). In cases of domestic violence and child abuse cases, mediation should not be made mandatory. Also when there is imbalance of power between the parties, it is said that mediation should be avoided. This is because in mediation the bargaining power to negotiate between the parties must be equal for them to arrive at an outcome which is fair and just to both parties (John Wade, 1994).

Mediation Process

Below describes the process of mediation in child custody;

1. Initial meeting with the mediator

The mediator will sit down with all the involved parties and explain the steps in the mediation process. The mediator is neutral and does not represent either party. The mediator will give legal advice or provide counseling to the disputing parties.

2. Identifying and categorizing issues

The mediator will help to determine the child custody issues that need to be resolved. The issues will normally be categorized in terms of time and importance. Sometimes it is easier to tackle the issues in ascending order of difficulty. This will allow the party to have success with the other parent in negotiations early on that will encourage cooperation with the more difficult issues.

It is useful to have the custody issues divided into five layers:

- The regular custody schedule
- The list of exceptions that override the regular schedule, such as holidays and vacations
- Communications between the parents about the children
- Special issues, such as religious training, medical care, activities and private school
- The method for changing the custody agreement in the future.

3. Discussing solutions with a give-and-take attitude

The time spent on each of the custody issue layers will depend on the family's situation. The party needs to openly discuss what he/she think is fair and be willing to listen to the other side. In order to find a satisfactory solution, both parents need to be guided by what's in the best interest of the child. It is also very important to negotiate the rules for changing the custody agreement in the future. There needs to be flexibility built into the custody plan for future changes and unforeseen circumstances.

4. Preparing your custody agreement

Once both of the parties involved have discussed all the custody issues, the mediator will help preparing the child custody agreement. The agreement should be carefully examined to make sure it accurately reflects the parents' understanding of the custody arrangement. The parties' lawyer should also examine the agreement before it is submitted to the court for approval. Any issues not settled in mediation will have to be settled in court.

The length of time that mediation will take depends on several factors, including;

- a) The number of custody issues,
- b) The complexity of the issues
- c) The commitment of all parties to succeed

Mediation and Custody Dispute in Malaysia

The discussion under this section focuses on the custody cases in the Civil and Syariah Court, the institutions in Malaysia that offer mediation service and the relevant legal provision on mediation.

Custody Dispute Cases in the Civil and Syariah Court

Cases discussed in this article show that litigation could have been avoided as the judgments by the court are not always to the satisfaction of the parties involved. If mediation is used to settle the custody disputes most of the problems with litigation could have been minimized such as, high cost of litigation, time consuming and problem with the enforcement of the court's order.

In the case of *Genga Devi Chelliah v. Santanam Damodaram* [2001] 2 CLJ 359, the husband converted to Islam. The wife dissatisfied with the decision made by the Syariah Court Alor Setar, Kedah to give the custody of their only child to the husband. The wife then tried to get a declaration that the order made by the Shariah court to be set aside. In such as a case of conversion of one party to Islam, there is always one party who will not be happy with the order of the court giving custody of the child to the other party. In mediation, both parties will be in a win-win situation thus, problem of dissatisfaction of one party would not arise as both parties have agreed to the settlement arrived.

In *Yip Fook Tai v. Manjit Singh S/O Mohar Singh @ Mohammad Iskandar Manjit Bin Abdullah* [1990] 2 CLJ 605, it was held that the order of custody can be made by the court. In deciding the custody of the children, whether it should be given to the converted or non converted parties, the paramount consideration is on the welfare of the child. Thus, it was ordered that the elder daughter remained with the convert father while the custody the younger one was given to the mother. Again, the above decision by the court may not be to the satisfaction of both parties. Settlement through mediation enables the parties to make arrangement for future parenting voluntarily. Moreover, mediation preserves future relationship of the parents in disputes.

The Malaysian Federal Court in the case of *Subashini A/P Rajasingam v Saravanan A/L Thangathoray* [2007] 2 MLJ 798, has made its decision concerning custody of the child in the case of conversion of one parent to Islam. However, the decision in this case has been described as still unclear and

confusing especially on the issue of jurisdiction of the court i.e., whether the Civil or Syariah court that shall have the jurisdiction to hear conversion cases. It is felt that the best solution to the conversion issues is to settle the disputes/conflicts amicably between the parties involved. This matter can be resolved in amicable way through mediation rather than through litigation.

In the case of *Norlela Mohamad Habibullah v Yusuf Maldoner* [2004] 2 MLJ 629, the applicant and the respondent were married at the Islamic Centre St Gallen, Switzerland and thereupon registered their marriage in Austria. However, three months later, the parties went through a divorce at a civil court in Austria. The applicant was three months pregnant then and came back to Malaysia to give birth to Nurul Iman and resumed her life and employment here. Subsequently, the respondent kidnapped the child and took her out of Malaysia. The applicant obtained a custody order of their child. The respondent applied to set aside the order by the applicant. The issue raised was whether the High Court had jurisdiction to hear the application for guardianship of the child since both parties professed the religion of Islam. In dismissing the application the High Court held that the order was valid because that order was an order of a court of competent jurisdiction, and until and unless it was set aside, it remained. This issue of jurisdiction of the court would not arise should matter is resolved through mediation.

There are cases where the judge in the Syariah Court referred to *sulh* and the disputes were resolved amicably between the parties. In *Ahmad Ismail v Mariani Khaled*,² the parties were married in 1984 and divorced in 1995. They had two sons aged 9 and 5 respectively. Both agreed that the custody of the first son was given to the plaintiff and the second son to the defendant. The same visitation rights were given to them respectively that they can bring home the child who was not in their custody twice a month. The plaintiff was denied his right of visitation by the defendant. The case went for trial in 1997 and during the trial the judge advised parties to solve the matter amicably. The parties agreed and consent judgement was made to the effect. Both parties abide by the agreement. Similarly, in the case of *Norliah bte Abd Aziz v Md Yusof bin A Rahman*, [2004] 5 MLJ 538, where Ismail Yahya J emphasized that when cases go to court, judges must first take step to effect mediation between the parties in disputes.

Institutions Offering Mediation Service in Malaysia

In an effort, to encourage Malaysians to settle their disputes through mediation including family disputes, the Bar Council (NGO) in 1999 established the Malaysian Mediation Centre (MMC). It is funded by the Bar Council, but those who use its services are required to pay the requisite fees for mediation. The mediators are drawn from a panel of trained and accredited lawyers, who are trained as mediators, as well as professionals from other fields (Syed Khalid Rashid, 2000). Under this service anyone may approach the Centre to request for mediation, and the Centre would commence the process by appointing a mediator. Parties may either attend the mediation themselves or may be

represented by lawyers. Parties may bring in expert witness. The mediator cannot subsequently be called up as a witness in court proceedings. The parties are not allowed to use any information given during mediation in any subsequent legal proceeding. The process may be withdrawn at any stage by the mediator or either party if it is felt that no benefit may be derived out of it and the parties are bound by any settlement agreement signed by them (Syed Khalid Rashid, 2000). Currently, the Centre mainly handles commercial disputes.

Other institutions such as, the Kuala Lumpur Regional Centre of Arbitration (KLIRCA), the Association of Architects, Malaysia and Banking and Financial Institutions also provide mediation service. Presently, at the civil court, mediation is a voluntary option. The judiciary in its 2005/2006 annual report on the superior and subordinate courts proposed a Mediation Act to allow for court-annexed mediation. This is an attempt to provide an alternative means for the disposal of cases. According to Tun Zaki Azmi (2010), the Former Chief Justice of Malaysia, at the end of 2008 the number of civil cases pending in courts are as follows; 93, 523 at the High Court, 94, 554 at the Session Court and 156, 053 at the Magistrate Court. To overcome backlog of cases problem in the civil court, drastic steps has been taken by the Malaysian Judiciary Department including introduction of mediation in April 2010. There are two types of mediation practised; first, is by an independent third party who is a trained mediator or by the judge himself and if he fails in this task the case will be heard by another judge (Zaki Azmi, 2010). On 16 August 2010, Practice Direction No. 5 of 2010 has come into force. This practice direction is aimed at encouraging the parties to use mediation as an alternative mode of dispute resolution (Practice Direction No. 5 2010).

Mediation (sulh) in Syariah Court

As for the Syariah Courts, family mediation (*sulh*) has been introduced in the Syariah Court of the State of Selangor in 2002. Section 87 of the Selangor Syariah Civil Procedure provides that the parties to an action are encouraged to hold *sulh* to settle their disputes. In this State, dispute resolution by mediation started its operation on the first of May 2002. Ten mediators were appointed to serve in nine Lower Courts and the High Court. A mediator or *sulh* officer is assigned to each of the designated courts. In implementing the Civil Procedure Rule (*Sulh*) Selangor 2001, a Mediation Work Manual was introduced for use by the mediators (The *Sulh* Work Manual, JKSM, 2002 and the *Sulh* Officer Ethical Code, 2002). This manual seeks to explain and standardize the procedures to be followed by the mediators in conducting the mediation (JKSM, 2003). Other States followed suit in establishing *sulh* unit at their respective Syariah Courts and the Rules on *sulh* were introduced and these include; Shari'ah Court Civil Procedure (*Sulh*) Rules (Malacca) 2004, Shari'ah Courts Civil Procedure (*Sulh*) Rules (Penang) 2006, Shari'ah Courts Civil Procedure (*Sulh*) Rules (Pahang) 2005, Shari'ah Courts Civil Procedure (*Sulh*) Rules (Johor) 2004. In the Syariah Court, mediation session is conducted before the case goes to trial.

Legal Provisions on Mediation

Below are the relevant statutes that have provisions on mediation and these provisions provide the Malaysian courts the authority to refer the parties to mediation including custody dispute.

i. Law Reform (Marriage & Divorce) Act, 1976

For the non-Muslims in Malaysia, in the case of petitions for divorce based on the irretrievable breakdown of marriage, section 106 (1) of the Act makes it mandatory that all petitioners have to obtain a certificate from the conciliatory body testifying that it has failed to reconcile the parties before filing their petitions.³ This mandatory requirement of a reconciliation attempt by the parties takes place prior to the filing of the petition for divorce and it is conducted by out of court reconciliation bodies⁴ as specified under the Law Reform (Marriage and Divorce) Act, 1976 (Section 106 (2) of the LRA 1976). Thus, reconciliation is mandatory in the contested divorce cases of adultery, unreasonable behavior, desertion for a period of two years; and separation for a period of two years (The LRA, 1976, section 54)

This compulsory reconciliation for couples who wish to divorce under section 53 of the LRA, 1976 has been severely criticized. Some criticisms attacked the very basis of this concept that reconciliation does not work in the Malaysian society because most couples would have exhausted all avenues of reconciliation before they even petition for the divorce (Mimi Kamariah, 1999, Round Table Discussion, 2009). The couple when they are referred to the reconciliatory bodies, like, marriage tribunal, already made up their mind to dissolve their marriage. Thus, any effort to repair the relationship between them does not work anymore.

ii. Legal Aid Act, 1971

By way of an amendment to the Legal Aid Act, 1971, a Mediation Unit was introduced in 2006 in the Malaysian Legal Aid Bureau. Part VA of the Act deals with provision of mediation services. In September 2006, the Legal Aid Bureau appointed twenty four mediators from its pool of paralegals, sixteen of whom are women (Faridah Abraham, 2009). Majority of the cases handled by the Bureau are matrimonial matters such as, maintenance of spouses or children, distribution of matrimonial property, claim for *mut'ah* and divorce. The introduction of the mediation service at the Legal Aid Bureau leads to a large number of cases settled through mediation.

Section 29B of Legal Aid Act, 1971 provides that any person, who is a party to a dispute which is the subject of, or which is related to any proceedings specified in the Third Schedule, may refer the dispute to a mediator. This means that any subject matter as provided for in the Third Schedule can be mediated upon by the in-house mediator of the Bureau. Examples of

proceedings under the Third Schedule are maintenance, custody, divorce and harta sepencarian. Section 29(A) (2) of the Act states that each mediation session shall be conducted by one or more mediators. At the Bureau with the composition of mediators of whom the female mediators outnumbering the male mediators, there is a likelihood of a mediation session being comprised of both the female and male mediators (Faridah Abraham, 2009).

It is said that there is the need for the Bureau to enhance the knowledge and skills of the mediators which would definitely require proper and adequate training. According to Faridah Abraham (2009) the paralegals appointed have undergone training in mediation which was conducted by Singapore and New Zealand mediators. Furthermore, there is also the need for the mediators to be trained in the field of psychology or social sciences. Faridah (2009) also emphasised on the importance to change the mindset of those related officials such as, the legal officers, the paralegals, the judiciary and the legal fraternity as a whole. At present, mediation at the Bureau has been well accepted by the public as can be seen from the increasing trend shown by the statistics of cases mediated from 2006 to 2008. Discussion below focuses on the *sulh* provision of the Islamic Family Law Act/Enactment.

iii. Islamic Family Law Act/Enactment

The provisions relevant to *sulh* are contained in section 47 (5) and 48 of the Islamic Family Law (Federal Territories) Act, 1984. According to section 47(5):

“Where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall, as soon as possible, appoint a conciliatory committee consisting of a religious officer as Chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the committee.”

The above provision illustrates that in the case of contested divorce, a religious officer will be appointed to chair a conciliatory committee. The word ‘religious officer’ is not defined by the Act. However, in practice the Chairman is usually the Head of Family Counseling and Development Unit or the Head of Registration of Marriage, Divorce and Revocation Unit in the Department of Islamic Religion of Selangor. In 1988, the Melaka Syariah Court decided that a reconciliation conducted by the army religious officer was valid. (*Abdul Razak v Siti Jamah* (1988) 7 JH 84). In other words, the judge in this case held an opinion that an army religious officer fell within the ambit of ‘religious officer’ provided by section 47 of the State Islamic Family Law Enactment.

The Chairman is assisted by representatives of the husband and the wife who are usually their relatives. In the event of unavailability of relatives, the court will appoint respected people in the community such as *imams*, to represent the parties in dispute. The representatives will be guided by the court on the conduct of the conciliation. The committee is given six months to settle

the case (Section 47 of the IFLA, 1984). If the settlement could not be achieved or the court is not satisfied with the performance of the committee, another committee will be appointed. Parties that are successfully reconciled will resume their conjugal relationship and the court will dismiss the divorce application. However, if reconciliation failed, the committee will issue a certificate to that effect to the court. The court will ask the husband to pronounce one *talaq*. If the court is unable to procure the presence of the husband, the case will be referred to *hakam* (Section 47 of the IFLA, 1984). The committee appointed under this provision may make suggestion as the committee thinks fit regarding maintenance and custody of the minor children (Section 47 (11) of the IFLA 1984).

The implementation of *sulh* in the form of *tahkim* is sanctioned by section 48, which provides that if the court is satisfied that there are constant quarrels between the parties to a marriage, the court may order the appointment of two *hakam*, one to act for the husband and another for the wife. The authority for this provision is derived from the Qur'an, al- Nisa': 35, which provides to the effect:

"If you fear a breach between them (the man and his wife), appoint two arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All knowing, well Acquainted with all things".

As discussed above, section 47 (5) provides that *hakam* may also be appointed if the conciliatory committee fails to reconcile the parties in a contested divorce and subsequently, in the event where the husband could not be ordered to pronounce *talaq* in court.

iv. Syariah Court Civil Procedure (Selangor) Enactment, 2003

By virtue of section 99 of the above Enactment, any of the parties to a proceeding may convene *sulh* at any stage of the proceeding in order to resolve their dispute according to the established rules and procedure. In the absence of such rules and procedure, they can resort to *hukum syarak*. It is presumed that judges are encouraged to conduct *sulh* if they feel that there is possibility of reconciliation among the parties. It can be seen that in this situation, judges play an active role to effect mediation. The involvement of judges through *sulh* with parties is highly needed in cases classified as urgent or chronic.

The role played by the Syariah Counsels in effecting *sulh* is illustrated by the case of *Zailan bt Mohamad v. Mohd Ariff b. Ali*.⁵ The plaintiff and the defendant married in 1980 and went to further their studies abroad. Upon completion of their study, they came back to Malaysia. They were blessed with four children. The defendant failed in his responsibility to maintain the plaintiff and their children. The plaintiff also found out that the defendant was involved with another woman and for the past three years, they had ceased their relationship as husband and wife. Unable to bear with the circumstances

anymore was the key factor that caused the plaintiff to apply for *fasakh* in court. During the trial, both counsels advised the plaintiff and the defendant to settle their dispute through *sulh*.

As a result, the disputants opted for a settled divorce and mutually agreed that;

- The custody of children is given to the plaintiff.
- The defendant pays RM1500 per month for maintenance of the children.
- The plaintiff waives her rights to *muta'ah* and *'iddah* maintenance.
- The matrimonial home is sold and the profit divided equally between them.

The above case shows that Syariah Counsels can play an active role in encouraging settlement of dispute by *sulh*. They can advise their clients to opt for *sulh* either at the initial stage of the case or during the trial itself provided before the judgment is made. Amicable settlement should be resorted in cases that involve high risk of conflicting interest and animosity among the disputants like what happened in the above case.

Section 94 of the Enactment 2003 provides for the recording of settlement reached in any proceeding including *sulh*. According to this section, settlement agreed by *sulh* will be recorded:

“Where by agreement of the parties an action has been settled, the Court may, at any time by consent of the parties, record the fact of such settlement with the term thereof. The record of settlement shall afford as a defense by way of *res judicata* to subsequent proceeding.”

The similar provision is seen reiterated in section 131 of the Enactment 2003. This section provides for Consent Judgment. According to section 131 of the Enactment, judgment based on consent or agreement of the parties, including parties in *sulh*, may be recorded by the Court at any time.

Challenges and Future of Child Custody Mediation in Malaysia

There are matters that need to be thought seriously should mediation in custody dispute to be introduced in Malaysia. First of all, it is suggested that court annexed mediation be introduced in the Civil Courts. Currently, *sulh* is only introduced at the Syariah Court. For this purpose, legislation needs to be introduced to empower judges to order parties to go for mediation. Perhaps, we can start by mandating mediation in family disputes since it is the most suitable dispute for mediation especially relating to child. Thus, it is necessary, to introduce or to amend relevant legislation in order to facilitate the use of mediation in Malaysia. There should be rules drafted to govern the practice of mediation, such as, a code of ethics and complaints procedures, rules for privilege and confidentiality and etc.

Mediation should be conducted by suitably qualified and experienced mediators thus; there is a need for mediation trainings to train the mediators. A senior Judge, J. Clifford Wallace in a two-day seminar said that “education of both lawyers and judges, especially in learning mediation skills, either as a mediator or mediation-lawyer, could not be over-emphasized (The Malaysian Bar, 2010).” He further said “law schools worldwide spent a lot of time teaching how to litigate and very little on how to mediate.” In order to have qualified and skilled mediators, there is a need to set up a body that handles the certification of mediation practice. For this purpose, it is suggested that the government should make an allocation/fund for setting up of mediation centres as well as mediation training centres in Malaysia. Accreditation of mediation services is the aspect that should be considered by the government for monitoring the quality of mediation services in Malaysia.

There should be rules of confidentiality to gain the confidence of the parties to mediation for them to enter into the session without fear of the content of the meeting being shared with the other party. It is also to protect the parties as well as the mediator of what they have said in mediation sessions. Thus, law needs to be introduced on statutory protection and immunity for mediators and confidentiality.

To ensure that mediation session is conducted comfortably and successfully, there is a need for properly designed mediation facilities attached to courts, such as, mediation rooms with suitable furniture, round tables, whiteboards, comfortable chairs, waiting areas and air-conditions. This is important because an environment promoting confidence, security and privacy is essential for the parties to deliberate their disputes towards resolution. Finally, as the awareness of mediation among the public in Malaysia is still low, it is thus, suggested to the government and the relevant NGOs to organize road shows, seminars, conference, workshops to disseminate to the public about the use of mediation in resolving disputes and its benefits/advantages.

Perhaps, as an example, we can look at the practice of mediation in Singapore, our neighboring country. In Singapore, there are two main types of mediation practice; court-based mediation and private mediation. Court-based mediation is mediation that takes place in the courts after parties have instituted litigation proceedings. This type of mediation is mainly carried out by the Subordinate Courts and is coordinated by the Primary Dispute Resolution Centre (PDRC). While private mediation is spearheaded and mainly conducted by the Singapore Mediation Centre (SMC). SMC is a non-profit organization under the Singapore Academy of Law. It is said that about 75 % of the cases mediated in SMC result in settlement and more than 90% of these cases are settled within a day. Apart from the two types of mediation practice, there is another one which takes place in government agencies and industry-based bodies such as, the Community Mediation Centres, Tribunal for the Maintenance of Parents and the Consumers' Association of Singapore.⁶

Conclusion

Mediation is a tool, associated with certain core values, necessary elements, advantages and limitations. It is generally agreed that despite its limitations, the advantages of mediation clearly prevail over the potential harms, especially in custody dispute cases. Except in certain situations, such as, domestic violence and child abuse, mediation is the best way to resolve child custody disputes. As stated earlier, the informal and flexible nature of the mediation process enables the parents to address issues that might not be raised in a more formal dispute settlement approach such as court. The court cases discussed earlier show that litigation could have been avoided as the judgement by the court is not always to the satisfaction of the parties involved. Mediation should be offered to the parties so as to arrive at the amicable settlement for the best interest of the child. It is hope that Malaysia will consider to introduce mandatory mediation in order to ensure the welfare of the child is well served. It is also hope that the suggestions presented in this article will be taken up by the relevant authorities in introducing mediation in Malaysia, especially in custody disputes.

References

- Emery, Robert E, David Sbarra and Tara Grover, (2005). *Divorce Mediation: Research and Reflections*. Family Court Review 43(1): 22-37
- JKSM, *Perlaksanaan Sulh di Mahkamah Syariah*. (2003). Jurnal Hukum. 16 (2), 65.
- Lawyers.com. Retrieved from <http://family-law.lawyers.com/child-custody/Benefits-of-Child-Custody-Mediation.html>, viewed on 16 September 2010
- Menkel-Meadow, Carrie J. (1991). *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR*. Florida State University Law Review. 19; 1-46.
- Mimi Kamariah Majid. (1999) *Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal, p. 188
- Pearson, Jessica and Nancy Thoennes. (1989). *Divorce Mediation: Reflections on a Decade of Research*. In *Mediation Research: the Process and Effectiveness of Third-party Intervention*, eds. Kenneth Kressel and Dean C Pruitt. San Francisco: Josser-Bass.
- John Wade. (1994). "Forms of Power in Family Mediation and Negotiation." Retrieved from http://epublications.bond.edu.au/law_pubs/106 viewed on 28 October 2011.
- Syed Khalid Rashid. (2000). *Alternative Dispute resolution in Malaysia*. Kuala Lumpur: Kulliyah of Laws, IIUM.
- The Malaysian Bar. (2010). *The Case for Mediation*. Retrieved from http://www.malaysianbar.org.my/mediation/the_case_for_mediation.html viewed on 12 October 2010.
- Vincent, Maggie. (1996). *Mandatory Mediation of Custody Disputes*. Vermont Law Review. 20: 256-297
- Zaki Azmi. (2010). *Overcoming Case Backlogs: The Malaysian Experience*. Retrieved from <http://202.75.7.131/portal/images/pengumuman/YAA.pdf> viewed on 27 October 2011.
- Lawyers.com. Retrieved from <http://family-law.lawyers.com/child-custody/Benefits-of-Child-Custody-Mediation.html>, viewed on 16 September 2010

Laporan Perbincangan Meja Bulat. (2009, May). *Keberkesanan Badan Pendamai di Bawah Seksyen 106, Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 (Akta 164)*, Kuala Lumpur.

Faridah Abraham. (June, 2009). *Realizing the Potential of Women in Building Effective Family Mediation and Community Mediation Programmes*. Paper Presented at the Workshop on Empowering Communities through Mediation in Malaysia, Kuala Lumpur, Vistana Hotel.

Endnote:

¹ See, <http://www.childcustodycoach.com/mediation.php>, viewed on 15 September 2010

² See Civil case 179/97 Petaling Jaya Lower Syariah Court

³ The 'mediation' and 'conciliation' are sometimes used interchangeably and synonymously. 'Conciliation' is the term used before the term 'mediation' becomes popularly used. In conciliation, conciliator appointed plays more pro-active role as compared to mediator who acts only as a facilitator and does not have the authority to give advice or to make any suggestion to the parties.

⁴ Reconciliation bodies are institutions, such as, church and temple that have been appointed to reconcile the estranged couple to return to live as husband and wife again.

⁵ Unreported civil case No. 12/2000, Syariah Court of Petaling Jaya

⁶ The information about mediation practice in Singapore is retrieved from <http://www.mediation.com.sg/intro.htm> viewed on 29 October 2011.