

Frequently Asked Questions (FAQs)

Status, Rights and Responsibilities: What Happens When A Spouse Converts To Islam

by

The Joint Action Group For Gender Equality (JAG)

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All Women's Action Society
(AWAM)



Malaysian Trade Union Congress
- Women's Committee (MTUC)



Sisters In Islam (SIS)



Women's Aid Organisation
(WAO)



Women's Centre For
Change, Penang (WCC)



Women's Development
Collective (WDC)

The Joint Action Group for Gender Equality¹ (JAG) has been engaged in the issues of violence against women and gender equality for more than 20 years. This includes safeguarding rights within the family.

In recent years a number of events have struck at the building blocks of national unity: the family unit, inter-religious relations and the Federal Constitution. The most notable relates to the conversion of a family member to Islam, which leaves both the converting person and the non-converting family members in situations where their legal rights are not clear.

In 2006, a representative of the Attorney General's Chambers announced in the United Nations that they were studying amendments to the Law Reform (Marriage and Divorce) Act 1974 (the Act). Among other issues, the amendments are to address the rights and obligations of family members following a family member's conversion to Islam.²

Judgments delivered by the courts in this area have been conflicting. This creates social uncertainty, and many families are torn apart by these disputes. Bearing that in mind, we now appeal to you, the honourable members of the Cabinet and Parliament not to lose sight of the following when you consider amendments to the Act:

- (a) Nothing can be closer to a person's heart than his or her family;
- (b) As a result, nothing causes more trauma and emotional stress than to have his or her family torn apart;
- (c) The objectives of the law should be to do justice and to lessen such trauma; and
- (d) Laws should inspire the confidence of citizens. They must not feel marginalised and there cannot be the perception of bias in the law. Only then will citizens appeal to the law and the courts to resolve conflicts.

Yang Berhormat, as lawmakers, the lives and happiness of Malaysian citizens are in your hands. You have the obligation and responsibility to ensure that the Federal Constitution remains the supreme law of the land, and that all laws comply with it. You also have the obligation and responsibility to make laws that allow Malaysian citizens to exercise their Constitutional rights, and to live freely and securely as individuals and within their families.

¹ Previously known as Joint Action Group Against Violence Against Women. The members remain the same: All Women's Action Society (AWAM), Malaysian Trade Union Congress – Women's Committee (MTUC), Sisters In Islam (SIS), Women's Aid Organisation (WAO), Women's Centre For Change, Penang (WCC) and Women's Development Collective (WDC).

² Paragraph 37 of the summary record of the dialogue between the Malaysian Government and the CEDAW Committee on 24th May 2006 pursuant to the 35th session of CEDAW Committee to consider the Initial and Second Periodic Reports by the Malaysian Government on the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (CEDAW/C/SR. 732).

FAQs

Q1: What issues arise when a non-Muslim family member converts to Islam?

A: They include:

- i) the status of his civil law marriage;
- ii) divorce;
- iii) maintenance;
- iv) division of assets;
- v) custody and guardianship of children; and
- vi) inheritance of assets.

Q2: Is a civil law marriage automatically dissolved when one spouse converts to Islam?

A: No. Conversion to Islam, by itself, cannot dissolve a civil law marriage. Only civil courts can dissolve such marriages, not Syariah courts.

Q3: Who can petition for divorce under civil law?

A: Only the non-converting spouse can apply for divorce under civil law. The law should be amended to allow either the non-converting spouse or the converting spouse to apply for divorce in the civil court.

Q4: What happens if the non-converting spouse does not apply for divorce?

A: The civil marriage continues to exist.

Q5: When a civil law marriage breaks down because one spouse converts, which law applies?

A: The civil law still applies because the marriage was registered under civil law. So issues of divorce, maintenance, custody and guardianship of children, and division of assets must also be decided under civil law.

Q6: Can the non-converting spouse apply for divorce immediately?

A: No. The divorce petition can only be filed 3 months after the date of conversion.

Q7: Is anyone legally required to inform the convert's family members of the conversion?

A: No. However, the convert should be legally required to notify his spouse (if married) and his immediate family members.

The religious authorities should be legally required to ensure that these family members are notified immediately upon conversion.

Q8: When one spouse converts to Islam, does it affect the rights and responsibilities of the spouses under civil law?

A: No. The rights and responsibilities of the spouses continue under civil law, e.g. if the husband converts, he must still continue to support the family financially.

Q9: Why must the rights and responsibilities of the spouses continue under civil law?

A: This is because the spouses agreed upon certain rights and responsibilities when they married under civil law. One spouse cannot be allowed to change the terms of the marriage contract without the other spouse's agreement.

Q10: What can a non-converting wife claim in a divorce?

A: She can claim:

- i) Maintenance for herself and the children;
- ii) Custody and guardianship of the children; and
- iii) Division of matrimonial assets.

Q11: Is it true that because her husband converted, she is entitled to maintenance for only 3 months after the divorce?

A: No. Many converting husbands think so because under state Islamic law enactments where both parties are Muslims, husbands are only required to provide shelter and maintenance to their wives for 3 months after divorce.

However, the civil courts have consistently dismissed this argument because civil law applies as long as one party is non-Muslim³.

Q12: For how long is a non-converting wife entitled to spousal maintenance?

A: Generally, she is entitled to spousal maintenance until she remarries or dies.

Q13: If a wife converts, can her disabled husband claim spousal maintenance?

A: Yes. Under civil law, the court can order a converting wife to pay maintenance to a husband who is physically or mentally unable to work. This is different from state Islamic law enactments where a Muslim wife never has to pay maintenance to her Muslim husband.

Q14: What is the difference between guardianship and custody?

A: Guardianship is the legal right to make decisions with long-term effect in relation to the children, e.g. welfare, education and religion. Custody relates to the daily care regarding the upbringing of the children.

Q15: When a parent converts, who should get custody of the children?

A: The parent who can take better care of the children should get custody. The best interest of the child is the most important factor.

Conversion should not affect custody decisions. In a recent decision, Justice Faiza Tamby Chik gave custody over 2 converted children to the non-converting mother⁴.

³ Tan Sung Mooi v Too Miew Kim [1994] 3 MLJ 121 (Supreme Court); L Ganesan v A Letchimidevi as reported in the New Straits Times on 14.2.2007 (a Court of Appeal decision).

⁴ Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah [2004] 3 CLJ 519 (subject to appeal to the Court of Appeal).

Q16: When a parent converts, who is the guardian of the children?

A: Under civil law⁵, both parents are equal guardians of the children. Conversion of one parent does not change this. Being equal guardians means that both parents must jointly agree on important decisions, including their children's religion.⁶

Q17: Can the converting parent convert the children without the permission of the other parent?

A: No. However, recent judgments have made the position unclear.⁷

To allow the converting parent alone to choose the children's religion would mean depriving the other parent of her equal right to guardianship.

Q18: Is there a way to ensure that children are converted to Islam only when both parents consent?

A: Yes. The state Islamic law enactments should respect the equal and joint rights of both parents. They must not allow children to be converted to Islam unless both parents consent⁸.

Q19: What are the concerns with allowing only one parent to change the children's religion to Islam?

A: One concern is that the other parent's equal right to guardianship is violated. Another concern is that once the children are converted to Islam, they will have extreme difficulty changing to another religion if they wish to do so when they grow up.

⁵ Section 5, Guardianship of Infants Act 1961.

⁶ Article 12(4), Federal Constitution.

⁷ See Shamala a/p Sathiyaseelan v Jeyaganesh a/l C. Mogarajah [2004] 2 CLJ 416. Cf. Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors [2003] 5 MLJ 106.

⁸ Section 117 of the Administration of Islamic Law (State of Selangor) Enactment 2003 states: "Seseorang yang tidak beragama Islam boleh memeluk agama Islam ... (b) jika dia belum mencapai umur lapan belas tahun, ibu dan bapa atau penjaganya mengizinkan pemelukan agama Islam olehnya." (emphasis added)

Q20: What if the parents do not jointly agree on the children's religion?

A: The children themselves must determine their religion upon reaching 18 years of age. In the meantime, no conversion should take place.

Q21: Who is responsible to pay maintenance for the children?

A: The civil court can order either parent to pay maintenance for the children. The maintenance order can be varied as the children grow up and their needs change.

Q22: Must a converting parent support his illegitimate children?

A: Yes. Legitimacy and change of religion do not affect the issue of maintenance. It must be paid so long as the children are under 18 and need financial support.

Q23: Which court has jurisdiction over family disputes when one spouse converts to Islam?

A: Only the civil court should have jurisdiction since the marriage was registered under civil law.

However, recent cases have suggested that the non-converting spouse should seek relief in the Syariah courts because the civil court has no jurisdiction. These decisions have made the situation unclear.

Q24: Why are these court decisions problematic?

A: They are problematic because the non-converting spouse is left with no court to go to for relief. This is because recent court decisions have suggested that the civil court has no jurisdiction, while the Federal Constitution clearly provides that the Syariah courts only have jurisdiction over Muslims.

Q25: What is the Federal Constitution?

A: The Federal Constitution is the supreme law of the land. This means that all laws must comply with it and all Malaysians must follow it.

That is why "Upholding the Constitution" is stated in the Rukunegara, and all judges and parliamentarians also take an oath to uphold it.

Q26: When a person converts to Islam, are his non-converting beneficiaries affected?

A: Yes. The non-converting beneficiaries cannot inherit under civil law because Section 2 of the Distribution Act 1958 provides that the Act does not apply to the convert's estate.

If the convert dies without a will, the non-converting beneficiaries cannot inherit according to faraid principles⁹ because non-Muslims can only inherit where there is a will. Even then, they can only inherit one-third of the convert's estate.

For example, non-converting aged parents can only inherit if there is a will. So, it is important to protect the rights of beneficiaries who should continue to be able to inherit regardless of their religion. After all, each religion urges people to care and provide for their families.

Q27: Can a non-converting beneficiary inherit if she is named by a convert in his insurance policy and nominated under the EPF scheme?

A: No. Under the law, a convert's EPF and insurance benefits must be distributed according to faraid principles.

These laws must be amended so that a non-converting beneficiary will be able to inherit a convert's benefits.

For more detailed information, please refer to our memorandum titled "Safeguard Rights Of Wives And Children Upon Conversion Of Husbands To Islam".

⁹Islamic principles of asset distribution.