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## HADHANAH; A CASE STUDY IN KELANTAN

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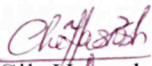
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## AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my work except for quotations and summaries which have been duly acknowledged.

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In the name of Allah, The Most Gracious, The Most Merciful, The Compassionate, Praise to be Allah, Lord Of the Universe and Peace and prayers be upon His Final Prophet and Messenger, Muhammad SAW.

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I hope, this project paper can give information to the requirement parties.

Wassalam.

## *ABSTRAK*

Anak merupakan anugerah Ilahi yang berharga. Oleh itu adalah menjadi satu kewajipan kepada kedua-dua ibubapa untuk menjaga kebajikan dan kemaslahatan anak-anak. Kajian ilmiah yang dipilih oleh penulis adalah untuk membincangkan kebajikan anak melalui hak hadhanah. Penjagaan kebajikan anak merangkumi segala aspek kehidupan termasuk makan, pakaian, tempat tinggal, pendidikan dan sebagainya. Di dalam Undang-Undang Keluarga Islam Negeri Kelantan 2002, kebajikan bukanlah faktor utama untuk melayakkan seseorang untuk menjadi penjaga kepada seseorang kanak-kanak sebaliknya kelayakan untuk menjadi penjaga yang diutamakan. Kajian ini lebih merujuk kepada kajian perpustakaan (library research) dan penghakiman kes. Hasil daripada kajian ini, penulis dapat menyimpulkan bahawa hak penjagaan anak bukanlah suatu yang boleh dipandang remeh sebaliknya ia memerlukan kepada seseorang yang benar-benar berusaha untuk menjaga kanak-kanak tersebut dalam segala aspek kehidupan.

### *ABSTRACT*

Child is a valuable gift from God to parents. Therefore, it is a responsibility of the parents to take care of the needs of the kids. This research project chosen by the writer is to discuss about the welfare of children or hadhanah. This responsibilities including all aspect of life such as food, clothes, home, education and so on. According to Family Law in Malaysia, those who are can fulfill the criteria that have been stated. Based on Kelantan Islamic Family Law Enactment 2002, the needs is not the main factor for someone to be a guardian for the child but the expectation to be a guardian is the most important one. This research is mostly regarding to the library research and cases judgments. From this research, writer can make the conclusion that the welfare of children cannot take easy. Even though, the realities to become a guardian are not a simple action but it needs someone who is really care of the needs of children.

## ملخص البحث

الأولاد هم عطية أو هبة من الله سبحانه وتعالى. وبسبب ذلك استوجب على الوالدين المحافظة عليهم. وهذا البحث العلمي التي اختارتها الكاتبة لتبحث أو لتتكلم عن صحة الأولاد في حق الحضانة. وحراسة الأولاد أو حق الحضانة تتضمن كل جوانب الحياة والمضمون فيه سواء كان في المأكولات والملبس والسكن والتربية وغيرها. وفي دستور الأسرة الإسلامية بولاية كلنتانية في سنة ٢٠٠٢، الأولاد ليس لهم جانب الأولى للملائم الفردية للمحافظة على الأولاد ولكن الملائم لإيجاد حراسة الأولاد للأفضل. وهذا البحث يقوم على المنهج المكتبي وتناول القضايا الحكومية. النتيجة من هذا البحث، الكاتبة تلخص ان حق الحضانة هو ليس الشيء لينظر إلى هذه المسألة هينة ولكن يحتاج الفرد إلى رعاية الحقوق لحفظ الأولاد في كل جوانب الحياة.

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# CHAPTER

# 1

## CHAPTER ONE

### 1.0 INTRODUCTION

A young child is physically incapable of caring for itself and mentally incapable of reaching reasoned decisions about its own future. Others must therefore assume the burden of care and of decision taking for the child. This responsibility generally rests on the parents who is said to have 'parental rights' over the child. Parental rights means all powers that parents have over their child including custody, care and control.

When there is a separation in a marriage, one vital question arises: to who is the child to be placed with. Issues such as deciding how much control the responsible person has over the child and what rights. If any others have to see the child follows. Disputes as to who should look after the child are commonly called custody or hadhanah disputes while those about the rights to see the child are known as access disputes.

### 1.1 BACKGROUND OF RESEARCH:

The Holy Al-Quran in Surah Al-Baqarah 2:233 stated:

"والوالدات يرضعن أولادهن حولين كاملين لمن أراد ان يتم الرضاعة، وعلى المولود له رزقهن وكسوتهن بالمعروف، لا تكلف نفس الا وسعها، ولا تضار والدة بولدها ولا مولود له بولده."

*The mother shall give suck to their offspring for whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable term. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child, or father on account of his child.*

In Malaysia, it has a systematic law in relation to *hadhanah* or custody of children. In Civil Law the statute that governs this law is Guardianship of Infants Act 1961. Besides that, custody of children is also has covered in Law Reform (Marriage & Divorce) Act 1976, Adoption Act 1952 and Education Act 1961. In Islamic Family Law Enactment in Malaysia also deals with *hadhanah* and other things related to it.

The terms 'guardian' has various meanings. A guardian in Muslim marriage is continued to the male relatives of a girl who wishes to marry.

A meaning of dealt in this academic paper is in relation to the adoption of children. A guardian is one who has powers over a child's upbringing, care, discipline and religion.

Custody refers to the state of having certain rights over a child, which rights may include care and control of the child. Parents who are divorced may be granted joint custody. In which case both parents have a say in the child's upbringing but one of them has physical custody of the child.

Usually, the right of *hadhanah* is given to mother when the child age is under seven years old and given to father or mother depending on the choice of the child eight years old and above. In this age, the child can think for himself if he or she is whether to live with the mother or father.

## **1.2 DEFINITION OF HADHANAH**

Hadhanah is defined as the maintenance of a child with regards to his or her welfare. According to fiqh, *hadhanah* means taking care at and educating child who has not reached the age of mentally and of unsound mind handicapped.

### 1.3 PROOF OF HADHANAH

According to evidence with regards to hadhanah, Rasullullah has handled hadhanah cases and given the right to the mother of the child. A mother normally has the right to the custody of her child because she is better custodian than a father and can give more care and love to her child and it also can help for growing up the child.

Al- Hadith from Rasullullah said:

*“ A woman said: ‘O Prophet my womb is a vessel to this son of mine, my breasts a water-skin for him and my lap is a refuge for him, yet his father has divorced me and wants to take him away from me.’ The Prophet said: ‘ You have more right to him as long as you do not marry.”*

Imam Shafi’e referring to the Hadith gave following rationale for preferring the mother in custody disputes:

*“Thus when a child has not reached the age of discretion, the mother has a greater right to his upbringing inasmuch as this is a question of the right of the child not the question of the degree of love, attachment and affection of the parents.”*

### 1.4 AIM OF RESEARCH

In this research, the study about the hadhanah cases is confined to Kelantan. Beside that, I can study about the hadhanah in Islamic Family Law Enactment at Kelantan, the conditions to be *hadhinah*, the provisions about the custody of children in Islamic Family Law Enactment in Kelantan and also the duration of hadhanah. This paper will also show the statistics of hadhanah cases in Kelantan.

## **1.5 OBJECTIVE OF RESEARCH**

1. The main objective of this research is to study about the Hadhanah cases in Kelantan.
2. To study about the procedure of application of Hadhanah.
3. To study the judgments of Hadhanah cases in Kelantan.
4. Research the right of person who want to be a hadhinah.
5. Analysis of data according to Hadhanah cases.
6. To know about the Islamic Law Enactment in Kelantan related to Hadhanah cases.

## **1.6 SCOPE OF RESEARCH**

The scope of this research is confined to the state of Kelantan. The paper also will reveal the sentiment of the count in granting hadhanah and what are the conditions that the count will consider before granting the right to guardianship.

## **1.7 RESEARCH METHODOLOGY**

In order to measure the hadhanah cases in Kelantan, I will make a study to analysis how many hadhanah cases at Mahkamah Tinggi Syariah Kota Bharu.

Besides that, I will do a survey to libraries to get important and relevant information about hadhanah cases including books, thesis before and others.

I will conduct interviews with Syariah Judges or any person who are related to this case to get more information. I also try to meet and speak with parties in hadhanah case.

## 1.8 LITERATURE REVIEW

Azhari Mamat (Hadhanah) Siri An-Naim Bil 109 (1999) from Jabatan Hal Ehwal Ugama Islam Kelantan, described that hadhanah is the act of taking care of children with their maintenance and educating them. According to fiqh, hadhanah means the taking care of educating them who are not *mumayyiz*, weak, mentally weak and unsound mind and their physical and spiritual welfare. It includes giving food, clothes and shelter.

According to Section 5 Guardianship of Infants Act 1961, father has the right to guardianship of the children and their properties. In Section 88 (3) *Law Reform (Marriage and divorce) Act 1976 (Act 164) & Rules*; There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. It means here, the children's under 7 years old must live with their mother. This is because in this age, they are needed more loves and loving care from their mother.

In Kelantan Islamic Family Law Enactment 2002 stated that:

Hadhanah is:

A person to whom belongs the upbringing of a child, shall be entitled to exercise the right of hadhanah if:

- a) She is Muslim;
- b) She is of sound mind;
- c) She is of an age that qualifies her to bestow on the child the care, love and affection that the child may need;
- d) She is of good conduct from the standpoint of Islamic morality and; or
- e) She lives in a place where the child may not undergo any risk morally or physically.

# CHAPTER

# 2

## CHAPTER TWO

### HADHANAH IN MALAYSIA FAMILY LAW

#### 2.1: INTRODUCTION

Malaysian has systematic roles about children cares such as Guardianship of Infants Act 1961. Otherwise, that thing also includes in Law Reform (Marriage And Divorce) Act 1976, Adoption Ordinance 1962 and Education Act 1961. Muslim's families enactment in Malaysian countries also provided about this thing.

#### 2.2: DEFINITION OF 'CUSTODY' AND 'GUARDIANSHIP'

To giving more meaning about the guardianship of infants, the two important terms that we should know about that things are custody and guardianship. It is important to us to know differences between custody and guardianship. This is because the main point of thing paper work is about guardianship and includes on children's custody and also children's cares.

##### **Custody**

According to Black's Law Dictionary, custody means: *the care and control of a thing or person for inspection, preservation or security.*<sup>1</sup>

A meaning of dealt in this term is including care and control to who are in their custody. The custody can get with law process.<sup>2</sup>

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<sup>1</sup> Bryan A.Garner.*Black's Law Dictionary*. Seventh Edition. p.390

<sup>2</sup> K.J. Aiyar's.1998.*Judicial Dictionary*. The Law Book Co. (p) Ltd.p. 359

## **Guardian**

According to Black's Law Dictionary, guardian means: one who has the legal authority and duty to care for another person or property especially because of the others infancy, incapacity or disability.<sup>3</sup>

A guardian may be appointed either for all purposes or for specific purposes.

## **Guardianship**

According to dictionary, guardianship is defined as:-

*"Guardianship over a minor is of two kinds: Wilayat, or guardianship of the property and education and marriage of the ward, and hizanat, or guardianship over the rearing and bringing up of the child."*<sup>4</sup>

Guardianship of minor are either so by natural right or by testament, or by appointment by a judge. The guardianship of a minor for the management and preservation of his property devolves first on his or her father, then on the father's executor, then on the executors, next on the ruling power of his representative, the Qadhi or judge

In default of father, father's father and their executors, as above all of who are termed near guardians, it rests in the Qadhi to appoint a guardian of an infant's property. The other paternal kinsmen who are termed remote kindred, and the mother succeed according to proximity, to guardianship of an infant for the purpose of education and marriage, they have no right to be guardians of his property: unless appointed to be so by ruling authority, or in original proprietors will proved by competent witnesses. The mother right of guardianship is, however forfeited upon her being remarried to a stranger, but regained when she is divorced by him, and has again become a widow.

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<sup>3</sup> Bryan A.Garner.*Black's Law Dictionary*. Seventh Edition.p.712.

<sup>4</sup> Tanzeem Fatima,Aligarh.*Islamic Law and Judiciary*. Muslim University.p.150

In default of the mother as well as of the paternal kindred of a minor, his maternal relations are, according to proximity, entitled to guardianship for the purposes of education and marriage, and not for management of his property. Unless so appointed in the late owner's will or by the Qadhi.

The general rule is that a guardian, executor, or who has take care of the person and property of a minor, can enter into a contract which is or likely to be advantages and not injurious to his ward.<sup>5</sup>

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<sup>5</sup> *Ibid.*

### 2.3: HADHANAH IN ISLAMIC FAMILY LAW IN MALAYSIA

Over the countries in Malaysia, provided about the custody welfare in Islamic families Enactment. To the Muslim, the Syariah Courts have their right to manage and handle Hadhanah cases.

As a civil court, in Islamic Act also provided that the children's welfare is the basic and a ground of Hadhanah. Based on Islamic Family Law (Federal Territories) Act 1984 in Section 86(3) that cannot accept as children guardianship are already ensure if they live their mother. But it's not good to disturbing children life with changes their custody.

Meanwhile in section 86(4) Islamic Family Law (Federal Territories) 1984 provides for situations where there are two or more children of a marriage. In this event, the court should not be bound to place both or all in the custody of the same person but should consider the welfare of each independently.<sup>6</sup>

In Section 104 Islamic Family Law (Federal Territories) Act 1984, has its equivalent in section 100 of LRA. When considering any relating to the custody of any child, the court should, whenever it is practicable, take the advice from some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow the advice.<sup>7</sup>

In the case of *Wan Abdul Aziz v Siti Aishah*<sup>8</sup> there were two children of the marriage between the parties. The younger girl lived with her father and paternal grandmother after her parents were divorced. The elder girl lived with her mother and was cared for by her maternal grandmother. The mother applied for the custody of the younger girl who was four years old at that point of time. She was still single whilst the father had remarried. The Kadhi gave custody of the child to her mother. On appeal by the father, the Appeal Board set aside the order and held that the father should continue to have custody of the child. The Appeal Board noted that the child had lived with her paternal

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<sup>6</sup> Mimi Kamariah Majid.1998. *Family Law In Malaysia*. Butterwoth Asia.p.298.

<sup>7</sup> *Ibid* p 299.

<sup>8</sup> (1975) 1 JH 47.

grandmother. Because of this, it felt that it would seriously affect the child if she were to be separated from her grandmother. Besides, the basis and aim of custody is the welfare of the child who is to be looked after and this is the basic right of the child. This right too must be paramount to the right of the person who claims custody.

### **2.3.1: Persons Entitled To Custody Of A Child**

Not all person has qualification to be a children guardianship. In addition if that children's is still young and need a full attention from the guardianship for his or her good's life.

According to Malaysia Family Act, there have a few people who have qualification to be a children's custody:

- i) Children's Parent includes father's
- ii) Custody
- iii) Volunteer's society that has belongings in Act to be a guardianship
- iv) Somebody who belongings under Acts if that children is under their guardianship such in Section 3 in Children And Young Person's Act 1969.

### **2.3.2: The foremost guardian**

According to Section 5, Child Protection Act 1961, children's father is a genuine custody to their child and also their properties. Meanwhile in Section 88 (3), Law Reform of (Marriage & Divorce) 1976 says that children aged below 7 years old must live with their mother, this is because in this age, children needs attention and loves from their mother.

## 2.4: THE QUALIFICATION TO BE A GUARDIAN

### 1. Personality and guardian's attitude

Guardian's attitude will show the children's attitude under them. That's why it is important to have a good attitude for someone who wants to become custody.

In case *S v S*<sup>9</sup>, the child's mother have a homosexual habits also called lesbian. But their child is not having potential to be homosexuals. To avoid this problem and to protect that children's, the courts gives a custody belongings to their father's.

In *G v G*<sup>10</sup> case, the court says that a father's transsexual habits can give bad effects to their young daughters. In case, the court gave a custody belonging to their mother.

### 2. Good Material and Habitation

It is important to custody to give a good house to the children. It is very important to make sure that child growing up in good situation. Both of this material is very important to children's education and their life.

### 3. Age

In Section 4 (1) (a), Adoption Act 1952 stated that the husband and wife who take adopted child must 25 years old and above and differences their aged with the children is 21 years old<sup>11</sup>.

### 4. Gender

Gender also very important. In Section 4 (2), Adoption Act 1952 stated that if who want to take a son, they cannot take a daughter except they are given.

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<sup>9</sup> SvS [ 1954 ] 3 All ER 736; [ 1962 ] 1 All ER 33.

<sup>10</sup> GvG [ 1982 ] 12 Family Law 184.

<sup>11</sup> Ahmad Ibrahim.1997.*Family Law in Malaysia*, Butterworth Asia.p.54.

### **2.4.1: Custody Categories**

There are many custody categories that stated in Family Act in Malaysia.

### **2.4.2: The right guardian under law**

The right guardian under law is children father. If that children's have no father, custody belongings transferred to their mother or any person told by courts or both of them who is given custody's belongings together. Mother's to children aged below than 7 years old also can be a right custody to their child.

### **2.4.3: Testamentary guardian**

A custody that is testamentary by a children's parent before they died. That guardian is not exactly their family but somebody who are testamentary by them.

## **2.5: GUARDIAN APPOINTED BY COURT**

Courts allowed somebody who not father's or mother's to that child to applied to transferred the custody belongings to them. In case, the children's parents not constitute children's guardian before they died, but it's depend to applicant status either steps mother or steps father.

The Federal Court, referred to the case of *J v C*<sup>12</sup> on the welfare of children and took the view that:

*"The phrase 'first and paramount consideration' does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather than it must be the overriding consideration."*

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<sup>12</sup>*J v C* [1969] 1 All ER 788.

In the case, the child concerned was at the time of the custody application aged ten years. He was from the age of four days taken care of by English foster parents because of his mother's ill-health. When his parents returned to Spain, he followed them for 17 months. Due to his own ill- health he returned to England and stayed with his foster parents ever since. At the time of the application, his parents were living in Spain and his mother's health had been restored. They were in no way unfit to have the care and control of their child. The foster parents had six children but the child in question had no difficulties adjusting or integrating with the family. There was medical evidence that because of his strong relationship with his foster parents as parental figures and with other members of the family, that the chances of him making successful adjustment in Spain were slight. If he did not, the consequences for his future emotional stability and happiness were grave.

The trial judge granted care and control to the foster parents. The Court of Appeal affirmed the decision. On appeal, the House of Lords, dismissing the appeal, ruled that section 1 of the Guardianship of Infants Act 1925 applied to disputes not only between parents but between parents and strangers, and strangers and strangers. In applying the section, the rights and wishes of parents, whether unimpeachable or otherwise, must be weighed in their bearing on the welfare of the child, which was paramount, in conjunction with all the other factors relevant to the issue. Further, the trial judge had acted correctly and applied the correct principles when in accepting as a general proposition that it was for the child's welfare to be in the custody of unimpeachable parents, he declined to accept it as a general rule automatically and invariably.<sup>13</sup>

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<sup>13</sup> Anisah Che Ngah. 1995 *Skop dan Perkembangan Undang-Undang Kanak-Kanak*, Makalah Undang-Undang Memori 10 tahun Fakulti Undang-undang UKM, First Edition, UKM, p 25.

## **2.6: DUTIES OF GUARDIAN**

Guardian's is responsible to do a good job to make sure that the children cares.

### **2.6.1: Maintenance**

In section 92, Law Reform (Marriage & Divorce) 1976 stated that it is compulsory to parent to contract their children either under them or someone else.

In Section 93 (2) stated that the courts have a power to govern that children maintenance under men and under Subsection 2 stated about the powers of court to govern a woman to give maintenance to their child as they can do it.

In Section 3 Guardianship of Infants Act 1961 stated that a guardian must responsible to the children's health and education such in *Saraswathy v Palakrishnan*.<sup>14</sup>

### **2.6.2: Maintenance Managing**

Guardian's have responsible to take care and manage the children' maintenance. In Section 4, 14 and 15 in Children Protection Act 1961, giving a task, responsibilities and interdict to guardians into that children's maintenance. Meanwhile, in Section 16 stated that guardians compulsory give the patrimony maintenance when they need it.

### **2.6.3: Education**

Nowadays, education is most important thing to everybody. That's why to giving a good future to children's. In Section 22(1) Education Act 1961 stated that guardian are compulsory to give education to their child.

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<sup>14</sup>*Saraswathy v Palakrishnan* [1986] 2 MLJ 127 in Mimi Kamariah Majid, *Undang-Undang Keluarga di Malaysia*, Butterworth Asia, 1992, p.140.

#### **2.6.4: Self Protection**

Guardians should protect the children. The protection are includes physically and morals protection. Physically protection means giving a food, drink, house and so on. Meanwhile, moral protection means to avoid children from something that negatives such as drug abuse or other.

Let say that guardians failed to protect their children, they can punish for two years or not less than five thousand fine or both of them.<sup>15</sup>

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<sup>15</sup> Anisah Che Ngah, Opcit, p.31.

## 2.7: CRITERIA TO BE A GUARDIAN

### 2.7.1: Welfare of children

#### Introduction

Principle of welfare is accepted and announced by Courts in Malaysia and the main factors to decide the guardian's belongings. This items includes on Section 11 in Child Protection Act 1961, stated that parents must take care about children welfare.

Courts interpret that children welfare under section 11 as interminable guardianship; children needed like parent's loves, parent attitude, age and children's gender, custom and others.

According to the case *Loh Kon Fah v Lee May Lan*<sup>16</sup>, in this case, children age d between 3-8 years old have taking under their mother when their parents are divorced. This thing interminable until five years, then the father's applied to Courts to get guardianship belongings. In the High Court it was held that the expression 'welfare of the infant' set out in section 11 of the guardianship of Infants Act 1961 should be construed in the widest possible terms. The court should put itself in the position of a reasonable and wise parent and determine what would be best for the infants, not what a selfish parent wants the infants to have. Having regards to the circumstances of the case, the learned trial judge gave the custody of the children to the mother.

Meanwhile in *Myriam v Mohamad Ariff*<sup>17</sup> case, the fact s was that the applicant had been divorce d by the respondent. At the time, of the divorced, the Kadhi had recorded a consent order giving the custody of the children of the marriage, a girl aged eight years and a boy aged three years to the respondent. After the divorced, the applicant married a man not related to the infants. On an application to the High Court for custody of the two children, the respondent contented it, inter alia:-

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<sup>16</sup> [1976] 2 MLJ 199.

<sup>17</sup> [1961] MLJ 265.

- (a) That the applicant was precluded from making the application as she had consented to the order of custody made by the Qadhi, and
- (b) That the Guardianship of infants Act 1961 was inapplicable as the children Muslims.

### **2.7.2: Statute provision**

There are many statute provide about the guardianship in Guardianship of Infants Act 1961. In Section 5 provide that father's is a genuine guardians to children and their estate.

Meanwhile in Section 6 provide that if the children's not have father, mother's become a genuine guardians. The courts can announce another person to be a guardian to him and to the estate. In section 10 stated that the courts can take back the guardianship belongings and give to another person.

### **2.8: GUARDIANSHIP DURATIONS**

In Section 2(2) (a), Guardianship of Infants Act 1961 provided about guardianship duration, which is for Islamic religion, when they are 18 years old. While for the non-Muslim's, the duration is until they were 21 years old.

According to Law Reform (Marriage and Divorce) provided in Section 87 that when that child is 18 years old. In Section 95, 96, 97 provides about guardianship durations and courts powers to change about that agreement.

## 2.9: HOW RIGHT OF CUSTODY IS LOST

The right of Hadhanah of a woman is lost when:

- a) by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child but her right to custody will revert if the marriage is dissolved;
- b) by her gross and open immorality;
- c) by her changing her residence so as to prevent the father from exercising the necessary supervision over the child, except that a divorced wife may take her own child to her birth-place;
- d) by her abjuration of Islam;
- e) by her neglect of or cruelty to the child.

According to the section 90 Law Reform (Marriage and Divorce) Act 1976, where is courts give a govern about the mothers who is not competent when that child were 18 years old.

In Common law allotments that the not competent to be a guardians when:<sup>18</sup>

- i) the child was mature
- ii) the child got married
- iii) the child is army
- iv) command courts

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<sup>18</sup> Zulkifli Yaso'. Januari 1992. *Penjagaan Kanak-Kanak Dalam Undang-undang Malaysia: Perbandingan Dengan Konsep dan Amalan al-Hadhanah di Wilayah Persekutuan*, (Latihan Ilmiah, Fakulti Syariah Akademi Pengajian Islam Universiti Malaya Kuala Lumpur), p.12.

## 2.10: CUSTODY OF ILLEGITIMATE CHILDREN

The custody of illegitimate children appertains exclusively to the mother and her relations.

According to that thing, the guardianship of infants 1961 and the Law Reform (Marriage and Divorce) 1976 not provides anything but in Civil Law Act 1956, Section 27 and in legitimacy Act 1961 in section 3 and 4.

In Section 11(1) (2) provided that when that child was legitimated by their birth, automatically they become a legitimate child.

# CHAPTER

# 3

**CHAPTER THREE**  
**HADHANAH IN KELANTAN ISLAMIC FAMILY LAW**  
**ENACTMENT 2002**

**INTRODUCTION:**

The Guardianship of Infants Act 1961 applies only to Peninsular Malaysia. It applies to Muslim in any State where the law made by the legislature of that State has adopted it.

The enactments may provide that nothing in the Guardianship of Infants Act which is contrary to Islam or the custom of the Malays shall apply to any person under the age of 18 years who professes Islam and whose father professes or professed at the date of his death that religion or in the case of an illegitimate child, whose mother so professes or professed that religion.

**3.1: DEFINITION OF HADHANAH**

In Kelantan Islamic Family Law Enactment 2002, it is not provided about the mean of hadhanah clearly because as we know, in the Syariah, court refers to the Hukum Syara'. But it is stated in the sections of enactment about the custodian.

Hadhanah is defined as the maintenance of a child with regards to his or her welfare. According to fiqh, hadhanah means taking care at and educating child who has not reached the age of mentally and of unsound mind handicapped.

**Maliki School:**

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Maliki School of thought has stated that hadhanah or custody is securing the safety of child until he or she reaches the age of discernment (maturity) either for handicapped or sick child. But the custody for a girl is until she sets married.<sup>19</sup>

**Hanafi's Jurist**

In the midst of Hanafi's Jurist have viewed that hadhanah is bringing up a child by those who have the right upon them.

**Syafie's Jurist**

Syafie's Jurist, they are defined Hadhanah as keeping the interest of children from any calamity and agony including handicapped adults physically and mentally can cent rating on the basic necessities.

**Hambali's School**

Perpustakaan  
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Hambali's School of thought opinion 's about hadhanah is looking after children, physically and mentally handicapped persons and their guardian are responsible to manage their welfare such as bathing, laundry and all related things with their daily lives.

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<sup>19</sup> Dr. Wahbah Az-Zuhaili. 1989. *Al-Fiqh Al-Islami* (7): Darul Fikr. p.718.

### 3.2: EVIDENCE OF HADHANAH

The Holy Al-Quran in Surah Al-Baqarah 2:233 stated:

والوالدات يرضعن أولادهن حولين كاملين لمن أراد ان يتم الرضاعة، وعلى المولود له رزقهن وكسوتهن بالمعروف، لا تكلف نفس الا وسعها، ولا تضار والدة بولدها ولا مولود له بولده.

*“The mother shall give suck to their offspring for whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable term. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child, or father on account of his child.”<sup>20</sup>*

Al- Hadith from Rasullullah said:

*“ A woman said: ‘O Prophet my womb is a vessel to this son of mine, my breasts a water-skin for him and my lap is a refuge for him, yet his father has divorced me and wants to take him away from me.’ The Prophet said: ‘ you have more right to him as long as you do not marry.’<sup>21</sup>*

In another Hadith it is stated that a woman came to the Prophet and said: ‘ My husband wants to take away my son, although he (my son) gives me comfort and brings me drinking water from the well of Abu Inabah.’ Thereupon the husband appeared denying her claim over his son. The Prophet then said: “ *Child! Here is your father and here is your mother, make a choice between the two whomsoever you want’.* The son caught hold of the hand of his mother and she went away with her son.”

<sup>20</sup> Sunan Abu Dawud 2 Kitab al-Talaq-p-616.

<sup>21</sup> *Ibid* p. 617.

Imam Shafie referring to the Hadith gave following rationale for preferring the mother in custody disputes:-

*“Thus when a child has not reached the age of discretion, the mother has a greater right to his upbringing inasmuch as this is a question of the right of the child not the question of the degree of love, attachment and affection of the parents.”*<sup>22</sup>

### **3.3: CONDITION TO BE HADHINAH**

Hukum Syara’ provided the procedures before given a custodian belongings to the mother or father or other parties. The conditions are:

#### **i. Islam**

This factor if the child to be custody are Islam, he or she must given to the Islamic custodian compulsory. Non-muslim is not belongings to be a guardianship to Islamic children. This is because if the non-muslim being a guardian, it is frightened the children will influence with their religion and it also can corrupt the child’s mind. The most frightened is they growing up with eating the illicit foods.<sup>23</sup>

#### **ii. Sound Mind**

Unsound mind person cannot be a custodian because they’re also cannot manage their self, how they can manage and taking care the children. However if they are not sane for a short time, like two days a year, they also have a right to be a hadhinah.<sup>24</sup>

#### **iii. Free**

Slave and half free people not have a right to be a custodian whether their lord gives them permission. This is because if they are slave, they busy with their job to serve for their lord and they not have a time to educate their children.

<sup>22</sup> Kitab Al-Umm, Vol viii, p 235.

<sup>23</sup> Sharifah Zahrah Syed Mohammad. *Wanita dan Perundangan Islam*, p. 173.

<sup>24</sup> Muhammad Nabil Saad al-Syazali. 1989. *Ahkam al-Usrah Fi al-Fiqh al-Islami*, Darr al-Nahdhah al-Arabiah, , p. 373.

#### **iv. Trusted**

The custodian must be somebody “*thiqah*”, fair and pious to Allah in educating the child.

#### **v. Live in same country with the children**

This condition is given to the parents who are live in one country. If one of them moves to another place, the child is giving to who are not moving. But if they are moving for necessity like for Hajji or business, he or she will get their right when they are coming back.

#### **vi. Not marriage with *ajnabi***

For the mother who is divorced with her husband, she cannot marry with another person who is *ajnabi* with the child. If the mother married with the *ajnabi* to the child, it will make her husband dislike for the children and make barriers to the mother to give her responsibilities to their children.<sup>25</sup>

#### **vii. Not commit with unmoral behave**

The custodian avoid something that are agreed by Gods like drank and not leave pray to the God.

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<sup>25</sup> Sharifah Zahrah Syed Mohammad. Wanita dan Perundangan Islam.Hadanah: Pelaksanaannya Menurut Akta Undang-Undang Keluarga Islam Wilayah Persekutuan (1984).Ilmiah Publisher Sdn.Bhd. 2001. p. 174

**viii. Not being murtad**

This is because who are murtad, the punishment for them is will arrested until they convert to Islam back.

According to Fiqh-us-Sunnah by Syed Sabiq in Juz. 8, the right of custody will lost if one of these stipulations is breach. The conditions are:-

- i. Sound mind
- ii. Free
- iii. Islam
- iv. Polite
- v. Trustworthy
- vi. Not married
- vii. Domiciled

If one of these conditions is breach, the right of custody or hadhanah will lose.