



**CHILD PROTECTION FOLLOWING DIVORCE  
UNDER ISLAMIC AND CIVIL LAW**

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Perpustakaan  
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بسم الله الرحمن الرحيم..

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## ABSTRAK

Kajian ini bertujuan untuk mengenal pasti peruntukan undang-undang yang di tetapkan terhadap perlindungan kanak-kanak terutamanya selepas berlakunya penceraian. Kanak-kanak merupakan aset penting bagi sesebuah negara kerana kanak-kanak adalah pemangkin sesebuah negara. Selaras itu kajian ini menitikberatkan apakah hak-hak kanak-kanak di dalam undang-undang Islam dan Sivil khususnya selepas penceraian. Ia meliputi hadhanah, nafakah dan tanggungjawab ibu bapa. Terdapat beberapa perbezaan di antara undang-undang Islam dan Sivil terhadap perlindungan kanak-kanak. Kajian ini dibuat berasaskan kajian perpustakaan khususya untuk mengetahui undang-undang keluarga seperti Undang-undang Keluarga Islam Wilayah Persekutuan, Undang-undang Keluarga Islam Selangor, Undang-undang Perkahwinan dan Penceraian Akta 1976, Akta Pejagaan Kanak-kanak 1961 dan lain-lain. Melalui kajian ini dapat disimpulkan peruntukan undang-undang yang di tetapkan banyak membantu menyelesaikan masalah selepas berlakunya penceraian terutama pada aspek hadhanah dan nafakah terhadap kanak-kanak.

## ABSTRACT

The research is to identify the provision of law relating to the child protection especially after divorce. A child is an important asset to the country. Thus' this research emphasizes the right of children provided in Islamic and civil law, particularly after divorce, it is pertaining to the custody of child, maintenance and parental responsibilities. There are some differences between Islamic and Civil Law in the context of child protection. The research is done based on the methodology of library research especially pertaining to family law, according to the Islamic Family Law (Federal Territories) Act, Islamic Family Law Enactment of Selangor. Law Reform (Marriage and Divorce) Act 1976, Children Act and others. Through this research, the writer concludes that the provisions of law give a lot of assistance in settling the problem after divorce especially in custody of children and maintenance.

## ملخص البحث

تهدف هذه الدراسة إلى معرفة القوانين المخصصة لحماية الأطفال, وخاصة بعد حدوث الطلاق. إن الأطفال هم من امتلاكات الدولة. وبناء على هذا الأمر تعني هذه الدراسة عن ماهية حقوق الأطفال في القانون الإسلامي والمدني, وخاصة بعد حدوث الطلاق. وهذه الحقوق تشمل الحضانة والنفقة ومسؤولية الأبوين. ويلاحظ أن هناك بعض الفروق بين القانون الإسلامي والمدني في حماية الأطفال. وهذه الدراسة تعتمد على الدراسة المكتبية وخاصة في معرفة القوانين التي تتعلق بالأسرة مثل وثائق الأسرة الإسلامية في ولاية برسكوتوان, وقانون الأسرة الإسلامية في سلانجور, وثائق الزواج والطلاق 1976, وثائق رعاية الأطفال وغيرها. ويستنتج من هذه الدراسة أن القوانين المخصصة تساعد كثيرا في حل مشاكل الأطفال بعد حدوث الطلاق, وخاصة ما يتعلق بالحضانة والنفقة.

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## GLOSSARY

- Zina -Fornication or Unlawful Sex
- Hadhanah – Custody
- Nafakah – Maintenance
- Nasab – descent based on lawful blood relationship
- Wali – a person to give away in marriage a woman
- Solah – Prayer, the obligation of Muslim
- Zakah – paying alms of the obligation charity
- Sadaqah - paying alms of the voluntary charity
- Siyam – fast
- Haji – pilgrimage
- Rasulullah – Prophet of Muhammad or messenger of Allah
- Muhrim – lawful blood relationship

## ABBREVIATION

ACPA	Area Child Protection Committee
NPSPCC	National Society For The Prevention Of Cruelty To Child
LRA	Law Reform Act
S.A.W	Salullahu Alaihi Wassalam
S.W.T	Subhanahuwataala
P	Page
PP	pages
FT	Federal Territories
JH	Journal Hukum
VOL	volume
AA	Adoption Act
LA	Legitimacy Act
LEA	Local Education Authority
SSI	Social Service Inspectorate
DBP	Dewam Bahasa Dan Pustaka
SEC	section
CRC	Convention On The Rights Of Children

# INTRODUCTION

## INTRODUCTION

The child protection following divorce means the right of a child after divorce like who is the right person for the custody of the child, the right of maintenance for the child after divorce and parental responsibility. As we know the first person for the custody of the child under Islamic Law and Civil laws is the mother. But in law, the right persons of the custody of the child must have a characteristic and qualification to ensure she or he is the right person for the custody of the child.

Divorce can bring bad effect for the children. Sometime the children are worried when they think about the ending of their parents' marriage. In this case the parental responsibility must take place like explaining carefully and cleverly about divorce. The divorce also causes big problem to the children, they have to choose with whom they want to stay together.

From that situation the provision of law is very important to settle the problem of divorce and apply the right law to protect the child following divorce. In Malaysia there are many laws to settle the problem of child even and to protect them especially after divorce whether in Islamic Law or Civil Law.

Provisions of law in Malaysia provide guidelines on the right person in custody, who are entitled to payment of maintenance and who are the right persons to protect the child after divorce.

## AIM OF RESEARCH

Children are very important in our life because they are the new generation in our country. Therefore, child protection is very important to make sure the new generation can be a good generation.

As we know, now in our country there are many abused children and always separated from parents for many factors like divorce. Usually, when the parents are divorce, sometime the child lost their place for refuge and sometime the child is confused with whom they want to stay together. According to that fact, we must know the right of the child in that situation and what is the child protection law in our country according to Islamic Law and Civil Law. For example who is entitled for the child protection following divorce, what is the right of a person in custody, the procedure in child protection, the right of maintenance for the child.

In this research, the researcher wants to know what are the Laws imposed on parents or guardian who do not care of their child or leave their child. What is the right of protection given to the child in that situation.

## OBJECTIVES OF THE RESEARCH

The objective of research is to identify the effects on a child after divorce and the rights of the child after divorce. It is to know the following:

- a) The right to protection for a child and procedure in child protection.
- b) Parental responsibility and guardianship
- c) The right for a child after divorce and the right person for the custody of the child. What are the characteristics and the qualifications of the right persons for the custody and how such rights of custody can be denied.
- d) The maintenance of the child after divorce.

# CHAPTER ONE

## CHILD PROTECTION

According to the *Syafi'e* school of law where a child is born to the woman who is married to a man (a) after 6 months from the date of the marriage; or (b) within 4 years of the termination of the marriage, the mother not having remarried, the paternity of the child establishes relationship within the husband. If the child were born within 6 months of the marriage the paternity right of the child would not be so established unless the man asserts that the child is his and does not say that the child is result of fornication (*zina*).<sup>1</sup>

According to section 87 the Law Reform (Marriage And Divorce) Act 1976 (Act 164) And Rules (LRA) the meaning of child is child of the marriage” as defined in section 2 who is under the age of 18 years.<sup>2</sup>

There are provisions for the acknowledgement of a child. In the federal territories it is provided that when a man acknowledges another, either expressly or implicitly, as his lawful child, the paternity of the child shall be established in the man, if the following conditions are fulfilled, that is to say:.<sup>3</sup>

- a) The paternity of the child is not established in any one else;
  
- b) The ages of the man and the child are such that filial relationship is possible between them;

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<sup>1</sup> Tan Sri Datuk Professor Ahmad Ibrahim ,1997. *Family Law in Malaysia*. n.pl Malayan Law Journal. Third Edition P.326

<sup>2</sup> N.a Law Reform (Marriage And Divorce) Act 1976(ACT164) & RULES . Sec 87p.42

<sup>3</sup> Tan Sri Datuk Professor Ahmad Ibrahim ,1997. *Family Law in Malaysia*.n.pl Malayan Law Journal. Third Edition P.328

- c) Where the child is of discreet age, the child has acquiesced in the acknowledgement;
- d) The man and the mother of the child could have been lawfully joined in marriage at the time of conception;
- e) The acknowledgement is not merely that he or she is his son, but that the child is his legitimate son;
- f) The man is competent to make a contract;
- g) The acknowledgement is with the distinct intention of conferring the status of legitimacy;
- h) The acknowledgement is definite and the child is acknowledged to be the child of his body

Generally the basic of family and children in particular can be traced in the Holy **Quran in surah At-Tahrim “verse 6”**

يأيتها الذين ءامنوا قوا أنفسكم وأهليكم نارا وقودها الناس والحجارة عليها ملكة غلاظ

شداد لا يعصون الله ما أمرهم ويفعلون ما يؤمرون (6)

Meaning:

*“O you who believe save yourselves and your families from a fire whose fuel is men and stone, over which are (appointed) angels. Strong and severe, who*

*do not hesitate (from executing) the commands they receive from Allah but do (precisely) what they are commanded.*<sup>4</sup>

The protection of child means to care for a child about his life and his welfare. As we shall see, the court may not pronounce a decree absolute unless it has made an order with reference to the arrangements for the welfare of the children of the family. This differs from the protection given to the respondent just considering in that the latter applies only if the petitioner relies on two or five years' separation and the respondent specifically invokes the relevant provision, whereas the court is required to make an order with respect to the children in all cases and the decree absolute will be void if it fails to do so.<sup>5</sup>

Protection of child in Islamic law means providing all physical, spiritual and material needs of child.<sup>6</sup>

Protection afforded by the *Syariah* relating to the children would be on dealing with certain protection or more precisely, certain right of the children in Islam. For example, Islam grants the right of children to maintenance and inheritance, the parents the guardian or any body responsible for the children must fulfill these obligations.

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<sup>4</sup> Prof(Dr) Syed Vicker Ahmad n.d. *Interpretation Of The Meaning The Glorious Quran*. N.pl. n.pb

<sup>5</sup> P.M.Bromley n.d *Family Law*.pl n.pb page 264.

<sup>6</sup> Norizan Abdul Rahman , (1993/94) .*Child Abuse: Protection Afforded by Law*. Kulliyah of law IIUM. N.pb P. 79

In Islamic religion Allah The Almighty says in surah **Al-Baqarah** verse 233,<sup>7</sup>

والوالدت يرضعن اولدهن حولين كاملين لمن أراد أن يتم الرضاعة\* وعلى المولود له رزقهن وكسوتهن بالمعروف\* لا تكلف نفس إلا وسعها\* لا تضار والدة بولدها ولا مولود له بولده وعلى الوارث مثل ذلك فان أرادا فصلا عن تراض منهما وتشاور فلا جناح عليهما\* وإن أردتم أن تستر ضعوا أولدكم فلا جناح عليكم إذا سلمتم ماءا تيمم بالمعروف\* واتقوا الله واعلموا أن الله بما تعملون بصير (233)

*“And the mothers shall breast-feed children for two full years, for those desiring to complete the (limit of the term of) breast-feeding, and the feeding and clothing of them rests upon the father, in a suit-able manner. No soul is burdened beyond its means: a mother shall not be injured because of her child nor the father because of his child, and on the (father’s) heir rests the like of that (which was an obligation for the father). Then, if they desire to wean the child by mutual consent and consultation, there is not sin upon them; and if you desire to give your children to a wet nurse, there is no sin upon you, provided that you pay (the wet nurse) what is due from you in suitable manner. And be mindful of Allah, and know that Allah is Seer of whatever you do. (Qur’an 2:233)”<sup>8</sup>*

This verse established several important principles in establishing the parents’ responsibility for the children:

<sup>7</sup> Prof Dr. Mahmud Yunus.n.d Tafsir Quran Karim.n.pl .pb.

<sup>8</sup>Prof(Dr) Syed Vicker Ahmad .n.d.Interpretation Of The Meaning The Glorious Quran. n.pl .pb

First, mothers are encouraged to nurse their children. Nursing is then seen as an extension of the pregnancy, that means the child's security and wholesome entry into the earthly world from the world of the womb. From this we can deduce the divine ordinance of the mother's being the primary caregiver to the child whenever possible. That she is not positively obliged to nurse the child herself can be understood from the permissibility of employing a wet nurse, who then takes on the status of a foster mother.

Thus a divinely ordained, permanent bond of *mahrem* relationships is established between the nursed infant and his "milk mother" and her family. Thus, restricting marriage possibilities with them, just as with one's own blood relatives. The Prophet himself had a milk mother, a Bedouin woman, *Halimatul Saadiyah*, whom he never ceased to treat with great respect. The prophet's son *Ibrahim* also reported to have been placed with a milk mother.<sup>9</sup>

However, from the *Quranic* wording, "it is no sin for you" if a wet nurse is used, and from the mention of mother's nursing first, we can understand that Allah wishes and expects a mother to care for the children. And while the man is definitely not simply a higher animal, this is in keeping with the *fitrah* or innate nature of all species of higher animals. With which mankind is linked, in which mothers provide nurturing and nourishment.

Second, this verse clearly makes father as being responsible for providing for their children. A man is obliged, first, to take primary responsibility for the welfare of his family members and, second, to provide the means of obtaining food, clothing, shelter, and other needs, both for the wife for whom he has taken responsibility for his children.

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<sup>9</sup> Norma Tarazi.n.d *The Child in Islam. A muslim Parent's n.pl Handbook.American Trust Publicatins.* Pp. 56-57.

## CHAPTER TWO

# Kunci anak dalam rumah salah akta

KUANTAN: Perbuatan mengunci anak di rumah untuk membolehkan ibu bapa keluar bekerja semakin menjadi-jadi di kalangan mereka yang berpendapatan rendah, terutama yang tinggal di bandar besar.

Perbuatan berkenaan, walaupun boleh membahayakan anak-anak, terpaksa dibuat ibu bapa berkenaan kerana tidak mampu menggaji pengasuh.

Menteri Perpaduan Negara dan Pembangunan Masyarakat, Datuk Seri Dr Siti Zaharah Sulaiman, berkata gejala berkenaan banyak berlaku di taman perumahan atau rumah setinggan, kerana ibu bapa mahu menjimatkan perbelanjaan keluarga.

Beliau berkata, biasanya kanak-kanak yang dikunci dalam rumah itu berusia bawah tiga tahun dan mereka ada kalanya dijaga oleh abang atau kakak yang berusia antara lima hingga enam tahun.

Katanya, walaupun jarak rumah berdekatan dengan tempat kerja ibu bapa berkenaan mungkin tidak jauh, tindakan mengunci anak dalam rumah berbahaya kerana kanak-kanak terbabit sukar untuk menyelamatkan diri jika berlaku kejadian tidak diingini termasuk kebakaran.

"Kecenderungan mengunci anak dalam rumah ketika ibu bapa keluar bekerja ini semakin berkembang kerana ia murah berbanding menggaji pengasuh atau menghantar anak ke pusat asuhan.

"Selain membahayakan keselamatan kanak-kanak, tindakan ibu bapa terbabit sebenarnya menyalahi Akta Kanak-Kanak 2001, kerana membiarkan kanak-kanak tanpa penjagaan dan pengawasan orang dewasa," katanya selepas majlis pelancaran jentera pilihan raya Parlimen Paya Besar, di sini petang kelmarin.

Kes mengunci anak dalam rumah itu turut dibincangkan dalam Fokus Berkumpulan Mengenai Jenayah Kanak-Kanak yang diadakan di

Institut Sosial Malaysia, dua hari lalu.

Siti Zaharah berkata, jiran atau orang ramai yang mengetahui kes seumpama itu perlu melaporkannya segera kepada Kementerian untuk tindakan susulan.

Beliau berkata, Kementerian akan menghantar pegawai Jabatan Kebajikan Masyarakat (JKM) untuk memberi nasihat kepada ibu bapa supaya menghentikan tindakan itu dengan menghantar anak mereka ke pusat komuniti yang mengenakan bayaran minimum.

"Kita tahu mereka tiada pilihan dan terpaksa berbuat demikian untuk keluar mencari rezeki tetapi keselamatan dan kebajikan anak perlu diutamakan.

"Bayaran yang dikenakan di pusat komuniti hanya di antara RM10 dan RM20 sebulan bagi setiap

anak dan jika kemudahan itu belum diwujudkan di kawasan mereka, anak terbabit perlu dijaga orang dewasa sama ada pengasuh persendirian yang beroperasi di rumah atau di taman asuhan kanak-kanak.

"Kita tidak mahu ibu bapa terus bersikap 'tidak apa' dan hanya berharap sesuatu yang buruk tidak berlaku ke atas anak mereka," katanya.

Siti Zaharah berkata, pengasuh persendirian perlu mendaftarkan kegiatan mereka dengan Kementerian bagi memudahkan pemantauan dilakukan.

Katanya, Kementerian juga sedia memberi latihan kepada mereka supaya dapat mengasuh kanak-kanak mengikut cara yang betul.

# Seks seawal 9 tahun: Ibu bapa perlu ambil iktibar

KUANTAN: Menteri Perpaduan Negara dan Pembangunan Masyarakat, Datuk Dr Siti Zaharah Sulaiman, berkata kajian mengenai kegiatan seksual yang membabitkan golongan kanak-kanak seawal usia sembilan tahun perlu dijadikan panduan dan kesedaran kepada masyarakat terutama ibu bapa.

Beliau berkata, fakta mengejutkan membabitkan seks seawal usia itu dapat dibendung sekiranya nilai murni, soal akidah diri dan batas ketatasusilaan diterapkan oleh keluarga sejak kanak-kanak masih kecil.

Pendedahan mengenai pentingnya menjaga diri seperti me-



Dr Siti Zaharah Sulaiman

ngenali cara sentuhan yang boleh membawa kepada soal pencabulan juga perlu diterjemahkan secara terang kepada golongan itu demi keselamatan mereka.

Cara ini secara tidak langsung memberi kefahaman dan panduan kepada mereka apabila berdepan dengan situasi negatif sedemikian, katanya kepada pemberita selepas merasmikan Program Pelancaran Jentera Pilihan Raya Peringkat Parlimen Paya Besar, di sini malam semalam.

Program yang dihadiri kira-kira 500 petugas pilihan raya kawasan Parlimen Paya Besar akan diadakan secara berterusan sebagai persediaan menghadapi pilihan raya umum akan datang.

Minggu lalu, Siti Zaharah yang juga Anggota Parlimen Paya Besar mengadakan satu perjumpaan tertutup di Kuala Lumpur bagi membincangkan persoalan berkaitan masalah jenayah membabitkan kanak-kanak.

Katanya, hasil perbincangan dan maklum balas yang diterima pada perjumpaan yang turut disertai wakil daripada badan bukan kerajaan (NGO) itu akan dibawa dalam satu forum khas dikendalikan kementeriannya tidak lama lagi.

Katanya, perbincangan bersama itu juga tertumpu kepada soal pembelajaran dan usaha meningkatkan kesedaran secara bersama bagi mewujudkan satu rancangan tindakan membanteras permasalahan itu daripada berleluasa.

- Bernama