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THE RIGHT OF CHILDREN AND WIFE IN CUSTODY AND THEIR
MAINTENANCES UNDER ISLAMIC AND MALAYSIAN LAWS

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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

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First of all, I would like to wish our grateful for our Almighty Allah. Alhamdulillah, with His Blessing finally I was successfully complete this academic project in order to perform the requirement to fulfill this course. I struggle my best and finally successful in complete this academic project, even though I had a lot of barrier and challenging to complete this academic project.

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May successful be ours together.Amen.....

Kind Regards,

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ABSTRAK

Kajian ilmiah ini adalah berkaitan dengan hadhanah dan nafkah, iaitu dalam menentukan hak hadhanah bagi seorang kanak-kanak dan juga menentukan hak nafkah bagi seseorang isteri samada dalam perkahwinan dan selepas penceraian, begitu juga nafkah bagi anak-anak menurut undang-undang Islam dan undang-undang Malaysia (sivil). Kajian ini adalah lebih tertumpu kepada kajian perpustakaan. Cara untuk memperolehi maklumat dalam kajian ini pelbagai teknik telah diguna pakai antaranya, melalui internet, jurnal, majalah, buku-buku dan lain-lain yang berkaitan dengannya. Hasil kajian yang diperolehi menunjukkan bahawa hak penjagaan seseorang anak adalah lebih berhak kepada ibunya mengikut syarat-syarat tertentu, manakala nafkah bagi isteri adalah tanggungjawab ke atas suami dan nafkah bagi anak-anak adalah menjadi tanggungjawab ke atas ayah. Oleh itu, dapatlah dinyatakan disini bahawa undang-undang Islam dan undang-undang Malaysia (sivil) mengenai hadhanah adalah bertujuan menjaga kebajikan kanak-kanak tersebut agar sempurna kehidupannya.

ABSTRACT

The research concerns about child's custody and maintenances for wife that will determine the rightful guardian for a child. This included their expenses according to Islamic and Malaysian Laws point of view and also the amount of many that a wife deserves during and after the dissolution of marriage. The methodology is mainly based on library research, by obtaining information through Internet, Journal, Magazines and others related books. The out come of this research shows that a mother entitles to raise her children after fulfilling particular requirements. Whereas, a husband is obliged to look after the maintenance of his soul mate spouse Both Islamic and Malaysian Civil Laws related to child custody is to provide sufficient welfare of the children for the their future life.

ملخص البحث

إن هذه الرسالة العلمية تتعلق بالحضانة والنفقات أي: في تحقيق حق الحضانة للوالد وحق النفقات للزوجة إما في الزواج أو الطلاق وحق النفقات للأولاد باعتبار القوانين الإسلامية والقوانين الماليزية. فهذا البحث يركز على البحث المكتبي باستخدام طرق كثيرة بحصول المعلومات عبر شبكة الإنترنت والدوريات ومجلات والكتب ونحوها. والنتيجة من هذا البحث تثبت أن الأم أحق بالحضانة من الأب (بالنظر إلى بعض الشروط المقررة)، والنفقات للزوجة والأولاد هي مسئولية الأب. لذلك , يمكننا أن نقول بأن القوانين الإسلامية والقوانين الماليزية المتعلقة بالحضانة تراعى مصالح الأولاد حتى يعيش حياة كاملة ودون أى صعوبة فى المستقبل.

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Syarifah Sopiayah v. Wan Alwi [1998] 6 JH 259
Ismail v. Norsiah [1970] 2 JH 11
Tengku Anum Zaharah v. Dato' Dr. Hussein [1980] 3 JH 125
Abdul Kadir v. Hajjah Fatimah [1968] 2 JH 99
Zarah v. Idris [1984] 5 JH 186
Sharifah Zaharah v. Juatan Hussain [1987] 6 JH 254

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Islamic Family Law Federal Territories Act 1984
 Federal Constitution
 Law Reform Marriage and Divorce Act 1976 (Act 164)
 Married Women Children Maintenance Act 1950
 Maintenance Ordinance 1959

GLOSSARY

<i>ahadīth</i>	Plural of <i>hadith</i> sayings of the Prophet Muhammad s.a.w.
<i>a.s</i>	Abbreviation of "'Alaihi Al-Salam" meaning "Upon him the Peace". Only reserved for prophets other than Muhammad s.a.w.
<i>ayah</i>	Signs.
<i>ayāt</i>	Plural of <i>ayah</i> , verses of the Qur'an.
<i>baligh</i>	Of the age of majority.
<i>da'wa</i>	Change, claim or accusation.
<i>diyah</i>	Compensation paid causing death.
<i>'ibadah</i>	Devotion or worship.
<i>'ilm al-qadi</i>	Personal knowledge of a judge.
<i>fatwa</i>	Opinion upon a point of law.
<i>fiqh</i>	Jurisprudence.
<i>fuqaha</i>	Islamic jurists.
<i>had</i>	A specific form of punishment laid down in the Qur'an.
<i>hadīth</i>	Sayings of the Prophet Muhammad s.a.w.
<i>hudūd</i>	Several specific crimes and punishments laid down in the Qur'an.
<i>hujjah</i>	Argument.
<i>hukm</i>	Legal rule.
<i>ijma'</i>	Consensus of opinion of the 'ulama.
<i>ijtihad</i>	Extracting legal rules from the original sources.
<i>imam</i>	Leader.
<i>jahiliyyah</i>	Ignorance, i.e the period before Islam embraced by the Arabs.
<i>hadhanah</i>	Custody or guardianship for children
<i>kaffarah</i>	Expiation.

<i>kitabī</i>	Jews and Christians.
<i>mazahib</i>	Schools of jurisprudence.
<i>mukallaf</i>	Persons with full legal competence.
<i>nas shar'i</i>	Authority.
<i>nasab</i>	Paternity or lineage.
<i>qadi</i>	Judge.
<i>Mut'ah</i>	Gift of husband for former wives after divorce
<i>qiyas</i>	Analogical reasoning.
<i>r.a</i>	Abbreviation of " <i>Radhi Allahu 'An Hu</i> " meaning "Upon him the Blessings of Allah.
<i>ruju'</i>	Reconciliation after a revocable divorce.
<i>s.a.w</i>	Abbreviation of " <i>Sallallahu 'Alaihi Wa Sallam</i> " meaning "Peace be upon him". It is compulsory for a Muslim to utter this blessing whenever he hears the Prophet Muhammad's name being mentioned.
<i>shar'i</i>	Legally recognized by the shari'ah.
<i>sunnah</i>	Sayings, deeds and approvals of the Prophet s.a.w.
<i>surah</i>	Chapter of the Qur'an. The number preceding colon denotes the Chapter number while the numbers after the colon denote the verse number.
<i>iddah</i>	Period of divorce
<i>'ulama</i>	Plural of <i>'alim</i> , Islamic jurists.
<i>ummah</i>	The global Muslim community.
<i>wājib</i>	Mandatory or obligatory.
<i>wali</i>	Legal guardian.
<i>zakah</i>	A tax levied on every competent Muslim.
<i>nafkah</i>	Maintenance

ARABIC WORDS transliteration SYSTEM
transliteration TABLE

1. Vocal

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	a	آية	ayât
ب	b	بليغ	baligh
ر	r	رجع	Raj`ie
ر	r	رجوع	Ruju`k
ش	sh	شرع	syara'
ع	a	عدة	iddah
ف	f	فقهاء	fûqaha
ل	l	لعان	li'an
م	m	مكلف	mukallaf
ن	n	نشوز	nusyuz
و	w	والي	wali

2. Short Vocal

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
----- [َ]	a	نسب	nasaba
----- [ِ]	i	عدة	iddah
----- [ُ]	m	مطعة	Mut`ah

3. Long Vocal

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	ā	آيات	āyat
ي	ī	حديث	hadīth

4. Diphthong

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ي	iyy	شرعي	syar'iyy

ABBREVIATION

LRA	Law Reform Act Marriage and Divorce
Act	Akta
ABIM	Muslim Youth Movement of Malaya
A.H	After hijrah
Art	Article
a.s	alayh al-salam
d	death
Dr.	Doktor
<i>etc</i>	<i>et cetera</i> , and so on
Hj.	Haji
Ibid,ibid	<i>ibidem</i> , in the same place
i.e	that is to say
ISA	Internal Security Act
KUIM	Kolej Universiti Islam Malaysia
MLJ	Malayan Law Journal
n.a	no author
n.d	no year
no.	number
n.pl.	no place
n.pb.	no publisher
p.	page
JH	Journal Hukum
Prof.	Professor

s	section (of a statute)
s.a.w	salla Allah alayh wa sallam
Sdn. Bhd.	<i>sendirian berhad</i>
s.w.t	subhanahu wa ta ala
trans.	translator/translated by
v	Versus
vol.	Volume

Chapter 1

Chapter 1

CHAPTER ONE

INTRODUCTION

1.1 Introduction

Marriage is considered as endless knot, throughout marriage, both couple would spread out their descendent by the willingness of Allah, thus the objective of marriage could be achieved if they live in peace and harmony.

However, not all marriage or as family could stand and remain happy forever, dispute and disagreement may arise between of them and serious cases not settle together or become better there some couple or family may end up in divorce.

Based on the Islamic Law in Malaysia, there are many problems concerning family institution. Most of these problems are due to release of matrimonial duties, or commonly known as divorce. Recently, there are claims made to the court of law, especially the alimony or maintenance (right wife), child custody and so on.

Therefore, the Court in Malaysia, especially *Syariah Court*, plays an important role in handing these problems. It is the institution which is responsible in solving these problems for the Muslims in Malaysia.

According to the appropriate field of the power that is wields. This project focuses on the role of the Court at Malaysia, especially *Syariah Court* in handing the problems of *Hadhanah*, or child custody and of maintenance or alimony. Hence, it is wise to say that the solution for the problems of *hadhanah* needs special attention from the appropriate parties and the solution about the maintenance need special attention from ex-husband. So, all of the parties must work together to attain the solution about the case. However, it will emphasize more on Islamic jurisdiction at *al-Quran and Sunnah* and the views of four fore most schoo

Guardian can be defined as the one who is formally appointed to look after a child's interest when the parent of the child does not have parental responsibility for him or have died. The appointment can be made either by courts during family proceeding. It is considered necessary for the child's welfare, or privately by any parent with parental responsibility.¹

Right of maintenance of wife, the court may, subject to *hukum syara'*, order the man to pay maintenance to his wife or former wife. A wife shall not be entitled to maintained when she is commit *nusyuz*, or unreasonable refuses to obey the lawful wishes or commands of her husband such as: when she withholds her association with her husband, or she leaves her husband's home against his will, or when she refuses to move with him to another home or place, without any valid reason according to *hukum syara'*. As soon as she repents and obeys the lawful wishes and commands of her husband, the wife ceases to be *nusyuz*.

In this perspective also, custody and maintenance has to discuss base on *Act* and Enactments where, what are section of *Act* and Enactment says. *Act* according to the laws was legislated by federal government of century while Enactment the law was legislated by state government. The project paper is based on Islamic Family Law (Federal Territories) and others Enactments.

1.2 The Problem Statement

The issues to be discussing in this research are two scopes. First what is the Islamic laws says about the right in custody and maintenances. Second what is Malaysian laws says about the right in custody and maintenances. The research will exposed that both different perspectives, Islamic Laws and Malaysian Laws.

In Islamic laws have are view according to the right in custody and maintenances for children or wife, and discussing about it in verses Qu'ran and Hadith says about the right custody and maintenances.

¹ Elizabeth A. Martin. 1994. *Oxford Dictionary of Law*. 3rd edition. New York: Oxford Press. p: 180.

While in Malaysian laws, how Malaysian laws cope with the right of in custody and maintenances. Mean which section, and Enactments and what cases to before referred about this topic.

1.3 Research Objective

The objectives of this paper are:

1. To have the better understanding on the concept of “*Hadhanah*” (Child Custody) and maintenance for the wife.
2. To explain requirement needed in order to obtain the custody (to become the guardian or custodian) and requirement maintenance of the wife in marriage or after divorce.
3. To give awareness and education to public to emphasize on family matter so that children will be not the victims of divorce.
4. To give awareness for the husband to responsibilities of requirement maintenance of wife after divorce.
5. To expose the parent’s responsibilities over children even after their divorce.
6. Power of court to order custody and maintenance and allotment after their divorce.

1.4 Definition of Term

The custody means the right of *hadhanah* guardian to mother or father includes the ability and responsibility to care children in life perfectly, qualifications necessary for custody, and the duration of custody.

The maintenance means responsibilities husband to children and wife in marriage and requirements after their divorce to pay the maintenance, and must be the wife no *musyuz*.

1.5 Research Methodology

1- PARTICIPANTS

In attempt to inclusive this study. In order to complete the project paper, the writer used a few methods, which are:

1- Library research.

The writer did the research using reference books at Islamic University Collage of Malaysia's Library, Islamic National Library, Public Library and also, For additional data, others I adapt a several extra concerning data from reading materials such as Islamic commerce journal, *Syariah* article and magazine of laws, *fiqh* books and newspaper clipping.

2- Field research

In this research, the writer did some field researches and also verbal interviews.

As a result all informative substance I will analyze that and come out with my own findings. The entire outcome will be state in report of study.

2- Research Design

Firstly, in order to examine the level of knowledge of society about the topic, the researcher has using the three main methods. The first method is the researcher was using also the documentation method. In this method, it has shown to researcher how to collect the data with using some document which are relate for this research as well as the electronic media (internet) and so on.

Subsequently, the researcher also using the some books of Islamic laws and Malaysia laws, beside that the work of *Fiqh or kitab turath* to get the some data that relate to the background of the topic.

1.6 Data Collection Plans

In the data collection plans, researcher used sources. Of primary and secondary In the primary sources, the researcher collects the data by conducted survey and refers to Islamic laws and Malaysia laws books, beside that from internet and books of *fiqh*. For additional data I was adapted a relating data from such reading material likes magazines, journal, article and newspapers clipping and course works.

1.7 Implication and Limitation

In effort to complete this research, researcher passed through a several problems and obstacles. Firstly in collecting of literature review option, the researcher was spending too much period to attach the sources.

And lastly, the time is too limited for researcher seeks more data and information to produce a very bright result. In a short time it's impossible to researcher generate a best effort to collect data and through details in study.

1.8 literature review

The wife has a right to be maintained by her husband in return of his holding her and enjoying her. This maintenance is to be according to the status of the husband as shown in the Glorious Qur'an. Some say that it is to be according to that of the wife.

وعلى المولود له, رزقهن وكسوتهن بالمعروف

“The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term but he shall bear the cost of their food and clothing on equitable term”²

The wife after divorce she has right to accommodation in Islamic Family Law Federal Territories section 59.³ The maintenance given to divorced wives for the period of *iddah* is often inadequate. It is suggested that the provisions in Brunei and perils, which enable a chief *khadi* in his discretion, to make an order for maintenance for such period as he thing fit even after the expiry of the *iddah* should be generally followed. There is a similar provision for the grant of such maintenance as a consolatory gift in Syria provision should be made for the enforcement of order for maintenance , by the making of attachment of earning orders as in Singapore and for the reciprocal enforcement of maintenance orders made by *khadi*⁴. And the maintenance of children there are adequate legislation in Malaya and the Borneo territories for the maintenance of children. The obligation is however in practice on the father rather than the mother of the children provision for the making of the attachment of earning order to enforce an order of maintenance can only by make.

² Al- Qur'an. Al-Baqarah: 233

³ Sec.59. Islamic Family Law Federal Territories

⁴ Ahmad Ibrahim.1984. *The State of Muslim Women in Family Law in Malaysia, Singapore, Brunei.* Kuala Lumpur: Malayan Law Journal Limited. p: 102

In section 71⁵ providing for power of the court to order maintenance of a spouse, state that the court may order a man to pay maintenance to his wife or former wife in three situations:

- during the course of any matrimonial proceedings
- when granting or subsequent to the grant of decree of divorce or judicial separation
- If after a decree declaring her presumed to be dead she is found to be alive.

According to Law Reform Act, Maintenance of children in section 93⁶ (1) to provide the court may at any time order a man to pay a maintenance for the benefit of his child. The court ordinarily refer to high court or a judge thereof the phrase at any time should be given the same interpretation as in section 88⁷ (1) in relation to the custody of children, namely, during, a divorce or juridical separation or during the subsistence of the parents marriage.

The maintenance for wife under Islamic Laws is an importance obligation of the husband. Maintenance refers to; inter *alia*, food, clothing, lodging and general care. The *al-Quran* puts the entire burden of maintenance of the wife on the husband whatever the own wealth and income. She is not obliged to give her husband anything form her income. Even if husband poor and she is wealthy.⁸ The husband has to give her maintenance according to his means or capacity. The *Qur'an* does provide.

*Let him who has abundance spend out of his abundance and whoever has his means of subsistence straitened to him. Let him spend out of that which Allah has given him. Allah lays not on any soul a burden beyond that which he has given it. Allah bring about ease after difficulty*⁹.

In conclusion, the wife in marriage or after divorce can get the maintenance of the husband because it is obligation of the husband, if a husband refuses to pay maintenance, the wife has the right it sue for it. The *Hanafi* School shows more

⁵ Sec.71. Islamic Family Law Federal Territories

⁶ Sec.93. Law Reform Marriage and Divorce 1976

⁷ *Ibid* Sec. 88

⁸ Mimi Kamariah Majid. 2002. *Family Law in Malaysia*. Kuala Lumpur: Malayan Law Journal P: 340

⁹ Al-Qur'an. Al-Talaq 65:7

reference for the male in that it does not allow the wife the right to past maintenance unless a distinct agreement was previously made the wife who after the period of time, sues for maintenance has no means to obtain payment of her husband's past-due debt. In contrast *the Syafie School and Hambali School* consider maintenance arrears to be the husband's ongoing debt which can be claimed regardless of the amount of time that has elapsed. So the husband must be payment the maintenance for the wife. And the right children in custody are the mother because the mother more close,¹⁰ RasulAllah said in Hadith,

"O prophet of God! This is my son, the fruits of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from into his own care-to which the prophet applied "thou hast a right in the child prior to that of thy husband, so long thou dost not marry with stranger".¹¹

So, in Islamic the mother more importance to custody refer to section 81(1) the mother shall be of all persons the best entitled to the custody.

In Pahang a women may by application in court obtain an order against her husband for the payment from time in cash as maintenance which she is entitled to receive according to *Hukum Syara'*. It is also provided that if a wife shall not be in faithful obedience to the words of her husband in accordance with *Hukum Syara'* the husband may make an application to the court to obtain a nusyuz, the husband shall not be bound to give her maintenance according to *hukum syara'* as from the date the husband receives the order from the court.

In *Johore* it is provided that the married women may by application in the court obtain an order against her husband for the payment from time to time of any such sums in respect of her *nafkah* as she may be entitled to in accordance with the *hukum syara'*. But a claim for *nafkah* shall not be paid for a period exceeding three years prior to the date when the claim was made.

¹⁰ Mohd Fauzi Muhammad. 1998. *Undang-undang Keluarga Islam Dalam 4 Mazhab Pembaharuan Keluarga*. Jilid 2.n.pl: n.pb. pp: 158-161

¹¹ Ahmad Bin Hambal. Abdullah Bin Abdul Hussain al-Tarki.1997. *Mausu'ah al-Hadisah*. Bairut: Muassasah al-Risalah. Jil. 11.p:310-311. #6707

Maintenance orders made in the *Syariah Courts* can be enforced by the making of attachment of earnings orders.

In *Sabah* it is provided that the married women may bay application to the court of a *Kathi* obtain an order against her husband for the payment from time to time in respect of her maintenance as she may be entitled to under the Muslim law.

In Sarawak there are no special provisions for applications by Muslim women for maintenance and the provision of the general law relating to claim for maintenance apply to Muslims.¹²

¹³ Maintenance of the child due on the father is well established in the Glorious *Qur'an and the Prophetic Sunnah*. And, his parents have more right to maintenance than his own children. Maintenance becomes a must only when the parents and children are of restricted means and cannot work to earn their living. This is the view of *Imam Ash-Shafi'i*. All jurists view it as an obligation to maintain them when their resources are restricted even if they are not unable, to work and earn a living.

For relatives other than parents and children, it is not a duty on him to maintain them except as said by the *Hanafis* who declare it an obligation due to brothers, paternal and maternal uncles and aunts.

If the father whose resources are restricted is in need to marry, the well to do son should enable him to do this by giving him the dowry. Then, he should maintain his father's wife. Nevertheless the father is not obliged to get his son married.

If the son has no property and is capable of earning his living he should work to gain money to spend on his father and his own child as well. Some scholars are of the view that the father is free to take what he wishes of his son's property. However, the majority of them are of the view that he takes only that which he needs. If the father is able to work, but his work is inferior and disgraceful and his son has a good rank, the son must save his father's dignity and make him leave that work. These are some ways of practicing righteousness towards parents.

About the custody, the mother cannot prevent the father from visiting the child and taking him to school or to learn a craft. And, if the child is kept by the

¹² Ahmad Ibrahim. 1984. *Family Law in Malaysia and Singapore*. Kuala Lumpur: Malayan Law Journal. p:217

¹³ Hassan Ayop. 1999. *Fiqh of Muslim*. n.pl: Salma Cook Islamic. p:361

father, he cannot prevent him from visiting his mother or to be visited by her, but he can prevent her from visiting the unless she is ill. Thereupon, the girl can visit her to enquire about her health.¹⁴

Chapter 2

¹⁴ Hassan Ayop.1999. *Fiqh of Muslim* P:360

Chapter 2

CHAPTER TWO

THE PRINCIPLE OF CUSTODY (*HADHANAH*)

2.1 Definition of Custody

Custody means guardianship upon person who is not capable of managing himself and maintaining as well as educates the minor child.

And to the technical meaning custody (*hadanah*) means educate or take care the child or any person who has been giving the rights of guardianship by *syarak* or court towards them. And the same time, it means educate and nursing the child when he is not capable to fulfill such an obligation himself for any things which is danger or suffer to them. It is because such children are not able to do it themselves. Custody also prepares all the need of the children including food, clothing, and cleanliness of him and all them, which related to the children themselves.¹⁵

To defined custody or *hadhanah* as taking care of minor child regardless male or female or the adult child but not yet capable of distinguishing good and bad, and the such guardianship not from his order but to take care of him from anything which is possible to cause harm to himself and lead the physical and spiritual and his mind in order affordable to stand themselves in facing the life and shoulder any responsibilities.

2.2 Law of Custody

Custody over the minor child is obligates. Neglect of one self of the children means cause the child exposed to the danger and destruction over the child, obligation concerning to them oneself or anybody which has been give the rights of guardianship either mother or father or any individual who obtained such rights.¹⁶

¹⁵ Zaini Nasohah. 2002. *Penceraian dan Hak Wanita Islam*. First edition. Selangor: Utusan Publications & distributions. p: 58.

¹⁶ Azahari bin Mamat. 1999. *Hadhanah*, first edition. Jabatan Hal Ehwal Ugama Islam Kelantan, Kota Bharu. Kelantan: Percetakan dan Perniagaan Nik Daud Sdn.Bhd. p: 1

2.3 Purpose of Custody

- 1) Maintaining of children should be as usual and before the divorce took place between parents.
- 2) To flourish the love and affection as well as the growth of the children in a good manner.
- 3) Custody also purposing to avoid the children from being exposed to any kind of danger or any extinguished situation.
- 4) The blood tie relationship between parents and children would never end after the divorce took place.

2.4 Requirement of Custody (*hadanah*)

Among the requirement which has been underlined by Muslim scholars and section 82 of Islamic Family Law, Act 1984 to those who are responsible to upbringing and custody of children are as follow:¹⁷

1) Must be Muslim

Non Muslim women are not eligible to custody of Muslim child. These principles are based on Quranic,

Allah says:

"ولن يجعل الله للكافرين على المؤمنين سبيلا"

And Allah, will never give the path to the Kafir to destroy the Muslim (those who believe to Allah)¹⁸

It is because custody deals with the matter of solemnization of managing as well as estate administrative and execution. There for, non Muslim are not allowed for

¹⁷ Sec. 83 (a)(b)(c)(d)(e) of the Islamic Family Law Enactment of Selangor

¹⁸ Al-Qur'an. An-Nisa'4:141

the custody of Muslim child. It is worried that, it will leads to exert of conversion out of Islam. However, under this requirement, Muslim scholars are differ in matter relating to the Muslim is main requirement for the custody of child.

*Hanafi*¹⁹ and *Maliki* are in the opinion that not necessary for person apply custody of child is Muslim, even in some situation Islam gave the right of guardianship to those who are eligible regardless whether they are Muslim or not, with the condition they will not deviate the child from Islamic faith and teaching.²⁰

According to *Syafie and Hambali* School of law, they said that it is necessary to be Muslim, it is because of the different religion between guardian and children will cause a lot of difficulties.²¹

In fact *Syafie* school of law added other requirement to be observes are as follows:

Those who taking care of the children, obliged to breastfeed the child if the child is still needy. If they refuse to observe such right will loose his right of guardianship if they incautious over the responsibility to taking care of the children, will also loose such right. There for, it's totally difficult to non Muslim to obtain such right. Rasuallah said in Hadith:

“Every single children born with nature (*fitrah*) it up to the parent to draw them to be Jews or Christ or *Majusi*”²²

Indeed the appearance and attribute of the children is reflected form the teaching and guidance of the guardian.

Follower of *Abu Haniffa and Malik* and *Abu al-Qasim* and *Abu Tsur* were in the opinion that non Muslim women may take care of the Muslim children, but eventhough his allowed among the school of *Hanafi* they put the requirements that the women must not be as apostate.

¹⁹ Zainuddin Ibnu Najim al-Hanafī. n.d. *al-Bahru al-Raik*. Bairut: n.pb. pp: 188-193

²⁰ Ibrahim Muhammad Ramadhan. n.d. *Fikh ala al-Mazahib Arba'ah*. n.pl: Darul Kalam. p: 536-539

²¹ H.A Fuad Said.1995. *Penceriaan Menurut Hukum Islam*. Johor Bahru: Badan Bookstore Johor Bahru., p: 218.

²² N.a. *Tahfazul Ahwazi. Syarah Jama' Tarmizi* 1998 .Kitab al-Kodir. Bab,Maja,a kullu Mauludi Yuladu ala Fitrah.Bairut:Dar Ehia al-Taurath al-Arabi. Juz'6.p: 425.#1714

2. Puberty

A child not falls within the habits of guardianship as they themselves is under guardian of somebody else.²³

3. Sane

Sane should be one of the requirements. Mentally disorder reasons are not eligible for the guardianship of those children because they cannot manage themselves, they are not capable and how should they manage of affairs of others.²⁴

4. Eligible

Blind person, suffering from uncured disease infect infectious, feeble because of that illness, aged, too much business outside which affect to the neglect of responsibility as well as having bad feeling towards children not competent of being given rights of guardianship. *Imam Taqiuddin* in "*kafiyatun Akhyar*" having said that *Imam Nawawi* did not include capable of seen as are requirement and there for according to them the blind persons has right of guardianship.²⁵

5. Good Manner

Bad manner, bad personality, not competent to be given rights of guardianship, because there is possibility that the children will imitate with the bad character that they posses. It is however heard to the divergence of opinion any *ulama'* (contemporary jurist). *Imam Taqiuddin* assuming that fulfillment of element of honesty is foreseeable as the witness in the solemnization of married. Where as *Ibnu al Qayim* having said that, possessing good character does not include as a requirement, where as the other hand it is a requirement opined by *Imam Syafie* and Ahmad.²⁶

²³ Abdul Ghani Azmi b. Hj Idris.1996. *Perkahwinan dan Kekeluargaan Dalam Islam*.n.pl: Divie Publisher.p: 506.

²⁴ H.A Fuad Said. 1995. *Penceraian Menurut Hukum Islam*. p:221

²⁵ *Ibid*.p:220

²⁶ Abd. Ghani Azmi b.Hj Idris, p:506

6. Unmarried (single/bachelor)

If the women remarried again she automatically will loss her rights in guardianship. It is worried that women having much to do with her husband and neglecting the responsibility of taking care of those children as said by Hadith of prophet:

*You (mother) having much priority than (your husband) as long as you did not remarried again.*²⁷

According to section²⁸ 82 of Islamic Family Law. Act 1984, someone should reside at the place of where the children reside to avoid any harm to words the children in term of character and manner.

2.5 Priority over Custody (guardianship)

In the case of *Hadanah*, the mother will be priority of right in taking care of the children or priority of guardianship during subsisting of marriage or even after divorce took, place. The mother is give n priority than the father because the nature of women herself is given polite character and full with love and affection, infect with the mother instinct that she has during the giving birth of the child. It is very impossible to be challenged by anybody else including the father himself. It is suit with the need of the child who requiring more affection and love.²⁹ Prophet Muhammad S.A.W reported to said:

*Abdullah ibn Umar having said, that there was a women came before prophet Muhamad and said" Rasulullah, this is my child; he was be in my stomach during pregnancy. I breast feed him, and lapped them over. Indeed his father has divorced me and he want to take the child from me forcedly". Prophet said," Indeed you have more priority as long as you did not remarry again".*³⁰

²⁷ Mohd Fauzi Muhammad.1998. *Undang-undang Islam Dalam Empat Mazhab*. Jilid 2. n.pl: n.pb. p: 158

²⁸ Sec.82. Islamic Family Law Federal Territories

²⁹ Zaidan Abdul Karim, *Al-Mufasssal fi Ahkam al-Mar'ah al-Bait*. npl: n.pb p: 31

³⁰ Ahmad Bin Hambal. Abdullah Bin Abdul Hussain al-Tarki.1997. *Mausu'ah al-Hadisah*. Bairut: Muassasah al-Risalah. Jil. 11.p:310-311. #6707

Even the rights of custody give to the mother, it does not restrain the father to have contact with his own child as long as his intent for the welfare and education of the child.

By virtue of section ³¹81 of Islamic Family Law, Act 1984 it is stated that mother shall be the person that best entitled to custody the infant child.

By virtue of some section, following person are in the following order of preference of rights of custody:³²

- a) Mother
- b) Maternal grandmother form mother side and above
- c) Father
- d) Maternal grandmother form father side and above
- e) Uterine sister
- f) Consanguine sister
- g) Germane sister
- h) Uterine sister's daughter
- i) The consanguine sister's daughter
- j) The maternal aunt
- k) The paternal aunt
- l) The male relatives who could be their heirs as *asabah*.

And according to section 88,³³ mother will be given priority of custody. In determining the rights of the guardianship of the children, the court will put into consideration of the welfare of the children. Besides, the court also has to give attention to the parents and self-determination of the child. If he has attained specified age in making his own choice.

³¹ Sec.81. Islamic Family law Federal Territories

³² Shamsudin.1994. *Al-Iqnak*. n.pl: Darul Kutub. p: 358 (see Sec. 81 (2) Islamic Family Law Federal territories).

³³ Sec.88. Law Reform(Marriage and divorce)

2.6 Loss the Right of Custody

The rights of custody of a woman to her children will loss because of the following reasons:³⁴

- a) Remarry with a man, with has no blood relationship with children and not her *mahram*.
- b) Observing the bad character, immoral, dishonest and accessing what the ordinary human did not do.
- c) Change her residency, in order to avoid the father of the child from doing any necessary observation upon the child except when the women has been divorced by his husband, then enable the wife took back the child from him.
- d) If the party become an apostate, his right will lose. According to *Imam Hanafi*, apostate women party, will lose his right of guardianship until she repent and back to Islam, and rights against hadanah will be given to her.
- e) According to Section 83³⁵ of Islamic Family Law Act 1984, the rights of custody will lose if someone careless in taking care of the children until cause danger to the child. In addition, if it commits abused of the children under her supervision.

2.7 The Duration of Custody

The right of custody in priority belongs to the mother and her immediate family. It has been verified by the following verse:

*“The mothers shall give suck to their offspring for two whole years, if the father desire to complete the term but he shall bear the cost of their food and clothing on equitable terms”.*³⁶

Referring to the *Hanafi* School of though,³⁷ most of their previous jurist had said, the term of the child’s custody. It will end whenever the child (male) is capable to manage

³⁴ Salehan bin Hj.Yatim. 2002. *hak-hak Isteri Selepas Penceraian*. Selangor:Wardah Maju Enterprise. p: 31(see Sec. 83 Islamic Family Law Federal Territories).

³⁵ Sec.83. Islamic Family Law Federal Territories

³⁶ Al-Qur’an. Al-Baqarah: 233

³⁷ Peunoh Daly.1994. *Hukum Perkahwinan Islam*. Second edition. Selangor: Thinker’s Library Sdn Bhd. p:405.

after is own needs such a food, attire and health and doing *Istinja'* (purification) by himself. The meaning of purification is cleaning with clean (pure) water and for ablutions. On the other hand, for female children, the duration of custody will end after they reach the age of puberty. Anyhow, the jurist of *Hanafi* that come after them has different opinion in this matter depending on the condition of the said child. They had confined the duration. Rights of custody will be over, if the child attain the age of *mumayiz*, rarely 7 years old for the male and 9 years old for the female. *Imam alJassas* had criticized the age of maturity for the male children that are instead of seven year in should be nine years and eleven years for female children. Their conviction comes from *Rasulullah SAW* said, Give them an order perform their prayer in seven, and scold them if they disobey it in ten and separate them, between male and female their bed"³⁸.

According this view, the duration of custody will not end even the mother marries, but only she marries and immediate relative (blood ties) of the children.³⁹ *Muhammad bin al-Hassan Sahib Abi Hanifah* had described that the guardian who consist of mother or grandmother, the duration of custody for them for the child will end when they get mature which will be about eleven years of the age.

Explained that the extension period of custody would be given to custodian. But, it is only for the physically or mentally handicapped children such as Down syndrome or paralyses. By that time, the child is with his or her mother either for male or female child until the child recovers. After that, the right will turn the father.⁴⁰

From *Maliki* school of thought⁴¹ point of view, the age limit for the duration of custody, begins from when he was born until the age of puberty. Meanwhile, for the female child, from she was born until she married and until the marriage is consummated.

According to the *Syafie* school of thought,⁴² they is not fix limit for the duration of custody as there is no exact statement regarding the custody duration. Anyway, a child can choose when her or she is already *Mumaiyiz* and reaches seven

³⁸ N.a. 1994. Muhtasir Zawaid Musnad al Bazar ala Kutubul Sittah wa Musnad Ahmad. Bairut: Muassah al-Kitab as-shiqafiah. vol I. p: 190.

³⁹ Abdul Ghani Azmi b. Hj Idris. *Perkahwinan dan Kekeluargaan Dalam Islam*. p:506

⁴⁰ Ibid. p: 71

⁴¹ Peunoh Daly. 1994. *Hukum Perkahwinan Islam*. p:405

⁴² Ibid. p: 407

years of age.⁴³ If divorce has occurred, a child will always be with the mother until he or she can determine which between the father and the mother he or she want to live with.

But, if the child has chosen both, an election by the court will determine the choice. If the child does not make any selection, the custody belongs to the mother. This matter has been conceded by Imam *Taqyudin Husaini al-Syafie*, one of the *Syafie's* jurist:

"whenever a husband divorces his wife and they have a child, his wife is rather deserve to take him/her until the child turns to seven".⁴⁴

According to section⁴⁵ 84 of Islamic Federal Law (FT) Act 1984, it will allow to extend the duration of custody merely 9 year sold for male and 11 years old for female through an application made.

According to section 84, clearly stated that during age of *mumaiyiz*, the situation where the child can choose between good and bad, and in this situation the capability of the children in making decision whether to live with the mother or the father.

2.8 Custody According to Malaysian Law

In general, the Muslim family law in Malaysia is located under the states enactment respectively *syariah* contain each states are empowered to deal with children custody cases.

However, before 1998 constitution amendment, there was a case which the custody right has been over write in *Mariam v. Mohammad Arrif*⁴⁶ case. It happened when *Mariam* apply the custody right to Kuala Lumpur High Court a after she has given the right to her ex-husband at *Syariah Court*.

After studying the relevant provisions in the state Enactment, the High Court held that it was not prevented from hearing the application although there was consent order there was no appeal. Further, section 2 of the Enactment did clearly adopt the

⁴³ Mimi Kamariah Majid.1998. *Undang-undang Keluarga Islam*. Second edition. Butterworth: Malayan Law Journal p: 153

⁴⁴ Said Ibrahim.1999. *400 Soal Jawab Nikah Kahwin*. seventh edition. Selangor: Darul Ma'rifah. p: 178

⁴⁵ Sec.84. Islamic Family Law Federal Territories

⁴⁶ Azahari b. Mamat. 1999. *Hadhanah*. p:13

guardianship of Infant Act 1961, if there were no conflicts with Islamic Law or the custom of the Malays, in fact both laws emphasize children's welfare.

Hence in peninsular, the guardianship of Infant Act 1961, can be imposed on children below 18 when it has been approved by the state's assembly and the provision is not contradictory to Islamic and Malay custom law.

Thus it was clear that the custody enactment in a few states has been codified under Islamic Family Law Enactment.

However nowadays, there are two jurisdictions *Syariah* Court and Civil Court that hold based on Muslim law.

Therefore we could see when a custody case has been heard in civil court, the *syariah* court's held will be ignored according to the guardianship of Infants Enactment Act 1961. What is lacking here the Law Reform Act Marriages and Divorce 1976 is not implemented upon Muslim.

But now an amendment has been made to section 121(a) of Federal Constitution 1998. So the overlap may not arise again, as the custody cases just can be heard in *Syariah* Court and the Civil Court no longer possesses any jurisdiction in this matter.⁴⁷

2.9 Custody of Illegitimate Child

The illegitimate child means the children without marriage and the right custody of illegitimate child exclusively to the mother and her relative.

According to section 85,⁴⁸ Islamic Family Law (FT) Enactment 1984, clearly stated that the right of custody of illegitimate child exclusively to the mother and her relatives.⁴⁹ Whereas, according to Law Reform Marriage and Divorce Act, 1976, by virtue of section 9, stated that child deemed to be legitimate as under section 75, where the mother shall, in the absence of any agreement. Moreover, the mother will be entitled to the custody of her children.⁵⁰

In this case, the court gives priority over the option made by the children more than the rights of guardian. Without considering whether the mother or father because the main objective of the child is to take care of the welfare of the child.

⁴⁷ Azahari b. Mamat. 1999. *Hadhanah*. p:16

⁴⁸ Sec.85. Islamic Family Law Federal Territories

⁴⁹ Ibid.Sec.85.

⁵⁰ Mimi Kamariah majid. 1992. *Undang-undang Keluarga di Malaysia, Butterworths, Singapore, Hong Kong*. Kuala Lumpur: Malayan Law Journal. p: 156.

2.10 Rules in Determining the Custody or Guardianship of the Children

1- Under Malaysian Law

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Guardianship of the infant Act 1961, in peninsular Malaysia, by virtue of section 10, court can discharge the rights of guardianship from the parents and giving it to others. It means that, a guardian not necessary the parents of the child and court has power to confer such rights to others and appoint another persons to take care of that children.⁵¹

Whereas, according to section 3 of the same act stated that guardianship of the children, should be responsible on the health of the children and education of the child.

Law reform Act, 1976, by virtue of section⁵² 88 (4) when there is more than one child in marriage, court will not be bound to place both or all in the custody of the same person, but shall consider the welfare of each independently. Court will impose certain requirements to the order of guardianship and depending on such requirement, guardian should have rights and determine all things regarding the maintenance and education of the child.⁵³

According to the Guardianship of infant Ordinance in Sarawak, by virtue of section 2, stated that the rights of father not having priority form the mother rights and vice versa. If the welfare of the child heeds it, than the father should be given the rights of guardianship and vice versa, it depends on the situation of the child. Parents can apply in court rights of guardianship.⁵⁴

As far as the Sarawak ordinance is concern, it does not mention that father will have the right of guardianship, and then the mother will take over such right in the death of the father. Whereas, in Guardianship of infant Ordinance mention that father will have the rights and shifted to the mothers in the death of mother but it is but it depend on the order of the court.

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⁵¹ Mimi Kamariah majid. *Family law in Malaysia*. 1992. p: 136

⁵² Sec.88. Law Reform Marriage and divorce 1976

⁵³ Mimi Kamariah Majid. p: 140

⁵⁴ Ibid. p: 139

2- Under Islamic Laws Enactment

Referring to the section 86 of Islamic Family Law, Act 1984,⁵⁵ clearly mention that everything mention in section 81, that the mother will be given the priority but court has power to shifted the right to the father and even though to others or society to ensure the welfare and integrity of the child.

In order to determine whose right, the court in favoring of the first in consideration is the welfare of the child depending on the circumstance of the children themselves. The court has to consider to matters:

- a) Favor of the parents
- b) Favors of the child, if he has attain to the certain age and capable in giving his opinion.

A woman came towards *Rasulullah* SAW and said "indeed my husband take away my child. He feed me with the water from *Samer Abu Anbah* (more than a mile form *madinah*) and indeed, it is beneficial to me". *Rasulullah* said "This is your father and this your mother, hold the hand whom you prefer most". Then the son holds the hand of his mother, then she went away along with her son.⁵⁶

Ulama' has different opinion regarding this matter.

1. According to *Abu Haniffa*, father has the rights in guardianship and the choice made is not valid, as his choice is not the best, until the child attain the age of puberty and the mother remarry.
2. *Imam Malik* opined that mother has the right of guardianship until he marries.
3. According to *Imam Ahmad Ibn Hambal*, father has more right with no choice. When he attains 9 years old, and mother only has the right when he yet attain age 9 years old.

According to section⁵⁷ 87, clearly stated that even the right of guardianship is given to the mother or other person but section also provide the rights to visit the father or the mother. It did not been restrained but ensured and allowed by the court. It is because to protect the natural relationship between the children and the parents. In

⁵⁵ Sec.86. Islamic Family Law Federal Territories.

⁵⁶ Abdul Ghani Azmi. 1996. *Perkahwinan dan Perlembagaan dalam Islam*. p:510

⁵⁷ Sec.87. Islamic Family Law federal Territories

the same section, disallowing the other people bring out the children outside the jurisdiction of Malaysia.

2.11 By referring to the Previous Cases

1) *Wan Khadijah v. Ismail*⁵⁸

In this case, appellant (husband) applies for the right of custody of daughters whose age between 7 to 13 to be given to him. His reason is because respondent (wife) has remarry again and the court asked the children to be given to their father. It is base on kitab *al-Mughi al-muhtaj*, chapter 3, mean if mother remarry the right of custody /guardianship will be transfer to the father.

Appeal made by the mother rejected by the appeal committee referring to the fatwa those children who are *mumayiz*, the right of guardianship given to the father.

2) *Abdul Rahman b. Shafie v. Husna and another*⁵⁹

In this case, Federal Court *Syariah* High Court, have order that right of guardianship give to the mother, then the mother remarry and appellant appeal to shift of the right of guardianship given to him. During the approval heard, the children already *mumayiz*, then the child choose to live with the auntie who has taking care of him since he was child until the case heard and determined on 18th April 1998.

Appeal of father has been rejected by the federal committee of *syariah* court of appeal committee because the child already attain the age of *mumayiz* and then the child has the right to choose.

3) *Mansor v. Che pah*⁶⁰

In this case, the parties had two children, of whom the younger boy age two years and four mouths was in the custody of the plaintiff and the elder boy aged four years nine mouths was in custody of the defendant. The plaintiff claimed for custody of the elder son. The learned *Kadhi* after hearing the parties ordered the defendant to return the elder boy to the plaintiff as he was then five years old and not yet *mumaiyiz*.

⁵⁸ [1975] 1 JH (1) 53

⁵⁹ [1998] 12 JH 231

⁶⁰ [1975] 5 JH 316

Conclusion

It much better, if every claim made settled through the discussion made between the parents. Let the claim is according to the competency of the wife and husband and in order to ensuring the comfort of the children. If following the circumstances of the child, if the child is minor, it is better under the custody of the mother because reasonably the minor needs mother more than the father does.

Whereas, in ensuring the welfare and education of the child, court has right to put into consideration the affordability of their parents, who is more affordable, then he has the right of guardianship. It is because the future of the children is much more important than everything. For the betterment of the child, parents should in freehand accept any decision made by the court.

Signature

Name

Date

Place



Chapter 3

CHAPTER THREE

THE PRINCIPLE MAINTENANCE OF THE WIFE

3.1 Introduction

This chapter talks about the maintenance of Muslim which is obligation upon husband to pay the maintenance. It also discusses about requirement of the wife does entitle to the maintenance and the situation went she doe's not she want be eligible for maintenance for certain reasons, it also talks about the objective of the maintenance of husband toward his or his former wife, in this chapter also there is maintenance to be period day the subsistence of marriage and after divorce, there is the law are regard to maintenance of the wife after being divorce.

Indeed, is an obligation upon husband to pay the maintenance towards bring wife or are former wife or in other words, it is the right wife to get the maintenance for her husband and the husband must be paid either during the subsistence of marriage or after divorce came into existence. Therefore in mattes pertaining *nafkah* toward the once wife, the husband must have equality of greatnesses in giving it because it is counted as *ibadah* as ordered by Islam in order to show that Islam is taking care with matter parties to the maintenance of wives.

It is based a *quranic* verse:

﴿الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ
فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ
وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ فَإِنِ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا إِنَّ اللَّهَ كَانَ عَلِيمًا
كَبِيرًا﴾⁶¹

⁶¹ Al-Qur'an. An-Nisa'4:34