

CHILD CUSTODY IN ISLAM



**ISLAMIC PROVISIONS ON
CHILD CUSTODY IN CASE
OF THE PARENTS' DEATH
OR IN CASE OF DIVORCE**

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
الْحَمْدُ لِلَّهِ نَحْمَدُهُ وَنَسْتَعِينُهُ وَنَسْتَغْفِرُهُ وَنَعُوذُ بِاللَّهِ مِنْ شُرُورِ أَنْفُسِنَا
وَمِنْ سَيِّئَاتِ أَعْمَالِنَا مَنْ يَهْدِهِ اللَّهُ فَلَا مُضِلَّ لَهُ وَمَنْ يَضِلَّ فَلَا هَادِيَ لَهُ
وَأَشْهَدُ أَنْ لَا إِلَهَ إِلَّا اللَّهُ وَحْدَهُ لَا شَرِيكَ لَهُ وَأَنَّ مُحَمَّدًا
صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَبْدُهُ وَرَسُولُهُ

INTRODUCTION

In The Name Of Allah the most Beneficent the most Merciful. Praise is to Allah, the Absolute King, the Right and the Obvious. Prayers and Salutations are upon our noble Prophet, Muhammad, and upon his household, companions and those who follow their path righteously till the Day of Resurrection.

I compiled this small publication in order to guide us on the complex issue of Child Custody in Islam that may arise in the case of the death of one of the child's parents or in the case of a divorce. The publication brings as many opinions as possible from the various Islamic Schools of Jurisprudence but with emphasis on the Maliki School (which is most followed in our lands).

Under Islamic Law (Shari'ah), *personal* emancipation does not necessarily lead to an emancipation of *property*. As a matter of fact, the Islamic system recognises two distinct periods of a minor (child) growing into a major (adult):-

- (1) One has reference to the emancipation of the person of the minors - here the women are most suited (i.e.

maternal lineage). Here comes the issue of the **custody for the purpose of bringing up the children.**

- (2) The other to the assumption by the person of the minors of the management and direction of their property - here the men are most suited (i.e. paternal lineage). Here comes the issue of the **custody for the purpose of the management and preservation of the children's property**

The various Scholars, whose verdicts were quoted in this small publication, gave their opinions based on their understanding of the subject from the following sources:-

1. The Glorious Qur'an
2. Hadith Books
3. The book, *Radd al-Muhtar*, Vol.3
4. The book, *al-Mawsili, al-Ikhtiyar li ta'lil al-mukhtar* Vol.3
5. The book, *Mustadrak al-Hakim*, Vol. 2
6. The book, *Qadri Pasha*, Hanafi Articles
7. The book, *Wilaayat al-Mar'ah fi'l-Fiqh al-Islami*,
8. The book, *Fatawa-i-'Alamgiri* Vol. 1
9. The book, *Shari'ah Law*, Vol. II
10. The book, *al-Hidayah*, vol. IV
11. The book, *Irshad al-Salik* (known as *Askari*)
12. The book, *Tuhfatul Hukkam*
13. The book, *Minhaj Al-Muslim* Vol. 2

Indeed all the quoted verdicts gave the page numbers or the Hadith numbers (as the case may be) for easy reference and further studies by readers. May Allah pardon any mistakes we might have made in this publication, as all human beings are bound to err, *ameen*

May Allah accept this work and make it a source of salvation for us, our parents, our teachers, our family members and all our Muslim brothers and sisters, ameen.

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Part One

CUSTODY FOR THE PURPOSE OF BRINGING UP THE CHILDREN

Sheik Muhammad ibn Adam of Darul Iftaa gave a well researched view on child custody in Islam.

The Sheik avers that if and when a marriage unfortunately comes to an end, the problems of the parties involved should not in any way affect the children. Children are a trust (*amanah*) from Allah and they should be treated and looked after in a proper manner.

They have many rights, of which two are of utmost importance (1) to receive proper care and love, and the other (2) to receive proper upbringing (*tarbiyah*). These rights of a child cannot be fulfilled except with the joint endeavour of the parents. The love, care and attention of the mother is just as important as the upbringing and training of the father.

In the light of the above, divorce should definitely be avoided as much as possible, especially in the case where children are involved. The Messenger of Allah, Muhammad (SAW), said:

“Divorce is the most hated of all lawful (halal) things in the sight of Allah” (Sunan Abu Dawud, no. 2178).

However, if divorce did take place, and both parties demand their rights, then the right of custody will be in the following ways:-

The mother has a right of custody for a male child until the child is capable of taking care of his own basic bodily functions and needs, such as eating, dressing and cleaning himself. This has been recognised at seven years of age. Imam al-Haskafi states,

“The custody of a male child is the right of the mother until the child is capable of taking care of his own self. This has been approximated at seven years of age, and the Fatwa (legal verdict) has been issued on this age, as normally children are able to take care of themselves at this age (See Radd al-Muhtar, Vol.3, page 566).

In the case of a female, the mother has this right of custody until she reaches puberty. This has been declared at nine years of age. (See *al-Mawsili, al-Ikhtiyar li ta’lil al-mukhtar*, Vol.3 page 237).

The right of custody will be taken away from the mother if she:-

- (1) Leaves Islam
- (2) Openly indulges in sins such as adultery and there is a fear of the child being affected
- (3) She does not attend to the child due to her leaving the house very often

(4) She marries a non-relative (stranger) to the child by which the child may be affected

(5) She demands payment for the upbringing of the child if there is another woman to raise the child without remuneration

In the above cases (when the mother no longer has the right to custody), this right then transfers to the following (in this order):-

(a) Maternal grandmother, and on up;

(b) Paternal grandmother, and on up;

(c) Full sisters

(d) Maternal half sisters

(e) Paternal half sisters

(f) Maternal aunts

(g) Paternal aunts

After all the avenues of the females have been exhausted as explained by the Muslim Jurists, the males have the right of custody in the following sequence:

(a) Father

(b) Paternal grandfather

(c) Real brother

(d) Paternal brother

(e) Maternal brother

The reason for this is that, in the early years, the mother and the other female relatives are more suitable for raising the young child (regardless of sex) with love, mercy, attention, and motherly care. The male child after reaching the age of understanding (7 years) is in need of education and acquiring masculine traits, which is why he is then transferred to the father. The female child, after reaching the age of understanding is in need of being inculcated with female traits, which she receives by living with her mother. After reaching puberty, she is in need of protection which the father offers.

In a Hadith recorded by Imam Abu Dawud in his *Sunan*, the Messenger of Allah (SAW) said to a woman who complained that her husband divorced her and was intending to take her child away from her,

“You are more rightful of the child as long as you don’t marry” (Sunan Abu Dawud, no. 2276 & Mustadrak al-Hakim, Vol. 2 page 207).

It should also be remembered that after the transferral of custody from the mother to the father, the boy remains in the custody of the father until puberty, at which point, if he is mature and wise, he is free to choose with whom to live, or to live on his own. As for the girl, custody remains with the father until she marries (See Qadri Pasha, Hanafi Articles, pages 498 & 499).

Irrespective of who (mother/father) has the rights of custody, the other party has visitation rights according to mutual understanding and consent. Generally, the party having the rights of custody uses the child as a weapon to punish the other party by depriving them of visitation rights. This is totally against the concept of Islam and a grave sin. It is also very harmful to the child. At all times the father of the child is responsible for maintaining the child; in the case of a female, until she marries; while in the case of a healthy male, until he reaches maturity. In the case of a disabled child (male or female) the father is permanently responsible.

When the mother has the rights of custody but does not have a shelter to stay in with the child, the father must provide shelter for both. (See Radd al-Muhtar of Ibn Abidin).

The reasons for women's preference in custody of children is stated in the book, *Wilaayat al-Mar'ah fi'l-Fiqh al-Islami*, page 692, as follows:-

“Women have more right to custody of children than men because they are more compassionate and more kind, and they know better how to raise small children, and they are more patient in dealing with the difficulties involved. The mother has more right to custody of her child, whether it is a boy or a girl, so long as she does not re-marry and so long as she meets the conditions of custody. This is

*according to scholarly consensus. **The conditions of custody are:-** being accountable (i.e., an adult of sound mind etc.), being free (as opposed to being a slave), being of good character, being a Muslim if the child concerned is a Muslim, and being able to fulfil all obligations towards the child. The mother should not be married to a person who is a stranger (i.e., not related) to the child. If one of these conditions is not fulfilled and there is an impediment such as insanity or having remarried, etc., the woman forfeits the right to custody, but if that impediment is removed, then the right to custody is restored. But it is best to pay attention to the interests of the child, because his rights come first”.*

When the child reaches **the age of independence**, the period of custody comes to an end, and the period of *kafaalah* or sponsorship of the young begins, which lasts until the child reaches adolescence or in the case of a girl, starts her periods. Then the period of sponsorship ends and the child is free to make his own choices. **The age of independence** varies with the various Islamic legal schools. The Book, *Fatawa-i-'Alamgiri* vol. 1, page 728 states that, the woman's custody of a boy terminates when he is 7-years old, whereas the custody of a girl terminates when she reaches puberty. The man's custody continues until puberty for a boy, and not just until puberty for a girl, but until she can safely be left to herself and trusted to take care of herself.

Sheik Syed Amir Ali, in a *fatwa* in the book titled, *Shari'ah Law*, Vol. II, page 493, Published by All Pakistan Legal Decisions, Lahore, in 1965, avers that, among the Hanafi's and the Shiites, puberty is presumed to occur upon the completion of the 15th year; among the Maliki's upon the completion of the 18th year.

The Hanafi's and the Shiites generally consider *Rushd* (discretion) and *bulughyet* (puberty) to go together, and therefore the personal emancipation of minors which occurs on their attaining puberty, carries with it the emancipation of their goods from the hands of their guardians. They thus become entitled to take charge of their own selves and property.

There are cases, however, in which a boy or a girl may have arrived at puberty and may yet not be sufficiently discreet (possessed of understanding) to assume the direction of his or her own property. In such cases, the Shari'ah separates the two ages of majority, and while according to the minor personal emancipation from the right of *jabr*, (i.e. the right to impose the status of marriage on a minor) takes care (in the minor's own interest) to retain the administration of his or her property in the hands of the legal guardian. If a minor should not be discreet at the age of puberty, he or she will be presumed to be so when the ward completes their 18th year, unless there is any direct evidence to the contrary.

Custody and guardianship of a child by the mother is an issue that must be noted and understood, particularly in accordance with the provisions of the **Maliki School**. It is generally said that a mother has the right to the custody and/or guardianship of a male child up to the child's reaching puberty and a female up to her getting married and the husband having carnal knowledge of her.

The general confusion here is the presumption that the mother has this right whether she is married to the child's father or not, but the legal position is that the mother has this lengthy-period right (reaching the age of puberty for males and getting married for females) only if she is still married to the child's father. In the case of a divorcee mother, the ages of children mentioned earlier (ranging between 7 and nine years) becomes applicable. Sheik Abu Bakr Jabir Al-Jaza'iry one of the blessed lecturers in the Noble Prophetic Mosque in Medina, gave a good account on this issue on pages 394 and 395 of his book, *Minhaj Al-Muslim* Volume 2 as follows:-

“The period of guardianship and care is valid until the young boy reaches the age of puberty. In the case of a young girl, it is until she gets married and has sexual relations with her husband. However, when the wife is separated from her husband, she maintains the custody to look after the young girl until she reaches seven years of age. Thereafter, her guardianship should be transferred to

her father, since he is more suitable to look after her than other female guardians. When the boy reaches the age of seven, he is given the choice between his father and his mother. Whomever of them he chooses, to stay with, his guardianship will transfer to that person... If he chooses the mother, he has to stay at night with her while he spends the daytime with his father. If he chooses the father, he can be with him at night and during the day. This is because the child will be more secure with his father during the day who would take care of his rearing and education, as the mother does not usually take care of such things”.

Part Two

CUSTODY FOR THE PURPOSE OF THE MANAGEMENT AND PRESERVATION OF THE CHILDREN’S PROPERTY

The book, *al-Hidayah*, vol. IV, page 553, states that the guardianship of a minor for the management and preservation of his property devolves (1) first on his or her father, (2) then on the father's executor, (3) next on the paternal grandfather, (4) then on his executor, (5) then on the executors of such executors, (6) finally on the ruling power or his representative, i.e. a Qadi or Judge. Ultimately it rests upon the Qadi to appoint a guardian for an infant's property when there is no near guardian (i.e., the father, the father's father and their executors).

The other paternal kinsmen who are termed “remote kindred” and the mother succeed, according to proximity, to the guardianship of an infant for the purpose of education and marriage. They do not have the right to be guardians of the minor's property unless appointed to do so by the ruling authorities, or unless appointed to be a guardian (executors) in the original proprietor's Will, which has been duly attested by competent witnesses. If the mother remarries, she forfeits her right to guardianship. However, she can regain this right should she become divorced again and has thus returned to widowhood.

In case of default of the mother as well as the paternal kindred of a minor, the minor's maternal relations (according to proximity) are entitled to guardianship for the purposes of education and marriage, and not management of the ward's property, unless appointed in the late owner's Will or by the Qadi.

The general rule is that a guardian, executor, or anyone who has the care of the property of a minor, can enter into a contract which is (or likely to be) advantageous and not injurious to his or her ward.

Part Three

MUTUAL AGREEMENTS ARE ACCEPTABLE IN CHILD CUSTODY

Despite the complexity of child custody and child property guardianship in Islam, its administration is not as rigid as that of Zakkat and/or Inheritance. One cannot alter the Zakkat or Inheritance formula under whatever mutual agreement may be reached between the parties. But child custody and child property guardianship can be adjusted on mutual agreements within the provisions of the Shari'ah. The formulae are enforced only in the event of disagreement where one party demands his or her rights. Therefore it is totally acceptable for one party to renege or concede his or her rights to the other party. Sheik Muhammad ibn Adam of *Darul Iftaa* states that, ***“it should be remembered that there is nothing wrong in making a mutual arrangement, as long as there is no objection from those who have a right to custody”***.

Tammat bi hamdil Lahi

This concludes this small publication with prayers to Allah (SWT) to make it useful to the Muslim Ummah. Marriage, divorce and child custody are very important aspects of Muslims' lives as there cannot be a legally accepted people in Islam without the institution of marriage. Child bearing and child upbringing outside wedlock in Islam are outright *haram* (illegal, unacceptable, an abomination), therefore all care must be taken in preserving the marriage institution. May Allah accept this work and make it a source of salvation for us, our parents, our teachers, our family members and all our Muslim brothers and sisters, ameen.

*Wassalamu Alaikum wa Rahmatul Lahi Ta'ala wa
Barkatuhu.*