

**APPRAISAL OF THE PARAMOUNT INTEREST OF A CHILD
AS PRECURSOR TO GRANT OF CUSTODY (الحضانة) OF A CHILD UNDER
SHARI'AH**

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Abstract

Custody (Hadana) in Islamic jurisprudence is primarily guided by principles derived from the Qur'an, Hadith, and juristic interpretations within the four major Sunni schools (Hanafi, Maliki, Shafi'i, and Hanbali), as well as Shia perspectives. In Islamic Family law, custody is usually granted to the mother; with whom it is believed the interest of the child would be best served, particularly during the child's early years, emphasizing maternal care's importance in nurturing. Islamic law balances the rights and duties of both parents while prioritizing the child's best interests, a principle known as maslahah (welfare of the child). Therefore, father basically assume financial responsibilities and legal guardianships, overseeing matters relating to the child's education, finances, and marriage arrangements. However, there are factors which may cause shift in custody ranging from such as the child's age, the custodian's ability to fulfill the child's obligations, and circumstances that might be deemed harmful to the child's well-being. It must be noted however that Nigeria has numerous ethnic groups and customary laws vary broadly. Also, contemporary applications of custody in Muslim-majority countries vary, as interpretations of Islamic principles may integrate state laws, societal customs, and modern child welfare considerations. This paper through a doctrinal method appraises the provisions for child custody (Hadana) under the Shari'ah as affecting the Muslims' children vis-à-vis how the interest of the children would be best served. The objective of this research is to sensitize many Muslim women who had little or no knowledge of their right to custody of their children. It was observed that though some Muslim women know their right to custody of their children but lack prerequisite power to fight for it when been overridden by men. Lastly, the paper concludes by making recommendations to Muslim women who may want to explore custody under Islamic law.

Keywords: Shari'ah, Hadana, Child, Custody, Paramount Interest

1.0 INTRODUCTION

Hadana (الحضانة) is the Arabic term use for custody of a child in Islamic law.¹ The word is used to express the action of a mother-bird protecting its chicks with its wings. Thus, the word *Hadana* is technically used to convey the general care and protection a mother gives to her young child under Islamic law.² *Al-Hadana* is one of child's rights that are incumbent on his parents or some set of people as laid down in the *Shari'ah*.³ *Islam* considers the issue of children's rights very crucial, as children are the nucleus of a healthy society. This right of *Hadana* is due to a child before, after his birth. The reasons for this right are that; children are believed to be potentially weak, feeble, and prone to the negative effects of social vices and negative occurrences as well as harmful behaviors.⁴

2.0 MEANING OF HADANA

Literally, *Hadana* means 'to clasp in one's arm' 'to hug or embrace' 'to nurse' to bring up' 'to raise' a child.⁵ *Al-Hadana* technically means the act of protecting, guarding and shielding of a child physically, spiritually and mentally at his tender age from hazards of life.⁶ This protection is aiming toward helping the child to differentiate between good and bad, harm and benefit and generally to be able to face the challenges of life when he becomes adult.⁷ *Hadana* of a child includes: taking care of the child's personal hygiene like taking care of his body, his cloth, preparing his food,

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¹ JM Cowan (ed.) *Arabic-English Dictionary* (Junaid Offset Works, New Delhi, 1960) 185

² MA Ambali *The Practice of Muslim Family Law in Nigeria* (2nd ed. Tamaza Publishing Co. Ltd., Zaria, 2003) 256

³ IM Bakr *Al Fiqh al-Wadiah Minal-Kitab Was-Sunnah 'Alal-madhahibil-Arba'ah* (vol. II, 2nd ed. Daru al-Manar, Cairo, 1998) 159.

⁴ Zakariya O. A. 'An Appraisal of Child's Right under the Islamic Law' (Being a long essay submitted to the faculty of law, university of Ilorin, Ilorin, Nigeria, in partial fulfillment of the requirements for the award of the degree of bachelor of laws (LL. B Hons.) In *Common and Islamic Law*, 2011) pg. 19

⁵ Cowan J. M., (ed.) *Arabic-English Dictionary*, p.185, see also: *Muhammad ibn Mukarram Ibn Manzūr, Lisan Al-'Arab*, edited by Yusif Khaiyyatt and Nadean Mar'ashi, Vol. 1, Beirut. 661-662;

⁶ Bakr (n 3)159.

⁷ *Ibid.*

where he sleep.⁸ *Hadana* also involves taking care of the child intellectually, (عقليا) spiritually, (نفسيا) and physically (جسميا).⁹

2.1 MEANING OF PARAMOUNT INTEREST OF CHILD UNDER SHARI'AH.

The paramount interest of child; also known as best interest or welfare of child are nursing, health, proper training and the child's education.¹⁰ These are first thing to be considered in child custody under Islamic law.¹¹ Any determination of child custody must be done bearing the welfare of the children in mind and must be in the best interest of the child. Any discrimination in the granting of custody that does not align with the welfare and best interest of the child is invalid, unlawful and can be challenged in Court.¹² The welfare and best interests of the child are paramount, and various personal and situational aspects are evaluated to ensure that the custody arrangement serves the child's needs. The Sharia Court of Appeal of Kwara State held in *Adebiyi v. Adebiyi*¹³ that:

‘Mother’s intense care, bedding and bodily warmth are better for him (the child) than the father’s until he (the child) is of age and then choose for himself. Thus, the mother is more passionate, more tender, more compassionate, more subtle, more experienced (in child raising) and more pitiful. She is therefore more entitled to her child so long she has not remarried.’¹⁴

3.0 RIGHT OF *HADANA* IN ISLAM.

⁸ Abdulkadir Orire, ‘Shari’a: A Misunderstood Legal System’ (Sankore Educational Publishers Limited, Zaria, 2007). 81.

⁹ Ambali (n 2) 256

¹⁰ MA Ambali *The Practice of Muslim Family Law in Nigeria*’ 326

¹¹ See the unreported case of Katsina State Sharia Court of Appeal, *Bilyamin Bashir v. Suwaiba Muhammad* Suit No. (KTS/SCA/KT/39/2019)

¹² Ibid. see also the decision of the Sharia Court of Appeal, Kwara State in *Adebiyi v. Adebiyi* (2020) KSCALR. P. 85 @ 92.

¹³ (2020) KSCALR. P. 85 @ 92

¹⁴ Ibid.

Intuitively, parents' hearts are disposed to loving children and are filled with psychological feelings and parental compassion for protecting, caring, sympathizing, and loving for the children.¹⁵ *Hadana* is aimed at serving the paramount interest of a child hence the right of custody of a child belongs to the mother of such child either during the connubial relationship or after its dissolution.¹⁶

However, when such mother falls short of one of the prerequisites of right of *Hadana* as shall be discussed later in this paper, the *Hadana* shall be taken away from her to some other set of people.¹⁷

4.0 THE ORDER OF THOSE WHO HAVE THE RIGHT OF *HADANA*.

Muslim jurists gave preference as to who has the right to care for a child taking into consideration the interest of the child. Women are preferred over men and within the same gender, preference has been given to those who are closer to the child and who are expected to be more compassionate and merciful.¹⁸

4.1 ORDER OF WOMEN IN THE RIGHT *HADANA* The mother, (الأم).

¹⁵ Nasih Ulwan A. 'Child Education in Islam' (Dar El Salam, Cairo, 1st. 2001). 15

¹⁶ Bakr Ishmael M., *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah "Alal-madhahibil -Arba" ah* pg. 160. The reason for giving priority to the mother is that she has proper right to custody and breast-feeding of the child. This is because she is more skillful and more capable to discharge the duty better than man and she is endowed with patience and time to attend to the problems of the child both of which she is more suitable than man in respect of custody. See for detail, As-Sayyid Sabiq '*Fiqh As-Sunnah*' (Vol. II, 4th ed., Daru Al-Fikr, Lebanon, 1983) pg. 287; see also the case of Taibatu Aduke V.G. A. Mustapha KWS/SCA/10/85, where the Kwara State Shariah Court of Appeal sitting in Ilorin granted to the appellant the custody of her children with the respondent.

¹⁷ Ibid, 160

¹⁸ Imam Al-Hussain '*Custody of Children in Shari'ah*' available online at [http://www.irfi.org/articles/articles_551_600/custody_of_children_in_shari.htm\(irfi\)](http://www.irfi.org/articles/articles_551_600/custody_of_children_in_shari.htm(irfi))

Jurists unanimously agree that so as long as mother is qualified, she has priority over any other person to claim the *hadana* of her child.¹⁹ This is evident on a *hadith* reported by *Abu Dawud* that ‘*Amru Ibn Shu’yb* narrated from his father, from his grandfather that:

A woman came to the Prophet and said: ‘O Messenger of Allah! I carried my son in my womb, suckled him my breasts and held him on my lap; yet his father has divorced me and wants to take him away from me. The Prophet replied: “You have more right to him as long as you do not re-marry.”²⁰

Caliph Abu Bakr (RTA), was also reported to have made a decision between Caliph 'Umar (RTA), and his wife when he divorced her and took away her son – ‘Asim- from her, that the custody of the child be given to the mother. Abu Bakr said to Umar: ‘the hug and kisses of that old woman to the child is more important and valuable than whatever material wealth you can offer the child.’²¹

Grandmothers (ام الأم ثم ام الأب). Except in *Malikiyyah* where the maternal aunt has preference over paternal grandmother, the majority of juristic school of thought are of the opinion that in the absence of the mother (whether dead or disqualified), the custody right goes to the grandmothers; however, maternal grandmother is given priority over the paternal grandmother. This was evident on the *athar* reported by Qasim bin Muhammad that:

'Umar Ibn Al-Khattab had married a woman from the Ansar. She gave birth to a son whose name was 'Asim bin 'Umar. 'Umar later divorced the woman. One day when 'Umar was proceeding on horseback towards Qa'ba, he found his son was playing in front of the mosque. He caught hold of him and placed him on the horse's back. 'Asim's maternal grandmother caught up with them. A quarrel arose between the maternal grandmother and 'Umar about the *hadanah* of the boy. Both of them came

¹⁹ Al-Imam Muhammad bn Aliy Ash-Shawkani, *Comprehensive Islamic Jurisprudence According to the Qur'an and Authentic Sunnah*, (Trans. Abu Aisha Murthada Salahudeen al-Iwoowee, Edit. Muhammad Zubair Bin AbdulAzeez, Salmah bint Younus, 1st Ed., Dakwah Corner Bookstore, Malaysia, 2019) 399

²⁰ Abu Dawud, ‘*Sunanu Abi Dawud*’ (1st Ed., Daru Ibn Hazm, Beirut, 1998) Hadith No. 2276, 351

²¹ Abu Malik Kamal Bn As-Sayyid Salim, *Sahih Fiqh As-Sunnah Wa Adilatuh Watawdihi Madhahibil Ahimah*, (Vol. iii, Daru Tawfiqiyyah lilturath, Cairo, 2010) 371

to Abu Bakr who was the Caliph. 'Umar said: "He is my son". The grandmother said: "He is my son". Abu Bakr said: "Leave this woman and the child". 'Umar said nothing in reply [he raised no objection to this decision] ²²

Hierarchy of other women who are entitled to the *Hadana* of a child are as follows:

- i. Sisters (الأخت الشقيقة): maternal Full or half sister, then paternal Full or half sister. This is the preference of the *Hanafiyyah* and the *Shafihyyah*. The *Malikiyyah* prefers maternal aunts over paternal grandmother and sisters.²³
- ii. Aunties (الأب ثم الأم ثم الأب): Maternal aunt is preferred by the *Malikiyyah* after mother and maternal grandmother.²⁴
- iii. Nieces (بنت الأخت الشقيقة ثم بنت الأخت لأم): maternal Nieces have priority over paternal maternal Nieces.²⁵

The purport of the above list women is that is one is not available or fall short of any of the required conditions, the other (in order of their arrangement) takes over the *Hadana*. It must be said that mother of such child takes priority over all others except if she is wicked and/or guilty of immorality like frequently goes out for parties or picnics; if she lives as prostitute or marries someone not related to the child.²⁶ If none of the above-mentioned women is not available or available but unfit, then *Hadana* becomes right of one of the men in the following order.

5.0 ORDER OF MEN IN RIGHT OF *HADANA*.

- (i) The father, and then the grandfathers. (الأب ثم أب الأب)
- (ii) The brothers and then their children (nephews) (الأخ الشقيق ثم ابن الأخ الأب)

²² Quoted in Abu Malik Kamal Bn As-Sayyid Salim, *Sahih Fiqh As-Sunnah Wa Adilatuh Watawdihi Madhahibil Ahimah*, 370

²³ Ibid. pg. 370

²⁴ Ibid.

²⁵ M. Bakr Ishmael, *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah "Alal-madhahibil -Arba"ah*. 160; see also An-Nafrawiy Al-Malikiy, 'Al-Fawakihu Ad-Dawaniy 'ala Risalatun Ibn Abi Zayd Al-Qayrawaniy' (Daru Al-Fikr, Bairut, 2008, Vol. II). 66-67

²⁶ Sharma. A. 'When Mother does not lose her Right of Custody under Muslim Law in India' available online at <<http://www.preservearticles.com/2012030124304/when-mother-does-not-lose-her-right-of-custody-under-muslim-law-in-india.html>> accessed on 26/2/2023

(iii) The uncles and then their children (cousins) (العَمُّ الشَّقِيقُ أو عم أبيه الشَّقِيقُ ثمَّ ابنهما)²⁷

In the absence of all the above men, *Hadana* of a child shifts to the paternal side of his mother i.e. mother's father, mother's grandfather, mother's uncles, and then their sons.²⁸ However, in the absence of all the above listed people to take over the *Hadana*, then the authority or the judge shall appoint someone to take over the custody of the child,²⁹ this discretion shall be exercised with total consideration of physical, mental, emotional, religious, financial, or any other relevant factors, including a child's preference.³⁰

6.0 SHARI'AH HIKMAH IN THE ORDER OF HADANA VIS-À-VIS PARAMOUNT INTEREST OF CHILD UNDER SHARI'AH

The caring nature, dedication, attention and tender feeling a woman has toward children generally is the reason for giving priority to the woman in a custody matter. Mother is believed to be more skillful and capable to discharge these duties better than man and that is reason mother is given priority over man in Islamic Law of custody.³¹ This was further buttressed in an interesting case has been recorded by Imam Ash-Shawkani in his book *Nail al Awtar* which was brought before Ibn Taymiyya.³² In this case, child custody was contested by both parents. Court gave the option to the child for choosing the custodian. He opted for the custody of the father. On it, the mother asked the court to inquire from the child why he has preferred the father. On court's inquiry the child said, 'mother compels me to go to the school where the teacher punishes me every day while the father allows me to play with the children and do whatever I like.' On hearing this, the court gave the custody to the mother.³³ This clearly shows that welfare and best interests of the child are

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.161

³⁰ A Hadjian 'In matters of child custody, child support and spousal support, Islamic nations apply civil and Islamic legal traditions differently' available on line at <<http://abbashadgian.com/2013/05/the-children-of-sharia/>> accessed on 1 March 2023

³¹ MA Ambali *The Practice of Muslim Family Law in Nigeria* ' 326.

³² Cited by Iqra Firdous & Shahnaz, 'Best Interest or Religious Laws: The Paramount while Deciding Child Custody in India' International Journal for Multidisciplinary Research (IJFMR) (6, Issue 3, May-June 2024) 6. Available online at <https://www.ijfmr.com/papers/2024/3/21339.pdf> accessed on 20th March, 2025.

³³ Ibid.

paramount hence, wishes of the minor while deciding his or her custody has always been subject to the principle of best interest and welfare of the minor is best served even in classical Muslim legal tradition. This is why various personal and situational aspects must be evaluated to ensure that the custody arrangement serves the child's needs in the award of custody under Shari'ah.

7.0 SHARI'AH PREREQUISITES FOR *HADANA*.

Certain conditions to be met are laid down to qualify for the *Hadana* of a child. The conditions are as follows:

- Sanity (العقل). An insane person is not entitled to be awarded custody of a child since he/she also need someone to care for him/her.
- Adult (البلوغ) an underage person needs someone to take care of him/her either hence not qualifies to be awarded custody of a child.
- Competence/Capability (قادرة), someone who is entitled to *Hadana* must be competent and capable of serving and taking care of the child. Such a person must also have a prerequisite knowledge of how to train a child.
- Person of good character. A person who is to take charge of *Hadana* must be of good character. An insolent or a prostitute woman cannot be given custody of a child.
- Being a Muslim. Some jurists opine that *Hadana* cannot be awarded to an unbeliever with reference to surah An-Nisah: ³⁴وَلَنْ يَجْعَلَ اللَّهُ لِلْكَافِرِينَ عَلَى الْمُؤْمِنِينَ سَبِيلًا... And never will Allah grant to the disbelievers a way (to triumph) over the believers'.³⁵ This is also aimed at protecting the faith and religion of such child. It is possible that the woman trains the child on her own religion different from Islam and which may be difficult for the child to change after the *Hadana*.³⁶ Nonetheless, the *Hanafiyya*, *Ibn Qasim* (a *Malikiyyah*) and *Abu Thawr* opine that *Hadana* of a child should be given to his/her mother regardless of her religion³⁷ in as much as *Hadana* only entails nursing, breast-feeding, and caring for a child.³⁸

³⁴ Q. 4: 141

³⁵ Yusuf 'Ali A. 'The Meaning of the Holy Qur'an' (amana Publications Maryland, USA, New ed., 1998)

³⁶ Bakr Ishmael M., *Al Fiqh al-Wadhih Minal-Kitab Was-Sunnah "Alal-madhahibil-Arba"ah* pg. 161

³⁷ Except such a woman is an apostate, then she shall not be given custody of her child.

³⁸ *Ibid.* pg. 162

- Lastly, that the mother of the child who wants to assume custody has not been married /to another man who is a stranger (i.e., not being related to the child).³⁹ This is evident on the hadith narrated by ‘*Amru Ibn Shu ’yb*’ earlier quoted in this paper.

It must be added also that a divorced mother or any others who assume custody of a child is not allowed to travel outside the town far from where the child’s father lives except she will return same day, although she may do so with the permission of such father.⁴⁰ However, a mother taking custody of her child may travel and/stay in her hometown being a place where she was married after her *iddah* (waiting period) without necessarily seeking the permission of the child’s father (her ex-husband). Permission of the father should be sought if she is travelling to a town not being hers or being her town but not being the place where she was married, or being a town where she was married but not being her hometown.⁴¹

7.0 SHARI’AH FIQH OF DURATION OF HADANA.

The duration of *Hadana* for a male child extends till when he attains puberty (البوغ).⁴² While that of a female child is till when she got married and her marriage is consummated.⁴³ Some Hanafi jurists opine that custody of a male child ends when he attains the age of 7years while that of a female child end when she attains the age of 9years.⁴⁴ In Kuwait, the girl remains in the care of the *Hadana* until she marries. The boy remains until he reaches the age of puberty. After which he is given the choice to stay with his father or mother. (Same in Sudan) While in Morocco, the length of period is: 12years for the boy and 15years for the girl after which the child is given the choice to stay with the father, mother or another relative. Egypt has 9 years for the boy and more than this

³⁹ Al-Jazairiy A. ‘*Minhaj Al-Muslim*’ (Daru Al-Fikr, Beirut, 2002) pg. 361.

⁴⁰ Bakr Ishmael M., *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah “Alal-madhahibil –Arba”ah* pg. 163-164

⁴¹ *Ibid.* p. 164.

⁴² Puberty is attained by a child his/her sex glands become functional and the secondary sexual characteristics emerge. The sign of puberty in a male adolescent is known by his potency to impregnate a woman and the discharge of semen, while a female child’s puberty is known by her menstruation, nocturnal pollution and pregnancy. See generally, Anwarullah, ‘*The Criminal Law of Islam*’ (Kitab Bhavan, New Delhi, 1st ed., 2006,) pg. 25

⁴³ ‘*Minhaj Al-Muslim*’ pg. 362

⁴⁴ Bakr Ishmael M., *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah “Alal-madhahibil –Arba”ah* pg. 162

for the girl.⁴⁵ Nonetheless, the judge before whom a case for *Hadana* is brought has the discretion to pronounce on what he thinks would be best served the interest of the child.⁴⁶

After the age of *Hadana*; when a child has grown up to face the challenges of life, the child has the right to choose between his two parents or other relatives with whom he/she shall live, though at this time, his/her father has the right over and above any other person.⁴⁷ This is found on a *hadith* reported by Abu *Dawud* that ‘*Abu Hurayrah* narrated that a woman came to the Prophet and said: ‘O Messenger of Allah! My husband wants to take my child away from me. The prophet then made the mother sit down to a side and the father to another side, and made the son sit down between them and then said to the child ‘this is your father and this is your mother; hold onto the hand of anyone you wish between the two of them, the child held unto her mother’s hand and she went away with the child.⁴⁸ Imam *Malik* support that the still go with his/her mother while Imam Abu *Hanifah* opine that the child’s father has more right to the child than his/her mother after the age of *Hadana*. This is because the child does not know with whom and what his/her interest is best served.⁴⁹ To this point, *Hadjian Abbas*⁵⁰ put together the age of transfer of custody, discretion, maturity and marriage in 15 Muslim Countries under various law and practice.

Country	Sect/Fiqh	Age of Transfer		Age of Discretion		Age of Maturity		Age of Marriage	
		Boy	Girl	Boy	Girl	Boy	Girl	Boy	Girl
Afghanistan	Sunni/Hanbali	7	9	N/A	N/A	18	18	18	16
Azerbaijan	Shi’a/Ja’fari	N/A	N/A	BIC	BIC	21	21	18	18
Bangladesh	Sunni/Hanafi	N/A	N/A	7	9	18	18	21	18
Egypt	Sunni/Hanafi	N/A	N/A	15	15	15	15	18	18

⁴⁵ ‘*Custody of Children in Shari’ah*’

⁴⁶ Ibid. 162-163

⁴⁷ Ibid. 163

⁴⁸ See for detail: ‘*Sunanu Abi Dawud*’ hadith No. 2277

⁴⁹ Bakr Ishmael M., *Al Fiqh al- Wadiah Minal-Kitab Was-Sunnah “Alal-madhahibil –Arba”ah*. 163

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Indonesia	Sunni/Shafi'i	N/A	N/A	12	12	18	18	19	16
Iran	Shi'a/Ja'fari	7	7	N/A	N/A	15	9	15	13
Iraq	Shi'a/Ja'fari	N/A	N/A	10	10	15	15	18	18
Jordan	Sunni/Shafi'i	N/A	N/A	15	15	18	18	16	15
Morocco	Sunni/Maliki	N/A	N/A	15	15	18	15	18	18
Nigeria	Sunni/Maliki	N/A	N/A	7	9	15	9	15/21	12/18
Pakistan	Sunni/Hanafi	N/A	N/A	7	9	18	18	18	16
Qatar	Sunni/Hanbali	N/A	N/A	11	13	18	18	18	16
Sudan	Sunni/Maliki	N/A	N/A	7	9	18R	18	Puberty	Puberty
Saudi Arabia	Sunni/Hanbali	N/A	N/A	7	7	18	18	18	18
Turkey	Sunni/Hanafi	N/A	N/A	BIC	BIC	18	18	17	17 ⁵¹

8.0 MAINTENANCES/FINANCIAL SUPPORTS CUM REMUNERATION IN *HADANA*.

It is mandatory under Islamic law that father and mother raise their children; give them moral supports, sound education (religious and other general knowledge of life) to their children. The father is the head of the family and in charge of maintaining the family financially,⁵² regardless of whether he is rich or poor; he must assume the responsibility to the best of his capability. Allah says: ‘...but he (father) shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear’⁵³

Hence, it is the duty of the father to maintain the family in terms of sheltering, clothing and feeding the wife⁵⁴ and the children. He is also responsible for financing the education of children, and their

⁵¹ ‘*In matters of child custody, child support and spousal support, Islamic nations apply civil and Islamic legal traditions differently*’ (Published in The Los Angeles Lawyer Magazine, April 2013) available online at <<http://www.lacba.org/Files/LAL/Vol36No2/3028.pdf>> see also: <<http://abbashadjian.com/2013/05/the-children-of-sharia/>> accessed on 1/3/2023

⁵² Q. 4: 34

⁵³ Q. 2: 233

⁵⁴ During the period they are living together as spouse and also during the waiting period of revocable divorce. See for detail: Bakr Ishmael M., *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah "Alal-madhahibil -Arba" ah.* 165

general welfares. The *Sunni*⁵⁵ and *Shi'a* jurisprudence agree that during and after termination of the marriage, the father must maintain the children whether the wife is poor or rich.⁵⁶ It must be added that during the time when the father and the mother are living together with their children, the father are only entitled to maintain the family by providing their needs and having done that, the mother are not entitled to any further remuneration for taking care of their children.⁵⁷ However, if the custodian of a child is not the mother, hence, she is entitled to remuneration in addition to maintenance of the child.⁵⁸ Similarly, the maintenance of the children is the duty of the father. On his death or incapacity for maintenance, this duty devolves upon the paternal grandfather, and then upon the mother, maternal grandfather and grandmother, and paternal grandmother, with preference going to the nearer kin of the father. If the grandparents are similar in degree of kinship, they must pay maintenance expenses equally. The court has power to enforce support against a third party.⁵⁹ Similarly, any dispute or disagreement on custody of child may be resolved an Area Court of Northern Nigerian.⁶⁰

9.0 DIFFERENCE BETWEEN PHYSICAL CUSTODY AND LEGAL CUSTODY OF A CHILD.

Although this paper is only concerned itself with *Hadana* (physical custody) and not *Waliy* (legal custody or guardianship) of a child. Nonetheless, it is pertinent at this juncture to state clearly that

⁵⁵ Comprises of Malikiyyah, Shafihyyah, Hanbaliyyah and Hanafiyyah.

⁵⁶ *In matters of child custody, child support and spousal support, Islamic nations apply civil and Islamic legal traditions differently*' see also Article 78, 148 and 155 of the United Arab Emirates Federal Law No.28, (Personal Status Law, PSL) 2005. Available online at <http://ejustice.gov.ae/portal/page/portal/eJustice%20MOJ%20Portal/About%20Us/Law%20of%20Personal%20Affairs>>

⁵⁷ Bakr Ishmael M., *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah "Alal-madhahibil -Arba"ah* pg. 165

⁵⁸ However, it is also agreed to that compensation may be paid to the mother of a child if such mother demands for remuneration and it is in the best interest of the child that his/her mother takes custody. See for detail: Bakr Ishmael M., *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah "Alal-madhahibil -Arba"ah*. 165

⁵⁹ Bakr Ishmael M., *Al Fiqh al- Wadih Minal-Kitab Was-Sunnah "Alal-madhahibil -Arba"ah*. 166- 168. See also '*In matters of child custody, child support and spousal support, Islamic nations apply civil and Islamic legal traditions differently*'

⁶⁰ Item 1, Part II of the Schedule of Area Court Law

in all the cases of *Hadana*, father is the rightful legal custodian i.e., guardianship, (*waliy*) of his child regardless of who has the physical custody of the child. This is to say physical custody of a child is different from legal custody (i.e., guardianship). Hence, Fathers must approve of their children's education, including the places and types of schools attended and the type of education received. Similarly, financial guardianship is vested in fathers and/or grandfathers unless transferred by agreement or assigned by the court to mothers or third parties for some reasons. Fathers are the recipients of a child's earnings after divorce and are authorized to purchase, sell, encumber, and manage a child's properties. This right is especially significant if children receive inheritances or gifts during the marriage. This rule also is relevant when children receive public assistance or private insurance benefits.⁶¹

10.0 CHALLENGE OF SUBMISSION TO CUSTODY UNDER THE COMMON LAW AND IMPLICATION FOR MUSLIMS

Marriage under the Statutory Law brings the parties thereto under the Matrimonial Causes Act (MCA).⁶² A statutory marriage that comes under the jurisdiction of the Matrimonial Causes Act (MCA) must be celebrated before a licensed marriage officer outside Nigeria or registrar of marriages within Nigeria between a man and woman that are previously single. Section 71 of the Matrimonial Causes Act is very clear that custody should be decided based on the child's best interest.

(1) In the proceeding with respect to the custody, guardianship, welfare, advancement or education of children, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.⁶³

In *Odogwu V. Odogwu*⁶⁴ the parties in the case were married in 1982 and had three issues aged 9, 8 and 6 years. Their marriage was pronounced dissolved upon the petition of the husband alleging adultery against his wife –Odumeoku Odogwu- on 17th December, 1990 by Adeyinka J. sitting in Lagos State High Court. Custody was among other things considered which went from court of

⁶¹ Ibid. pg. 169

⁶² Cap 220, 1970

⁶³ S 71(1), Matrimonial Causes Act, Cap 220, 1970

⁶⁴ (1992) 2 NWLR Part 225 pg. 539

Appeal to the Apex court. Belgore JSC (as he then was) held that ‘the interest of children which are required to be taken into consideration in custody matters by virtue of S. 71 (1) of MCA 1970, cannot be qualified in terms of material such as money or food but they must of necessity promote the happiness and security that tender age requires’. Case law has upheld this principle but mothers that want custody are held to very strict proof that they can maintain the children without regard to the courts powers to grant maintenance orders. Mothers describe the arduous proof they are made to provide that they have a personal residence, job and income before they are given custody.⁶⁵ While it seems logical and fair that mothers in the contemporary world are encouraged to have a job, child maintenance is supposed to provide the necessary financial support that she may lack to take care of her child or children; and this is responsibility of the father without necessarily takes the physical custody of the child.

The principle of the best interests of the child remains paramount under the Act as under Islamic law. The child is to be afforded the protection and care that is necessary for its wellbeing, which would include the right to survival and development. The rights to an identity from birth, the freedom of thought, conscience, association, peaceful assembly and religion are guaranteed, under the guidance of its parents. The child has a right to family life; its dignity is to be respected at all times; it is entitled to health and health services, parental care, maintenance, leisure and recreation, free compulsory and universal primary education and freedom from discrimination.

10.0 CONCLUSION

Islam sees the paramount interest of a child to be best served with the biological mother of such child, unless such mother is not available or is unfit with any of the defects earlier discussed. If the mother is not available or unfit, the custody still goes to some set of female relatives to the child in a hierarchical order with whom it is believed the paramount interest of the child would be best served. It is only when these set of women exhausted that the custody can come to the father. The reason for giving priority to the woman in a custody issue is the caring nature, dedication, attention and tender feeling a woman has toward children generally. *As-Sayyid Sabiq* succinctly put this thus:

⁶⁵ MzAgams, ‘Child Custody in Nigeria’ available online at <<http://mzagams.wordpress.com/2011/11/18/child-custody-in-nigeria/>> accessed on 28/2/2023

The reason for giving priority to the mother is that she has proper right to custody and breast-feeding (nursing) of the child. This is because she is more skillful and more capable to discharge the duty better than man. With regard to *Hadana*, she is endowed with patience and time to attend to the problems of the child both of which she has more than man. So she is given the priority in the interest of the welfare of the child.⁶⁶

11.0 RECOMMENDATION

In common law, award of custody of child(ren) is usually either to father and mother who is able to prove that the paramount interest of the child would be best served with him.⁶⁷

As earlier discussed, marriage under the Statutory Law brings the parties thereto under the Matrimonial Causes Act (MCA). Hence, only the High Court has jurisdiction in both dissolution of marriage conducted under the Act and custody of children thereto.⁶⁸ It is common nowadays that many Muslims couple conduct their marriage under the Statute hence subject themselves to arduous of common law proceeding of dissolution and custody of child(ren). It is therefore recommended for all Muslims to conduct their marriage in line with the provision of *Shari'ah* and shun subjecting themselves to man-made laws which are erroneous, defective and fallible.

It is also recommended that several provisions governing child custody under Islamic law should be codified in such a way that everyone would understand, has easy access and easy reference to it. In doing this, it will go a long way to enlightening the Muslim community.

⁶⁶ As-Sayyid Sabiq, *Fiqh As-Sunnah*, Trans. Muhammad Sa'eed Dabas & Jamal al-Din M. Zarabozo (American Trust Publications, USA, 1991). 405.

⁶⁷ See section 71 (1) of the Matrimonial Causes Act, Cap 220, 1970

⁶⁸ See section 2 of the Matrimonial Causes Act, Cap 220, 1970

