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جالنغو مجلة الدراسات العربية والإسلامية

# JALINGO JOURNAL *of*

## ARABIC AND ISLAMIC *studies*

**Published by:**

DEPARTEMENT OF ARABIC AND ISLAMIC STUDIES  
TARABA STATE UNIVERSITY, JALINGO

Vol.2, No 1



# Child Custody in Islam: The Nigerian Muslims Scenario

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## Abstract

Muslim scholars have exhausted discussion on the rules governing the eligibility and hierarchy of *Al Hadanah* (child custody) but the social and cultural backgrounds of Nigerians make the implementation of the law difficult. It is to this background that this paper examined two tried cases of *Al Hadanah* in a Nigerian *Shariah* Court of Appeal with an objective of identifying the practicability of *shariah* law in the country. Historical research method was used for data collection and analysis and findings of the work revealed that some Nigerian Muslims are ignorant of the provision of *shariah* on *hadanah*. Not only that, the society's hostility to the law of Islam is equally an impediment to the successful application of the law. This paper is of the suggestion that proper education on child custody should commence with emphasis on the procedure for divorce. Judges in the *shariah* courts should exhaust everything at their disposal for just hearing for the achievement of the goal of *al hadanah*.



## Introduction

Islamic Law exhausts issues on Muslim family ranging from marriage solemnisation to the position of a child after marriage dissolution. However, the unfortunate aftermath of marriage dissolution among some Muslims in Nigeria is the transfer of the mood surrounding the marriage dissolution to the child who in most cases, is innocent of the cause or causes of the broken home. In some homes, the father seizes the child with him to punish the mother of the child even when he has little or no time to take care of the child. The mother in other homes, is either divorced along with her children or she herself insists to claim her right to custodian under the mood of rancour. A reason for which the father may deny taking up the obligation of providing for the maintenance allowance. For proper understanding of what child custody entails, we will study the concept under the provision of Islamic law.

### *Al Haḍānah* (Child Custody) under Islamic law

The term '*al-haḍānah*' is from '*al-hidn*' which literally refers to the part of the human body between the arm-pit and the waist<sup>1</sup>. Technically, *al hadānah* is the act of protecting a child in and outside his home, when he goes out and when he comes in, caring for his essential needs such as feeding, clothing, washing his body and cleaning his place of living<sup>2</sup>. *Al hadānah* is hence, the act of protecting and training a person who cannot independently protect himself from what could harm him due to his inability to distinguish between what is good and what is bad and or right and wrong.

Except by impediment, women are more eligible to the custodianship of a child because they are considered more compassionate, tender hearted and more knowledgeable with regard to training children. This is the more reason why, when a woman said to the Prophet (SAW): O Messenger of Allah! My belly was a receptacle for this child of mine, my laps were supports for him and my breasts were his water bags, but his father intends to take him away from me. The Prophet (SAW) reacted: "You are more eligible to his custodianship provided you have not been married to another man<sup>3</sup>." The superiority accorded the mother shows the beauty of *Shari'ah* and its concern for the needs of children. A mother generally has a right to physical custody of her child until the child reaches the age of custodial transfer at which time, the child is returned to the physical custody of the father or the father's family. The mother is entitled to receive custody wages from the father to help her maintain the child while the child is with her<sup>4</sup>. The right to physical custody is however, not an absolute one because a



mother or a father who possesses physical custody may not prevent the other parent from seeing the child. Even when the parent with physical custody cannot be compelled to send the child to the other parent's residence for visits, the law provides that he or she must bring the child to a place where the other parent can see him or her.<sup>5</sup>

In respect to the hierarchy of custodians, suffices it to quote the author of *Jawahirul Iklil* who, after establishing that the mother as the most eligible custodian of her child and the first on the hierarchy wrote:

If there is a reason that disqualifies the mother from looking after the child, or she forfeits the right after she had been awarded the right to custody, it then moves to her mother (i.e. mother of the mother). If the grandmother of the child loses it, it then shifts to the great granny of the child. This is on condition that the woman to be given the custody does not live in the same house with any of her daughters who had earlier lost the right of custody. The principle applies to all beneficiaries of the right that she should not live together in the same place with the child and the woman who had earlier on lost the guardianship. The maternal aunt of the child comes next to the mother and grand and great grandmother of the child. She may be a full sister to the child's mother, half sister through the father or half sister of the same mother but different fathers. The preference goes in that order. Next on the list is the aunt of the mother of the child. The right then shifts to the mother of the father of the child before moving to the father. It then moves to the sister of the child; first the full sister, next half sister of the same father and finally half sister of the same mother. She is followed by paternal aunt of the child. The opinion is divided between the niece of the child through the child's brother and the niece of the child through his sister. While the two nieces are favourably and keenly considered, the better of the two will be given the custody of her uncle or aunt on the basis of the available facilities and capacities. *Waliy*, an appointed agent follows. She is followed by the brother of the child, then the son of the brother of



the child. In all cases, full brothers are considered before the half brothers of the same mothers, then those of the same fathers.<sup>6</sup>

What needs to be understood in the hierarchy is that people of upper genealogy (such as the mother and the father) will be considered first for custodianship. In the absence of the upper genealogy, the lower genealogy will be considered. The female among them will be considered first; the sisters before the brothers and niece before nephew because women are better in nurturing than men. When they are all males, they will be chosen in the order of their closeness in relation to the child. In the absence of close relations, the law provides that the government or Muslim community should take over the guardianship of a child<sup>7</sup>

The mother or any eligible custodian does not just assume custodianship of a child until he/she meets certain criteria. Scholars agree that maturity, sanity, freedom from infectious diseases and possession of desired ability are conditions for eligibility to custodianship. In which case, an old woman who does not have the ability to give the child proper care and a person infected by leprosy are not eligible to custodianship.<sup>8</sup> The mother who is to be given the right of custody must not have re-married to an alien person, but if the new husband is a relative of the child such as the child's uncle or his relatives, she may still retain the right to the custody of her child with the hope that such husband will assist her in taking care of the child<sup>9</sup>. Otherwise, she forfeits the right to the next custodian except if the father knows it and sleeps over his right of objection for up to a year, in which case, he also forfeits it to her for ever<sup>10</sup> Maliki, unlike Shafi'i and Hambali, does not consider Islam as a condition for custodian but only posited that if it is feared that the child may be influenced against Islam by his non-Muslim female guardian, the guardianship should be placed under the monitoring of the Muslim community.<sup>11</sup> The Hanafi is however, of the view that a Christian or a Jew shall be allowed the custodian of her baby only when the child doesn't know what religion is, just like the mother forfeits her right to custodianship if she becomes apostates while being a guardian.<sup>12</sup> she equally forfeits it if she is found morally bankrupted to such an extent that it would harm the child.<sup>13</sup> Security of the nursing place is another condition for custodianship. The male must be secure from being exposed to indecency and the female from sexual harassment.<sup>14</sup> In a country like Nigeria where religious sensitivity is high and evangelism by adherents of religions is intense, it would be a risk of faith to entrust the custody of a Muslim child to a non Muslim. Even when Maliki opined that such child



should be kept under the watch of the Muslim community, getting a formidable Muslim community in Nigeria is an issue of concern. As regards the duration of *hadanah* when a child is under a legitimate custodian, a male remains there until he attains the age of maturity and a female until she marries and her husband consummates her marriage<sup>15</sup>.

### Child custody among Nigerian Muslims

Most Muslim women in Nigeria lose custody of their children immediately after the marriage dissolution either out of ignorance from the side of the wife or oppression from the side of the husband. One divorce process that is occasionally used by husbands within the Muslim Hausa community is *saki uku* (three divorce), where the husband pronounces the divorce three times at a stand. This process, even though it is permissible,<sup>16</sup> it makes reconciliation difficult because it denies the wife her right to the husband's maintenance during her three months retreat (*iddah*) and it deprives her of her divorce entitlements, such as her right to child custody and the tendency of reconciliation during the period of retreat. Worst than that is the divorce in some Yoruba Muslim community where the husband sends his wife packed out at a time of annoyance and would maintain that as divorce. In most cases, such a woman would gain custodian of her child only if she can pursue it legally. The mother is sometimes denied the maintenance allowance and if she cannot pursue it legally and she is not financially buoyant to take it up herself, she may choose to forfeit her right.

In Nigeria, virtually everybody is busy with his own affairs. In most cases, when the mother forfeits her right to custody by re-marriage or by other reasons, her mother or any other person who is next on hierarchy in the mother's lineage may not be ready to take over the custodianship either because it is considered a burden or because she feared the maintenance allowance might not be forth coming. Similar to this is a situation where either the husband or the wife or both fear negligence or maltreatment in the care of the child who may have to stay with the mother's co-wife. For a more practical study of the issue in Nigeria, two cases of *Hadanah* as tried by some *Shari'ah* Courts in Nigeria will be reviewed.

### The Trial of Khadija Musa V. Salman Alabi<sup>17</sup>

The first case is that of Khadija Musa V. Salman Alabi with the Appeal No KWS/SCA/CV/AP/IL/11/2003. The Appellant, Khadija Musa,



Appealed against the decision of the Second Upper Area Court, Oloje, Ilorin with Suit CVFM/541/2002 of 6<sup>th</sup> August, 2003, in which the court made an order that N2, 000.00 be paid as allowance for maintenance of each of the three children of their dissolved marriage with effect from the month the case was tried (August). The appellant complained that the backlog of what she spent on the maintenance of the children which amounts to N9, 000.00 monthly on each of the three children for a period of nine months before she filed her case with the court, with the addition of another N1,000 which she used in buying school uniform for one of the children were not ordered to be refunded. The respondent maintained that he was not ready to pay a penny because the appellant re-married and moved to the new husband's house a week after the dissolution of their marriage. All he wants is to be granted custodian of his children.

The Appeal Court could not find an evidence of the wife's re-marriage and that of the children's living in another man's house in the record book of the Trial Court hence, it upholds the decision of the Trial Court regarding the mother's custodian over the children but ordered the payment of the backlog of the maintenance allowance. The reliance of the court among others is the authority:

...as the payment for breast feeding as well as the payment for custody is binding on the father of the child, so is it binding on him to pay the rent or its provision if the mother, custodian does not have an accommodation of her own in which to house the child...this payment becomes due from the time the custodian begins to discharge her duty. It remains a debt which the father should pay. Nothing but payment or exoneration abrogates it<sup>18</sup>

With regards to the case in discussion, there is no evidence to show that the appellant has re-married and the respondent does not file the case either hence, the court is silent about it

#### **The Trial of Sidikat AbdulMumeen V Abdulmumeen Idris<sup>19</sup>**

The second case is that of Sidikat AbdulMumeen V Abdulmumeen with suit KWS/SCA/CV/AP/SH/01/2010. In this case, Abdulmumeen sued Sidikat to an Area Court requesting to be granted custodian of their daughter, Zainab. The judge passed his judgment in favour of the appellant but was



silent on the issue of maintenance of the children. Aggrieved with the decision of the Trial Court, the appellant filed an appeal with the Kwara State *Shari'ah* Court of Appeal, Shaare Judicial Division, requesting to be paid for the maintenance of Zainab and her younger sister, Rafia who was born after the decision of the Trial Court. The *Shari'ah* Court of Appeal in its judgment on 8<sup>th</sup> March, 2011, ordered AbdulMumeen to pay for the maintenance of the two children. The appellant demanded N20,000.00 monthly for the maintenance of the two children in her custody. The Appeal Court, having confirmed that the gross salary per month of the respondent is N29,112.48, approved that N4,000.00 be paid monthly for the maintenance of 8years 7months old Zainab and N3000.00 monthly for the maintenance of 11months old Rafia and the payment is with immediate effect.

### An Examination of the Two Cases

In the two cases reviewed, issues to be considered include; the issue of divorce, separation or release; the effective date of maintenance allowance and its proportion and finally, the hierarchy of custodians. It is clear that the issue of divorce was not raised in the two cases. However, issues of child-custody and maintenance allowance as applied to the two cases are preceded by marriage dissolution. In the second case reviewed, evidences show that the marriage was not dissolved in a proper manner. It is contained on page 91 of the record book that "on the claim of the respondent that the appellant had been denying him access to these children, the appellant accepted the claim on the ground that she could not understand her offence which resulted in the respondent sending her out of his house" if the normal procedure had being followed, the words "sending her out" would not have been used. Secondly, the fact that she claimed custody of Zainab in the Trial Court while Rafia was yet to be born shows that she was sent out of the house with the pregnancy that produced Rafia and she had assumed the custody of Zainab with the pregnancy owned by Zainab's father. Allah says regarding a pregnant woman who is divorced

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تَضَارُوهُنَّ لِيُضَيِّقُوا  
عَلَيْهِنَّ وَإِنْ كُنَّ أَوْلَاتٍ حَمَلْنَ فَانْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ  
فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أَجُورَهُنَّ وَأَمْرُهُمْ بَيْنَكُمْ بِمَعْرُوفٍ وَإِنْ  
تَعَاسَرْتُمْ فَسَرِّضْ لَهُ أُخْرَى

Lodge them where ye dwell, according to your wealth, and harass them not so as to restrict them. And if they are with child, then spend for them till



they bring forth their burden. Then, if they give suck for you, give them their due payment and consult together in kindness; but if ye make difficulties for one another, then let some other woman give suck for him (the father of the child (Q65:6)

What needs to be understood is that if there is pregnancy, a sacred third life comes on the scene for which there is added responsibility (perhaps added hope of reconciliation) for both parents. In any case, no separation is possible until after the child is born as expressed in the above verse.<sup>20</sup> The implication of absence of divorce at pregnancy is that the wife shall still remain in the husband's house under his full care until she delivers her baby provided she is not alleged of committing such offence that will warrant her being chased out of the house immediately.<sup>21</sup> Absurdity in the separation that exists between the discussed husband and his wife is hence, established. The resultant effect of this type of divorce is dispute over the right to child custody and the husband's denial of paying the child's maintenance allowance.

The next issue is of the time of commencement of maintenance allowance and its proportion. In the trial of *Khadija Musa V. Salman Alabi*, the court ordered that all the backlog of the maintenance allowance has to be paid, while in the case of *Sidikat AbdulMumeen V Abdulmumeen Idris*, the court ordered the payment of the maintenance allowance 'with immediate effect'. The language "with immediate effect" appears to be ambiguous because the apparent meaning is that the payment will be with effect from the day the judgment was passed even if separation took place six months before the trial. If this is the position of the court, we may stand to challenge it because maintenance allowance is a responsibility of the husband and the moment the right to custody is accorded the wife, whatever she must have spent on maintenance of the child remains a debt to be paid by the husband.

The hierarchy of custodian is equally a misunderstood issue in Nigeria. Little do husbands of a dissolved marriage know that even when their wives forfeit the right to child custody, they are not the next custodians except if others that are next in the hierarchy equally forfeit the right. More worrisome is the fact that some women re-marry but still want to retain custodian of their child.<sup>22</sup> Such women, because of their acclaimed affection for their children, fail to comply with the provision of the law and hence, give room for chaos in marital and post marital life.



## Suggestions and Recommendations

The argument for custodianship between the husband and the wife comes up when there is marriage dissolution. In a situation whereby the father died and nobody in his lineage was willing to take up the custodian of the children because the provider of maintenance is no longer alive, and if the wife should re-marry and she equally has no responsible eligible person to take care of the baby, we will suggest that she should retain her children even when the new husband is not an alien person to her provided he agrees with her on the matter. Even though this is a slight deviation from the position of some Muslim jurists, the death of communism in Nigeria calls for this necessity.

The allocation of two, three or four thousand naira monthly allowances for child maintenance is equally worth review considering the economic state of the country. When the mother is not a working class citizen, she mostly finds it difficult to take up the care of the child adequately. This paper suggests that if such decision is taken in *Shari'ah* Courts, the government should have a provision for augmentation of such allowance in the interest of proper child care. Equally, there is the urgent need for Islamic scholars to strategize the manner of educating Muslims on issues of child custody in the country.

## Conclusion

This paper has attempted to review some available literatures on child custody in Islam as a basis for studying the application of the law among Nigerian Muslims. For a practical description of the practice in Nigeria, the paper has reviewed and examined some decided cases of child custody in Nigeria and concluded that inadequacy in divorce procedure among Muslims of Nigeria is a contributing factor to dispute on child custody and adequate education of Muslim *ummah* is a solution to the problem.



## Notes and References

- 1 Muhammad bn Mukrim bn Mansur. *Lisānul Aʿrab*. Bairut; Darul Sadir (nd) Vol. XVI. pp278-279
- 2 M Ahmad (nd) *Hashiyatud Dasuqi Alas Sharhil Kabir*. Beirut: Darul Fikri Vol.II p526
- 3 S. Sabiq. (1983) *Fiq-hu Sunnah*. Beirut: Darul Fikri Vol II p 289
- 4 M. Ala'ddeen. *Addurrul mukhtar*. Beirut. Daarul fikr. (1995). Vol III p561
- 5 A. A. Ibn Quddāmah. *Al Mughni*. Beirūt; Dārul ihyā'I li turathi l ʿArabiyy (nd), Vol VII. p.617
- 6 A.A. Al-Azhari (nd) *Jawahirul Iklil*, Commentary on Mukhtasar. Vol.I Pp 408-409
- 7 A Jabir al Jaza'iri. *Minhajul Muslim*. Beirut: Darul Fikr. (1976) 8<sup>th</sup> edition p400
- 8 Ibn ... (1994) *Zaadul Mi Ad Fi Huda Khairil Ibad*. Bairut. Mu'assasatur Risalah. Vol IV p133
- 9 Y Yunus. (nd) *Kas Shaful Qana'i an Matnil Iqna'i*. Beirut. Darul Kutubil Ilmiyyi Vol III. P328
- 10 AlAzhari ...p409
- 11 A. Mas'ud. *Bada'it us Sana' Fī Tartībīs Sharā i i'*. Bairut; Darul Kutubil Ilmiyyi. Vol iv p 42
- 12 Ibid
- 13 Yunus... Vol iii. P328
- 14 Ahmad... Vol ii. p526
- 15 M. Amin. *Hōshiyatu Raddil Muhtār*. Beirut; Dārul fiqh, 1995.vol. ii. P. 367.
- 16 A. Aljuzairi. *Al-Fiqhu alal Madhāhibil arba'*. Bairut. Darul Kutubil Ilmiyyah. vol 4 (2003), p. 303.



17 The Law Report Committee. ed.(2004) Law Report  
pp389-397

18 Sabiq. (1983) *Fiq-hu Sunnah*... Vol. ii p344-345

19 Shariah Court of Appeal, Ilorin. Kwara State Annual Law Report, 2011

20 A. Y. Ali, *The Holy Qur'an, English Translation of the Meaning and Commentary*. Saudi Arabia: Ministry of Hajj and Endowment, 1410A.H, Footnote 5517, A Commentary on Qur'an 65:6.

21 S.A. As Sabuni. *Rawā iu'l Bayān. Tafsīru Ayātil Ahkām*. Cairo: Dārus Salām. 1995. P549.

22 A friend to the author of this paper who resides in Ilorin, Kwara State, divorced his wife in the early year of 2011 and the wife re-married late 2012. Herself and her former husband are ignorant of the fact that the father is not the next custodian of the children when the mother re-married hence, she forcefully retained the children in her custody for another one year in her new husband's house before she later returned the children to their father on the intervention of a Muslim legal practitioner.