

**CUSTODY AND GUARDIANSHIP OF CHILDREN:
SHARI'A PERSPECTIVE**

BY

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BACKGROUND:

Mr. Chairman, Sir, Members of the High Table, Distinguished Guests, My dear Colleagues, and Participants.

I feel delighted to be called-upon to make a little contribution in the on-going Refresher Course for Hon. Judges and Kadis at the 2019 NJI Calendar of programmes.

I am also delighted by the caliber of people invited as participants whom are Hon. Justices from various jurisdictions who are always being consulted by Judges of the Lower Courts for guidance on question of Law and Procedure and have had a long standing practical experience and determined so much on the custody of children.

On this premise, the paper is not meant for presentation. But as it is the current trend of training workshops and refresher courses in almost all jurisdictions, the paper is meant for live participation and professional discussions with a view of bringing out issues that touches on **Hadhana** in the Shari'a perspective.

Being Honourable Justices, I don't think, even a Professor of Islamic Law will stand before you with a view of teaching you the legal definition of **Hadhana** or how Qamus al-Lisanil Arab defines *Hadhana* or *Kafaala*. **No, we can only rub minds with you to share our experiences.** After all, it is scheduled to be refresher course and not fresh course. As we know, nobody will go to a Shari'a Court to institute an action seeking for an interpretation of the words "Custody or Guardianship" in relation to Islamic Legal System. But every now and then, actions are being instituted in such courts seeking determination as to whether a marriage subsists between a certain man and a woman, because issue of Custody or Guardianship of Children does not ordinarily arise, until after divorce.

CUSTODY AND GUARDIANSHIP OF CHILDREN UNDER THE SHARI'A:

As stated earlier, question as to who is entitled to hold custody of a child under the Shari'a does not normally arise during the subsistence of a marriage. It is the marriage that inter-connects the child with a certain man under Islamic Law on the authority which says:

الوالد للفرأش واللعاهر الحجر

MEANING:

"A child belong to a wedlock"

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, Most High, and they should be treated and looked after in a proper manner.

They have many rights, of which two are of utmost importance: to receive proper care and love, and the other proper upbringing (tarbiyyah) since at the time they cannot distinguish fully between right and wrong. These rights of a child cannot be fulfilled except with the joint endeavor 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 there are children involved. The Messenger of Allah (PBUH) said:

"Divorce is the most hated of all lawful (halal) things in the sight of Allah"

Sunan Abu Dawud No. 2178

Family is the basic unit of a society. Disruption of this basic unit has many consequences not just to the members of that family but also to the society as a whole. Therefore no society or religion encourages divorce or breakup

of a family. Islam also encourages continuation of the family and discourages divorce as can be seen in the Holy Qur'an where Allah says:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا
عَلَيْهِنَّ ۚ وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ
فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۗ وَاتَّمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ ۗ وَإِنْ
تَعَاَسَرْتُمْ فَسْتَزِضِعْ لَهُ أُخْرَىٰ

(6) سورة الطلاق

MEANING:

“Let them live where you live ‘during their waiting period’, according to your means. And do not harass them to make their stay unbearable. If they are pregnant, then maintain them until they deliver. And if they nurse your child, compensate them, and consult together courteously. But if you fail to reach an agreement, then another woman will nurse ‘the child’ for the father.”

In another verse, Allah says wife and husband are like garments for each other. They cover each other's shortcomings and help each other look good.

Generally, after a divorce, both parties are very bitter and angry. That parent's separation in itself creates tension between them, which may lead to hostile and vengeful behavior. From experience in our courts, the party having custody use 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 severe, brutal and indeed a grave sin; and also very harmful to the child.

It is said:

“No parent should be made to suffer in the matter of his or her child”

UNDERSTANDING HIDHANA (CUSTODY)

The term **Hidhana** (custody) in Arabic is derived from the root **Hadhana**. In Arabic Hadhana means “the distance between the armpits to the loins”, “the chest and the two arms and what includes in between”, that can be summed up as “embrace”.

Accordingly, **hidhana**, which can grammatically be either infinitive or noun, means “to clasp the baby to one’s breast”, “to nurture the baby” which can be viewed as a synonym to “nursing” and “wet nursing”.

In Islamic jurisprudence, hidhana is used in its lexical meaning (legal reality) as some believe. Thus using the word wilaya in the meaning of “guardianship” for the definition of hidhana would not be correct.

Hadhana (custody) can literally be said to mean “to embrace or hug”. And in the Shari’a, it means “raising or bringing up of a child”.

Hidhana is a form of guardianship which women are more suitable to assume because they are more experienced in the area of looking after children, and they are generally more caring and compassionate.

DIFFERENCES BETWEEN CUSTODY AND GUARDIANSHIP

Islamic Family Law is complex, and when it comes to the care of a child, the legal definitions can be confusing. Many people conflate custody with guardianship while the two terms describe very different things. The key difference is the child’s parentage: Custody describes a parent’s care of a child, whereas legal guardianship is granted to someone who is not necessarily be the child’s biological parent. In some situations, a child may be under the guardianship of an individual while remaining in the custody of their parents to a degree.

CHILD CUSTODY

Custody is granted to the child's parents. There are two types of custody; physical and legal. Physical custody refers to the child's daily life, such as living arrangements, medical care and other necessities. Legal custody refers to making major decisions on the child's behalf. In some situations, a parent may have partial physical custody of a child and be allowed to live with them for some period of time and spend some time with them, but the parent is not legally permitted to make any official decisions on the child's behalf.

Custody is different than guardianship largely because a guardian can make physical and legal decisions for the child. In many ways, a legal guardianship is like an adoption, except that in a legal guardianship, the child's biological parents are still legally considered the child's parents. In an adoption, the biological parents surrender their legal rights to the child.

LEGAL GUARDIANSHIP

The main role of a legal guardian under the Shari'ah is to act in the child's best interests when the child's parents cannot do so. Legal guardians are usually relatives such as an aunt, uncle, or grandparent. This may be due to death, incapacitation, or incarceration for a crime. In some situations, adults with severe handicaps may need a legal guardian to care for them and act on their behalf. This is known as an adult guardianship.

In most cases involving the guardianship of a child, a guardian may not necessarily fill in the paperwork (which shows his interest in being named the child's guardian) unless it is in a court of law; where the court will arrange meetings to determine whether such an arrangement would be in the child's best interest. A legal guardian is not only responsible for the child's physical wellbeing and care, but is also charged with handling all major decisions for the child. It is important to note that legal guardianship typically only ends when the child reaches 18 years old or the guardian dies.

WHO HAS MORE RIGHT TO CUSTODY OF A CHILD

If divorce did take place, and both parties demand their rights, then the right of custody will be in the following way, but should be remembered here 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.

There are divergent juristic views on who has the right of custody under Islamic Law. But almost universally, the courts take into account the wellbeing of the child as the basis of awarding custody. In other words, court has flexibility and authority to decide this matter in the best interest of the child. The Maliki and Hannafi School of thoughts said this right is a right to the custodian and can forgo it even if he is not going to be paid, because if it were an obligatory right, it cannot lapse on him even if he forfeited it.

Some other jurists said it is a right of the one to be taken care of. And had he forfeited it, it has lapsed. But the question is how can someone to be taken care of, can forfeit his right? In a situation when he cannot distinguish between right and wrong or a person with mental dis-ease?

Therefore, the preponderant view is that custody is a right to the custodian which is the later view of majority of the Maliki School which most of the West African countries were inclined in their judgments.

To this effect, according to Imam Al-Haskafi, the mother has a right of custody for a male child until the child is capable of taking care of his own self. This has been approximated at seven years of age, and 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*, 3/566).

This is because women 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.

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 (al-Mawsili, al-Ikhtiyar li ta'lil al-Mukhtar 3/237).

It is reported:

أن امرأة جاءت إلي رسول اله صلى الله عليه وسلم فقالت له: يا رسول الله إن ابني هذا كان بطني له وعاء, وثديي له سقاء, وحجري له حواء, وإن أباه طلقني وأراد أن ينتزعه مني, فقال: أنت أحق به ما لم تتكحي

أخرجه أبو داود والبيهقي والحاكم وصحح إسناده

MEANING:

"A woman came to the prophet and said: O Messenger of Allah! I carried my son in my womb, suckled him my breast and hold him on my lap; yet his father has divorced me and wants to take him away from me".

The Prophet (PBUH) replied:

"You are more rightful of the child as long as you don't marry".

According to this Hadith, some scholars said that even being a polytheist does not nullify the right of a mother to her child. Other scholars however, are of the opinion that being a Muslim is a pre-condition for custody.

Sunan Abu Dawud, No. 2276

Mustadrak al-Hakim 2/207

The presenter is more inclined to the former view because -
Kowayasayirariya, yasanzatazubar da ruwa.

And another Hadith in which the Prophet was reported to have said:

"من فرق بين والدتها وولدها فرق الله بينه وبين أحبته يوم القيامة"

رواه أحمد والترمذي والحاكم عن أبي أيوب وهو صحيح

In all these situations, 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 or physically challenged child (male or female), the father is permanently responsible.

When the mother has the right 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 IbnAbidin).

QUALIFICATIONS/PRE-CONDITIONS NECESSARY FOR HADHANA

Although the mother or her relations (ذآرحم) and the father, his relations or executors can take care of a child up to seven years (or peculiarity of the case to be determined by the court in a particular jurisdiction it operates), the custodian has to meet certain qualifications which are pre-conditions for undertaking such a task, the lack of each one of which would lead to losing the competence to this end.

Of course, it is to be noted that if undertaking the child's custody is subject to the realization of these qualifications, there is no difference in this task between the mother and other people of equal rank or her successors. And among these include:

1. **Intellect:** Among the basic requirements of the mother's custody of her child is her being sane. If the mother does not enjoy the soundness of intellect, she cannot undertake her child's custody

because she is not only unable to take care and safeguard her child, but she herself needs someone to take care and custody of her.

However, the jurists wonder if there is a difference between the periodical and chronic insanity in this respect. They have had different opinions. To our opinion, however, taking care of her child is possible for a mother only in case she enjoys soundness of intellect, i.e. being accountable, because how can an insane person who is unable to manage his or her own life, be able to take care of another person?

2. **Trustworthiness:** Among the qualifications mentioned in legal texts for permitting the mother to take the custody of her child is her trustworthiness. This has been interpreted in two aspects: Lack of sinful signs (depravity) and lack of negligence in the issues related to the child's life, which seems to be more pertinent. Since the very legislation for custody is for protecting the life and psycho-physical well-being of children after the ominous phenomenon of divorce; instead of engaging the children in such acts as beggary, windshield cleaning, etc. Can it be claimed that the Holy Lawmaker would consent to such an act?
3. **Unaffected with Chronic and Contagious Diseases:** We explained previously that the mother's insanity is a factor in disclaiming her competence in the custody of her child. Furthermore, some jurists have raised the question whether the mother having being affected with chronic and contagious diseases, as was the case for insanity, causes the loss of her competence or not.

The Maliki and Zahiri's raised the issue, that a child's living with its sick mother will cause harm to it and by referring to the Prophet's (PBUH) words warning to keep a distance from those infected with leprosy and not watering a diseased camel from the same place as

the healthy animals drink. They claim that such medical considerations in a religious context prompted them to proclaim with certainty that a child must be separated from its sick mother.

Other qualifications include, but not limited to:

3. She should live in a place where the child may not undergo any risk morally or physically.
4. She should be of an age which would qualify her to bestow on the child the care which it may need; coupled with a good character.
5. If there are several relations, equal in degree or not, entitled to the custody of the child, the one who most tenderly looks after the child's interests is entitled to preference, then the one most virtuous and then the one senior in age. We can here see how Shari'a is more liberal and tolerant than most modern legislations.
6. And, for the mother not to re-marry as explained earlier in this paper.

ON WHAT GROUND CAN CUSTODY BE TAKEN AWAY FROM THE MOTHER

Once custody of the child is granted, it is not permanent. A significant change in the circumstances will be the basis of consideration by the court. A child can be turned over to its mother to be taken care of (custody) during its first two years of life (infancy) as long as the mother consents to breastfeed her child. However, if she rejects to do so, the father is permitted to hire a foster suckling-mother for the child and take its way from its mother.

A mother will lose custody:

1. If there is an impediment such as insanity or
2. Having re-married.
3. Also where she openly indulges in sins such as adultery and there is a fear of the child being affected; or

4. She does not attend to the child due to her leaving the house very often.
5. She demands payment for the upbringing of the child if there is another woman to raise the child without remuneration.
6. If she relocates to a long distance where the father cannot visit the child and come back in a day.
7. Contagious diseases.

RESTORATION OF THE RIGHT OF HADHANA

It is important to note here that if these impediments are removed, then the right to custody is restored.

Where the custodian, on her own free will places herself, in such circumstances as render her incompetent to exercise the right of hadhana, such right will never be restored to her even though the cause of disqualification disappears. For instance, if she marries a stranger and the marriage consummated, her right to the custody of the child will not revive should she be separated from the second husband either by divorce or death. But if the right is lost involuntarily e.g. through illness or the father moving to another place of residence, her right will revive as soon as she is cured or the father returns to his former place or she moves to the father's new place of residence.

As earlier stated, significant change is a basis of consideration by the court. Therefore, if a mother had the custody and she re-marries, this would be considered a significant change. It does not mean that the custody will be revoked, it only means a review.

The jurists have differed in this matter. Some think that if mother marries a close relative of the child, then there is no need for a review, while others think that marrying a non-relative of the child should necessitate a review.

By the subsequent marriage of the custodian to a complete stranger, she does not lose the right until the marriage is consummated, and the father or

other legal guardian does not within the space of one year from the date of the consummation of the second marriage and the date of his knowledge thereof, claim custody of the child, it would remain henceforward under her care.

The right of **hadhana** is also lost if the child is removed, without the consent of its father or guardian, to such a distance from his usual place of residence as would prevent him from exercising his right of general supervision and control. This rule is only effective, according to Maliki's and Hannafi's when the distance is more than 72 miles which contemporary texts approximated at 115 kilometers.

But where the change of residence is a temporary one, the right of **hadhana** is not lost. If the father moves from his usual place of residence, he has the power of withdrawing the child from its custodian.

Hadhana is also lost by apostasy and such misconduct on the part of the custodian as is prejudicial to the interests of the child. But some jurists (after studying that renowned Hadith) on this matter in which the Prophet (PBUH) is reported to have said:

وقال المالكية: "تستمر الحضانة في الغلام إلي البلوغ علي المشهور, ولو مجنوناً أو مريضاً, وفي الأنثي إلي الزواج ودخول الزوج بها, ولو كانت الأم كافرة, وهذا في الأم المطلقة أو من مات زوجها"

انظر الشرح الصغير 2 ظ 755 وما بعدها

والقوانين القهية ص 224 وما بعدها

نقلا عن الفقه الإسلامي وأدلته

The jurists said that being a polytheist does not nullify the right of a mother to her child. Other scholars however, are of the opinion that being a Muslim is a pre-condition for custody of a child.

With all respect, the later opinion does not sound correct because it is being said: "*kowayasayirariya, ya san zatazubdaruwa*". It needs to be noted here that all the jurists are silent on Christian and Jewish women. This is because Islam allows a Muslim male to marry a Christian or Jewish woman and therefore be entitled to custody of an issue therefrom.

OTHER PERSONS ENTITLED TO CUSTODY

Under the Islamic Jurisprudence, mother is the first custodian for an infant or very young child. This is keeping in mind the best welfare of the child. If the mother is not fit for some reasons such as physical disability or mental illness, then the custody will be granted in the following order: (though there is no hard and parcel rule) the welfare of the child is the prime objective.

In default of the mother, the right passes to other relatives, priority being given to females and to the maternal side asserted by **IbnBarraj** as follows:

1. The mother's mother how high so ever (the mother's father's mother excluded).
2. The maternal aunt and grand-aunt.
3. The father's mother how high so ever.
4. The father.
5. The paternal aunts and grand-aunts.
6. The child's sisters and their daughters, priority being given to the full sisters, followed by uterine sisters and then consanguine sisters.
7. The father's executor or the executor's executor.
8. Anyone appointed by the Qadi.
9. The child brothers, uncles and paternal grandfather.

The reasons 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.

In contrast to this view, other views have also been raised by some jurists such as transfer of custody to the child's near kin according to the hierarchy of their inheritance '*awla bi mirathi hi'* (agnates in the science of inheritance). i.e transfer to the child's paternal kin, which, given the previous explanations, do not sound correct.

DURATION OF HADHANA

The right of the mother to the custody of her male child, some said, extends until puberty and in the case of a female child until such a child is married and her marriage is actually consummated. And no male has the right to the custody of a female child unless she is a minor or a muhrim to him, that is within the prohibited degrees of relationship, and cannot under any circumstances marry her.

There is consensus of opinion among the jurists that custody begins right from the day a baby is born up to the time he can discern what is what. But they disagree as to the period to be in custody thereafter.

To the Maliki's, thereafter, the custody of the male child extends up to puberty, even if he is insane or had some disability. And to a female child until she marries and the marriage actually consummated and even if the mother is infidel, as pointed out earlier. And when the period of custody is over, the child is to be returned to its father, grandfather or his executors.

Once the child becomes older (than 2 years), the opinion changes. Some jurists believe that a male child should be returned to the father at age two. Others think this age is seven. In case of a female child, some jurists believe this age is seven while others think it is puberty. According to FiqhulAhmadiyya, the age when the child should be returned to the father is nine years in case of both male and female child.

In the Wilayat Al-Mar'ah Fil-Fiqh Al-Islami page 692, it is said that the period of custody lasts until the age of discretion and independence, i.e. until the child is able to discern what is what and is independent in the sense that he can eat by himself, drink by himself and clean himself after using the toilet, etc.

When the child reaches this age of independence, which is usually at the age of seven or eight whether the child is a boy or a girl, 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 choice.

But according to Mufti Muhammad Ibn Adam of Darul Iftaa, Leicester, UK: The male child after reaching the age of understanding 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.

Some jurists have asserted two stages of child custody. According to them, the issue of child custody is examinable in two stages: the infancy and afterwards; or, in other words, before and after two years of age.

1. Child Custody before the Age of Two

Some jurists believe that the custody of a child before the age of two is to be undertaken by the mother. Others believe that the custody of the child is upon both parents, even though they are separated.

2. Child Custody after the Age of Two

In this respect, three hypotheses were formed.

- (i) The parents being alive.
- (ii) Either of the parents being alive.
- (iii) None of the parents being alive.

Which all suggests to the question of who will be entitled to custody as pointed out elsewhere.

DURATION OF CUSTODY IN VARIOUS JURISDICTIONS

IN KUWAIT

Research has shown that in Kuwait a girl remains in the care of Hidhana until she marries.

IN MOROCCO

The length of period is 12 years for a boy 15 years for a girl. After this period, the child is given the choice to stay with the father, mother or another relative.

IN EGYPT

It is 9 years for the boy and more than this for the girl.

JUDICIAL DECISIONS ON CUSTODY

In the case of **BILYAMIN BISHIR VS SUWAIBA MUHAMMAD KTS/SCA/KT/39/2019** which is an appeal from Upper Shari'a Court No. II, Katsina to the Katsina State Shari'a Court of Appeal. It was the plaintiff Suwaiba, who had seven children with the defendant sued the defendant, her former husband Bilyamin, asking the USC II, Katsina to give her custody of 4 out of the seven children then in custody of the defendant; for her to put them together with the remaining 3 children with her to continue taking care of the 7 children since she did not re-marry. And asked the court to order him be paying their upkeep.

The defendant objected to her claim and added that they went to the Katsina Emir's palace where they attempted to settle the parties for the father to take 4 out of the children, and the mother to take 3. And to consider what the father will be paying for their upkeep.

The Upper Shari'a Court gave an option to the children to choose whom they prefer to stay with; on which they chose their mother. The Court left the custody with the mother and ordered the father to be paying her ₦7,500:00 monthly for their upkeep.

The defendant/Appellant appealed to the SCA, Katsina State and his grounds of appeal inter-alia include:

1. The trial court did not consider the ages of the children before giving custody to the mother which were Khadija 15, Muhammad 13, Fatima 12, Amina 10, Ahmad 8 and Zainab 3 years. And added that custody of a male child terminates at 7 and female child 9 years.
2. That the trial court did not consider the fact that the mother does not usually stay at home and she lives in a rented apartment where no one admonishes her on what she does.

In her response, the plaintiff/respondent argued that on the issue of ages of the children canvassed by the appellant, it is the views of Hannafi school of thought while Shari'a Courts in Katsina State are guided by Maliki Law and by Maliki Law, custody of a male child does not terminate until it reaches bulug; and to a female child until it get married and the marriage actually consummated.

On the other ground, the respondent argued that staying in a rented place is not an offence. The place is very close to her parents' residence and it is her father who pays the rent.

The appeal court formulated an issue thus: Is it right to leave all the 7 children with the respondent as decided by the trial court?

The court said before the law establishing the Shari'a Courts, i.e. **Law No. 5, 2000** placed the courts on Maliki Law, it had asked them to abide by Qur'anic provisions, Traditions of the Prophet (PBUH), Qiyas and

Ijma'i (consensus of opinions) as provided by **Section 8 of the law**. And this may not be unconnected with what was obtained from the 4 leaders of the schools where each one of them says:

اذا صح الحديث فهو مذهبي

Therefore, the paramount issue to be considered in this case is attaining justice and the authorities relied upon in making the decision, but not the school of thought relied upon.

The court said that the first thing to be considered in custody matter is the child's best interests; his health, proper training and his education. That is why Abubakar Jabir Al-Jaza'iri in his book *Aysarut-tafaseer* Vol. I, page 221, after he brought the tradition which says *لا ضرر ولا ضرار*, he then said: Here what is to be considered is the best interest of the child. The court will ascertain the person who will be capable of taking care of the child and give him proper training and counseling, and that: the preference should be given to a person who will be more lenient to the child.

The SCA said: in the matter before them, the children on whose custody is being litigated, Khadija of 15, Fatima 12, and Amina 10 years can all be married out and their husbands can in law consummate their marriages. Therefore, a degree of caution must be exercised regarding their custody.

In a book *Al-Kharshiy* Vol. 4, page 211 where an explanation is being made on the views of Sheikh Khalil where he said:

وحرز المكان في البنت يخاف عليها

ومما يشترط ايضا في حق الحاضن ان يكون المكان الذي
يسكن فيه بالنسبة الى البنت حرزا مصونا

MEANING:

It is also made a condition in the case of a custodian that the place where he will be residing with the child to be safe and secured.

Also in a book *Al-SharhulKabeer of Ad-Dardeer Vol. II*, page 528, it is said: To a girl who reaches the age of puberty, there is need to have secured place where she can be protected from any abuse.

On the second ground that the respondent lives in a house rented by her father and she roam about and does not stay at home, the court said it is of course a problem that need to be considered. Because trustworthiness, as mentioned by Sheikh Khalil, in his book *Mukhtasar* at page 139, is one of the conditions for custody.

And in a book *Durrul-MuktarwaHashiyatIbnAbideen*, Vol. III, page 556, trustworthiness or integrity was interpreted thus: A child will not be jeopardized as a result of the mother not staying at home.

Also, in a book *Al-MabsutSarkhisiy Vol. V*, P. 208, it is explained that if a girl reaches puberty, she will need to be married and her desire may be high and in such a circumstance men are more jealous to their children than women. Therefore, the father will be vigilant than the mother.

Therefore, since one of the children, Muhammad is 13. At this age, he needs male gender training, to enable him learn how to go about life to be self-reliant. And such training is not meant to be given by female gender. That is why in a book called *Al-Mabsud* which the court cited earlier on, it is said: If a child reaches puberty, he will be in need of education and male gender activities which only father can introduce that to him in addition to his feeding and discipline unlike if under the custody of the mother.

The Katsina State Shari'a Court of Appeal said based on the facts and the reasons adduced by them, they are of the opinion that there is no wisdom

in the decision of the trial court for leaving 7 children under the custody of the respondent.

We so therefore amend the decision. We have now given the Appellant custody of 4 children: Khadijah 15, Muhammad 13, Fatima 12 and Amina of 10 years respectively. While the respondent is to hold in custody of the remaining 3 children: Ahmad of 8 years, Aliyu 5 and Zainab 3 years up to the time prescribed by Islamic Law.

In addition, it is ordered that the appellant is to be giving ₦10,000:00 to the respondent for their upkeep. And he will be responsible to take care of their health, clothing and education as imposed to him by the shari'a, relying on Qur'anic provision in Chapter 2: Verse 233.

The writer will leave this decision for the participants to digest and comment.

In the case of **RABI ABDULMAJID VS ABDULMAJID ISMA'IL**, the plaintiff sued the defendant asking for confirmation of divorce and custody of their three children. In her testimony, she stated that she was a Christian before the defendant helped and converted her to Islam and married her. The marriage is blessed with three children. According to her, trouble started when she gave birth to her third child who turned out to be a female child named Maryam. That when the defendant realized that the child was a female he started having affairs outside the marriage. She became frustrated and decided to resume her studies. He subsequently divorced her and when his father intervened, the marriage resumed. He later accused her of committing zina with a colleague of her's after seeing some Facebook messages on her phone. After this, the marriage deteriorated and finally came to an end with three irrevocable divorces pronounced by the defendant on 16/2/13. Thereafter, the plaintiff sued the defendant for defamation of character, confirmation of the divorce and custody of the three children. On this part, the defendant confirmed the three divorces.

He also admitted accusing her of committing zina. On the issue of custody, he pleaded with the court to award him custody for the proper upbringing of the children according to the Islamic faith.

Surprisingly, the court decided to ask the parents of the parties for their views first and while the father of the defendant left the decision to the court, the plaintiff's mother asked the court to award custody to the father because as she said, 'he is also her son'. The court then awarded custody to the defendant's father i.e father's father and authorized the defendant to obtain accommodation for the plaintiff close to the father's father's house to enable her be close to her children. The questions or issues that beg for answers here are:

1. Is a mere allegation of immorality without proof sufficient evidence to deny the mother custody of her children?
2. Does being a convert deny the mother eligibility to custody of her child?

On the first issue, it is submitted that the mere allegation of immorality without proof is not and cannot be sufficient ground to deny the mother custody of her child. In fact, such an allegation without proof will amount to the offence of *qadhaff* for which the father could be punished but surprisingly enough, though the mother sued for *qadhaf*, the court was silent on the issue. Therefore, in the absence of such proof, her eligibility should be intact.

On the second issue, it is the position in Islamic law, relying on the traditions cited earlier that being a non-Muslim does not render a mother ineligible to custody. If a non-Muslim is entitled, what more of a Muslim? A convert to Islam is a Muslim and there exists no tradition of the Prophet that excludes a convert from eligibility to custody. Agreed custody to a non-Muslim is frowned at but just like divorce, the dislike does not make it illegal.

However, in the case of **RAKIYAT SADIQ V. SADIQ ANIMAKUN** which is an appeal to the Shari'a Court of Appeal of Kwara State, the marriage was dissolved in Grade 1 Area Court Lafiagi at the instance of the husband and the court granted custody of the eight year old daughter to the father by requesting the child to choose among the parents and the child chose the father. This, the court did relying on a Sunnah of the Prophet as it stated. The mother appealed to the Shari'a Court of Appeal in Kwara against the award of custody. She argued that the father cannot take proper care of the daughter because being a police officer, he travels a lot and the daughter is left with her co-wife with whom they are not in good terms. She also informed the court that she had not remarried.

The court after hearing from both parties and relying on the following books: *JawahirulIkli* Vol. II, Order VII Rule 2(1) of the Shari'a Court of Appeal Rules Cap. 112 Laws of Northern Nigeria 1963, *FiqhusSunnah* by SayyidSabiq Vol. II, *Minhajul Muslim*, *AshalulMadarik* Vol. II, *Al-FiqhAlaMadhahibulArba'a* Vol. 4 and S13(a) of the Shari'a Court of Appeal Laws Cap. 145 Laws of Kwara State of Nigeria 1994 allowed the appeal and awarded the custody to the mother based on the fact that the mother has not remarried, she has not been disqualified for any reason, that the judge applied the opinion of Hannafi and Shafi'i schools in giving the child the option of choosing at that stage instead of the opinion of Maliki School which is the applicable law in Shari'a Courts in Nigeria. In the words of the court: For the above reasons, the judgment of the trial court is unfair to say the least. He did not follow necessary procedure in conformity with the applicable law before arriving at his decision. We therefore allow the appeal and set aside this decision with an order that the custody of Salamat is hereby awarded to the appellant since she has not remarried.....Appeal succeeds.

GUARDIANSHIP OF A CHILD

In the course of discussing *Hadhana*, we have also belabored substantially the issue of *kafaalah* (guardianship).

In the realm of Islamic family law, guardian typically refers to anyone assuming the legal responsibilities of caring for a child who is not the child's parents. Temporary guardianship may be granted in some cases, and emergency guardianship applies to other scenarios. A temporary guardianship is appointed for a specific period or for a specific purpose. In some cases, an emergency may urge the court to appoint a guardian if the person requiring care is facing an immediate risk of harm or is incapacitated and unable to make legal decisions on their own behalf.

Guardianship comprehends both the direction and care of the person of the infant or person of unsound mind, and the administration and care of their property.

TYPES OF GUARDIANS

Guardians under the shari'a are Natural, Testamentary or Appointed.

1. Natural Guardians

The first and primary natural guardian is the father who alone can exercise both the right of guardianship over the person of his infant and the administration and care of the infant's property.

2. Testamentary Guardians

Guardianship of the property and the person of the infant may be exercised by whomsoever the father formally appoints as guardian (*wasiy*) after his death.

The person appointed must be adult and sane. If he is a minor, a lunatic or an imbecile, the appointment is *ipso facto* void. All acts

committed by such a guardian, before his removal by the judge, in exercise of the authority received from the testator, are inoperative.

If the guardian becomes imbecile or insane after the appointment, the tutelage conferred by the father is made void and the right of appointing the tutor devolves on the judge.

The father can appoint whomsoever he wishes irrespective of sex or religion.

The testamentary guardian stands in *loco pateris* in every matter relating to the welfare of the minor and the care and supervision of his property.

A person so appointed must, during the life-time of the father, accept the appointment. A purported acceptance after the death of the testator is invalid. Acceptance may be withdrawn during the testator's lifetime but not after his death.

3. Guardians Appointed by a Judge (de jure)

The judge possesses the power to restrain the father or the guardian from exercising the right of guardianship over the infant's property if the father or the guardian is proved to show lack of foresight, or is guilty of bad conduct or untrustworthiness. The judge can then appoint another guardian in his place as per a tradition reported by Abu Dawud, Tirmizi and others which says:

"Amir (A Leader) is the guardian of one who has no guardian"

DURATION OF GUARDIANSHIP

(a) The right of the guardian to the guardianship of the male child's property terminates when the child attains majority.

Islamic law recognizes two distinct periods of majority - one of which has reference to the emancipation of the person of the minor from *patrispotestas* (Bulugh), and the other to the assumption by him of the management and direction of his property - i.e. *rushd*. If the child therefore attains majority but is not *rushd*, the property guardianship continues.

(b) In the case of a female child, in addition to her attaining puberty, she must be married and the marriage actually consummated. Where the guardian is her father, a proof that she is *rushd* is necessary.

In case of guardians, other than father, in addition to (b) above, her emancipation has to be pronounced before witnesses. If she remains unmarried, then she is emancipated after reaching the age of at least thirty and to the *Hambali's*, they extended the age to be forty years.

But to our opinion, this age is too much considering the fact that nowadays some girls in the various Nigerian jurisdictions completed their university education at 22. And a university graduate who may be working in the financial sector or public service can obviously be able to manage her property - therefore, getting married should be dispensed with as a condition.

RIGHTS AND DUTIES OF A GUARDIAN

1. It is lawful for a guardian to trade on account of his ward, but in doing so, he must act with prudence.
2. A guardian is authorized to sell the movable property of his ward for an adequate consideration, and invest the proceeds in a profitable undertaking.
3. Guardians, except the father, cannot sell the ward's real property (aqar) except in the following circumstances:
 - (a) Where it is to the manifest interest and advantage of the ward.
 - (b) Where the property is required to be sold for the purpose of paying off the debts of the testator which cannot be liquidated in any other way.
 - (c) When it is in imminent danger of being destroyed or lost.
 - (d) When the minor has no other property, and the sale of it is absolutely necessary for his maintenance.
 - (e) When it is in the hands of a usurper, and the guardian has reason to fear there is no chance of restitution.
4. A guardian is bound to keep his accounts separated from those of his ward, when the capital of both is engaged in the same trade or business.
5. A guardian can pledge or even sell the property of his ward and use the proceeds in the ward's maintenance.

The father is allowed to maintain himself from his child's property if he has no other means of maintaining himself.

Other guardians who are poor are allowed to take a reasonable and moderate remuneration for their labor, but not more. In the Holy Qur'an Allah says:

وَابْتُلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ
رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ ۖ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَنْ
يَكْبُرُوا ۗ وَمَنْ كَانَ غَنِيًّا فَلْيَسْتَعْفِفْ ۖ وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ
بِالْمَعْرُوفِ ۗ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ فَأَشْهَدُوا عَلَيْهِمْ ۗ وَكَفَىٰ
بِاللَّهِ حَسِيبًا

سورة النساء(6)

MEANING:

“And test the orphans [in your charge] until they reach a marriageable age; then, if you find them to be mature of mind, hand over to them their possessions; and do not consume them by wasteful spending, and in haste, ere they grow up. And let him who is rich abstain entirely [from his ward's property]; and let him who is poor partake thereof in a fair manner. And when you hand over to them their possessions, let there be witnesses on their behalf - although none can take count as God does”

CONCLUSION

Custody and guardianship are very significant in the upbringing and overall welfare of a child. In most instances, the two determine what or who the child turns out to be later in life. As stated earlier, children are gifts from Allah and a trust (amanah) in our custody. We must therefore care for them and preserve them by implementing the teachings of Islam and following what the Holy Prophet (PBUH) guided us to in his prophetic

tradition where he said each of you is a shepherd and each of you will be accountable for his flock.

In its legislations and jurisprudential laws, Islam pays special attention to childhood and children. The main purpose of *hidhana* is caring for the child, and the women being generally more caring and compassionate, they are more suitable for custody and even from the literal meaning of *hadhana* which means "to embrace" shows that custody is the domain of women.

Where a marriage terminated by death or divorce, the custody of a child is with the mother but its guardianship remains with the father. i.e, the mother keeps or lives with the child, its father provides all the necessities for the child and if it happens the child is to make any financial dealing or some other transactions, the right to guide or making the transactions is with the father, his representative or a family head from the father's side.

We have discovered from our experiences in the courts, when a father died and his estate shared among his legal heirs, problem do arise where there are minor children as to who should be entrusted with their property.

The mothers usually assert right to keep the property of their young children, especially where they have had problem with their in-laws during the lifetime of the husbands.

What is practically being obtained is that even if the mothers are entrusted with the property, in most cases they marry some young men who in total disregard to the limitations ordained by Allah not to touch the property of the orphans, the young men do deceive their wives and embezzled her own share of the property and that of the children.

We therefore urge our courts to be up and doing in seeing that such property are entrusted to some credible people from the father's side whom the religion assigned as guardians to the children until they reach the *rushd* position. But we suggest that the mothers should be co-signatories in the affairs of their children's property so that they will be in the true picture of what is happening and can checkmate and advise the other side, to avoid any excesses.

REFERENCES:

1. Ad-Durrul – MukhtarwaRaddul-Mukhtar, 2/877
2. Ashar-hul – KabirMa’ad-dasuki, 2/533
3. Abbas, AbdullahiMachika, Guide to Advocates, (2017)
SankoreEducational Publishers Ltd, Zaria
4. Abdulmalik, Bappa Mahmud, Supremacy of Islamic Law, Huda-
Huda Publishing Company, Zaria-Nigeria
5. Abu Ishak Ash-Shairazi, Al-Muhazzab, 2/169-171
6. Ad-Dardir Al-Maliki, Ash-sharhus – Sagir, 2/737, 763 & 764
Ad-Dardir Al-Maliki, Ash-sharhus – Sagir, 2/756
Ad-Dardir Al-Maliki, Ash-sharhus – Sagir, Op. Cit. 2/762
7. Ad-durrul – MukhtarwaHashiyatuIbnAbidin - 2/883-884
8. Ad-Durrul – MukhtarwaHashiyatuIbnAbidin 2/871-875
9. Al-Badai’u 4/41-44
10. Al-Buhufi, Kash-shaful – Kina’i, 5/576
11. Al-Hasfaki, Ad-durrul – Mukhtar, 2/87-875
12. Al-Jaza’iry, Abu Bakar Jabir, Minhaj Al-Muslim, Vol. II (2001)
Darussalam Global Leader in Islamic Book, Riyadh

13. Alkali, Dr. Sa'idu Usman Muhammad, *Kundin Fiqhun Musulunci a Takaice*, Vol. III (2015), Daar Al-Khair
14. Al-Khadib Ash-Sharbini, *Mugnil - Muhtaj*, 3/452
15. Al-Mugni 7/613, 614, 615, 619 & 624
16. Anwar, Ahmad Qadri, *Islamic Jurisprudence in the Modern World*, (1986), Taj Printers, Najafqarh Industrial Area, New Delhi
17. App. No. KWS/SCA/AP/LF/12/2004. Kwara State Shari'a Court of Appeal Annual report (2005), p. 89
18. Ash-sharhus - Sagir wad-dasuki 2/512
19. Ash-sharhus - Sagir, 3/458
20. Dr. Muhammad Taqi-ud-Din Al-Hilali, *The Noble Qur'an*, King Fahad Complex for the Printing of the Holy Qur'an, Madinah, K.S.A.
21. Faydh, Kashani, Al-Safi, 1/336
22. Hussaina Haruna VS Alhaji Misbahu Abdullahi (unrep.)
23. Hussaina Haruna VS Alhaji Misbahu Abdullahi (unrep.) KTS/SCA/MF 2018, Katsina State SCA
24. Ibn Juzay Al-Maliki, *Al-Kawanin Al-Fikhiyya*, P.224-225

25. IbnRushd, BidayatulMujtahid Translated by Prof. Imran
26. Ahsan Khan Nyazee as The Distinguished Jurist Primer, (1996)
Garnet Publishing Ltd, South Street Reading, UK
27. IbnuKudamah Al-Maqdisi, Al-Mugni, 7/612
28. Ibnul-Humam, FathulKadir, 3/319
29. Imam Al-Kasani, Al-Badai'us - Sana'in, 4/40
30. Jama'atun min Ulama'il Hind, Al-FatawilHindiyya, 1/484
31. Mugnil - Muhtaj, 3/452, 453 & 456
32. Omar, MohmedLawal, (2014) Marriage and Divorce under
Islamic Law (unpub). A paper delivered at the Training
Workshop for Katsina State Judiciary Staff.
33. Qummi, Mashhadi, Kanz al-Daqa'iq, 2/87
34. Raulatu Bashir Umar Yakasai VS MukhtariBalaMaiyafe (2008)
SLR, P. 256
35. Shaukani, Muhammad b. Ali b. Muhammad, Fath al-Qadir,
1/339
36. Shaykh, (Mufti) Muhammad Ibn Adam, Lecture Notes,
Darullftaa, Leicester, U.K.
37. Sheikh Mar'iyBn Yusuf, Gayatul - Muntaha

38. Tabari, Muhammad b. Jarir, Jami al-Bayan 3/331
39. Tabrisi, Fadhi b. Hassan, Majma al-Bayan, 2/293
40. Tabrisi, Fadhi b. Hassan, Majma al-Bayan, 283
41. Tusi, Abu Jafar Muhammad b. Hassan, Al-Tibyan, 2/459-460
42. USC/MKR/018/13 (unreported) Upper Shari'a Court Makera, Kaduna.
43. Zia H Shah. & Dr. LutfurRehman, (27th March, 2017) Lecture Notes, Nashville, TN
44. http://www.daruliftaa.com/node/5385?txt_QuestionID
45. http://www.irfi.org/articles/articles_551_600/custody_of_children_in_shari.htm
46. <https://islamqa.info/en/answers/8189/who-has-more-right-to-custody-in-islam>
47. <https://themuslimtimes.info/2017/03/27/divorce/>
48. <https://www.al-islam.org/child-custody-islamic-jurisprudence-saeid-nazari-tavakkoli/part-two-study-legal-issues-child-custody>
49. <https://www.boydlawsacramento.com/differences-custody-legal-guardianship/>