

## **Judicial Approaches in Custodial Cases Relating to *Mumayyiz* Children**

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### **ABSTRACT**

Children's position after divorce often becomes an issue, as to who will be responsible for their welfare. Some divorced couples manage to mutually settle custody issues outside the court. However, many the custodial dispute to the court. It is provided in the Islamic Family Law Enactment (State of Selangor) 2003 that the mother shall be entitled to the custody of her under-aged children. When the child has reached the age of discernment (*mumayyiz*), he or she shall have the choice of living with either of the parents, unless the court orders otherwise. However, the law does not provide any guidelines on how the *mumayyiz* children shall be called and to what extent their opinion is to be heard. This study examines the approach taken by the Syariah court in handling custodial cases relating to *mumayyiz* children. It adopts doctrinal legal research method as provided in unreported cases. Findings show the judges do not have a standard approach in handling custodial cases of *mumayyiz* children. Therefore, the study recommends proper guidelines are provided in assisting Syariah court judges to arrive at a mutually acceptable solution.

*Keywords:* Children's choice, *hadhanah*, Malaysia, *mumayyiz*, Syariah Court, welfare of children

### **ARTICLE INFO**

*Article history:*

Received: 1 March 2017

Accepted: 23 November 2017

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### **INTRODUCTION**

Child custody or *hadhanah* literally means taking care of someone. The word *hadhanah* is derived from the word *al-hidn* which means to embrace or hug where adults hug or place a child in their lap (Sabiq, 1987). Al-Zuhayli (2001) defines *hadhanah* as taking care of those who have not reached the age of discernment and cannot live independently. It also means raising them

in accordance with their best interests and protecting them from anything that may harm them. This includes providing them with sustenance and education to ensure they become a good human being and are able to care for themselves.

Some Muslim scholars propose that *hadhanah* has a certain limit whereby it is considered complete when the child reaches the age of *mumayyiz* (the age of discernment). The age of *mumayyiz* is important to distinguish between small children who have no capacity to make a decision and those who are deemed to be able to give an opinion in matters concerning them. The *Mumayyiz* children are believed to have the capacity to manage and defend themselves without the help of others. As such, they are considered qualified to make a choice to live with either of their parents or any other party post-divorce.

Muslim scholars often support this understanding by referring to the *hadith* (traditions, records of the words and deeds of the Prophet Muhammad) where it was reported a mother came to the Prophet and lodged a complaint about the custody of her child (Albani, 1998, p. 47). She claimed that her husband wanted to take away her son from her. She said, "My husband wishes to take away my son, O Apostle of Allah, and he draws water for me from the well of Abi Inabah, and he has been good to me." The Prophet then said, "Cast lots for him." Feeling dissatisfied with the complaint lodged by the wife, the husband said, "Who is disputing with me about my son?" The Prophet then said to the child, "This is

your father and this is your mother, so take whichever of them you wish by the hand." The son took his mother's hand and she went away with him.

The opinion of Muslim scholars who are of the view that the *mumayyiz* child deserves to be given the right to express his/her opinion and to be with either parent after the divorce is also in line with the provisions of the United Nations Convention on the Rights of the Child (UN Convention on the Rights of the Child [UNCRC] 1989. Article 12 provides that all persons shall take care and respect the rights of children to express their views in any matters concerning them, including the issue of guardianship (<http://www.unicef.org.uk/UNICEFs-Work/UN-Convention/>).

#### **Legal Provisions Concerning *Hadhanah* and *Mumayyiz* Children**

In Malaysian Syariah law, the mother is given priority in custodial cases of small children. Section 82 of the EUUKIS states: the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution. However, the right of the person to the custody of a child terminates upon the child attaining the age of seven years, in the case of a male, and the age of nine years, in the case of a female.

Upon fulfilment of that period, section 85 (2) provides:

- (1) The right of the *hadinah* to the custody of a child terminates upon the child attaining the age of seven years, in the case of a male, and

the age of nine years, in the case of a female, but the Court may, upon application of the *hadinah*, allow her to retain the custody of the child until attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female.

(2) After termination of the right of the *hadinah*, the custody devolves upon the father, and if the child has reached the age of discernment (*mumaiyiz*), he or she shall have the choice of living with either of the parents, unless the Court otherwise orders.

Section 87 of the EUUKIS further provides that the court has the power to place the child, in specific circumstances, in the custody of any other person or of any association if it is in the best interest of the child. In determining such cases, the court shall have regard to the wishes of the parents of the child; and the wishes of the child, where he or she is of an age to express an independent opinion. The law thus makes a clear provision that the court has the power to determine this matter and the *mumayyiz* children are given clear right to express their views and make a choice to live with any of their parents or any other party of their choice.

Even though *mumaiyiz* children are entitled to give their opinion, the law, however, does not provide any provisions on how the practice should be implemented. There are no guidelines for judges in dealing

with this matter, particularly on how and what to ask the child in order to elicit a response regarding the child's preference. Moreover, there is no provision showing to what extent the opinion of the children will be considered by the court (Che Soh, 2014).

## METHODS

This study adopts doctrinal legal research approach which refers to a research methodology centred on the study of legal principles and values derived from primary sources of law i.e. legal provisions and cases decided by the courts applicable in society (Mike & Wing, 2007, p. 20). This study was conducted by examining the provisions under the EUUKIS concerning the custody of small children and those who have reached *mumaiyiz*, and reviewing the judgement made by the Syariah court with regards to the *hadhanah* of *mumayyiz* children after divorce. The analysis was based on an examination of 20 unreported cases decided by the Selangor Syariah courts between 2008 and 2012. In this study, all cases are cited with anonymised names, the registered case number and the year the decision was made.

## FINDINGS AND DISCUSSION

Although the law has given the right to the *mumayyiz* children to express their views and making their choice to live with any of the parents or other parties after divorce, the cases reviewed in this study showed inconsistencies in the approach taken by the court: first, the *mumayyiz* children were not called to the court; second, *mumayyiz*

children were called to the court to consider their opinions; and third, the opinion of *mumaiyiz* children were not considered despite the fact that they were interviewed by the judge.

### ***Mumaiyiz* Children Were Not Called to the Court**

In most of the *ex parte* cases, judges did not instruct for *mumaiyiz* children to give their opinion before determining the custodial issues. An *ex parte* case refers to a case where only the plaintiff appears before the open trial, without the appearance of the defendant. From a procedural perspective, when the plaintiff makes any application for open trial, a summon and statement of claim will be served on the defendant. When the summon is duly served, the defendant should appear and present their case. Section 121 of Syariah Court Civil Procedure (State of Selangor) Enactment 2003 provides that;

(1) If, when any action is called on for hearing -

(a) neither party appears, the Court may dismiss the action;

(b) the defendant does not appear, the Court may, subject to proof of due service, hear and determine the action in his absence; or

(c) the plaintiff does not appear, the Court may dismiss the action and hear and determine any counterclaim.

It shows that when the defendant fails to appear, the court has the power to instruct for the case to be heard which is known as *ex parte* hearing. However, section 121(2) states that before making any judgment on the plaintiff's claim under paragraph (1) (b), the court shall order the plaintiff or the defendant, as the case may be, to take an oath of *istizhar* (a specific oath taken by the plaintiff upon instruction given by the court, with the intention to reject any negative claim against the plaintiff after he or she produces the evidence).

Cases reviewed showed that in the *ex parte* custodial cases concerning *mumaiyiz* children, judges instructed for the trial to be resumed after the plaintiff took the oath of *istizhar*. Judges also, in most cases, made the decisions about the custody of the children involved without calling them to the court. It seems that the *mumaiyiz* children were not given any voice during the trial of *ex parte* application.

This approach can be seen, for example, in the case *Z v. T.Z* (10300-028-0015-2012) where the Plaintiff (mother) applied for the custodial right over their six children, aged 18, 16, 13, 11, 7 and the youngest aged 5. The summon had been served on the father as the Defendant, but he failed to attend the hearing. The court had resumed the hearing, and instructed the Plaintiff to present her case. After the Plaintiff took the oath of *istizhar*, the judge made the decision that the children should be placed under the supervision of the Plaintiff and was given full custodial right. In this case, the judge did not ask the children, including the children

who had reached the stage of *mumayyiz*, to give their opinion on the issue.

A similar approach was applied in cases where both parties appeared in court. In the case of *M W v. W S* (10400-028-0587-2012), the father (Plaintiff) claimed for the custody of their two children, a son and a daughter aged 11 and 9 respectively. The judge in this case ordered for the proceeding to be continued and instructed both disputing parties to produce relevant documents. Throughout the proceeding, the court did not elicit the views of the children. After several sittings, the judge decided that the two children would live with the Plaintiff, without eliciting views of the *mumaiyiz* children.

#### ***Mumaiyiz* Children were Asked to Give Opinions and the Judge Considered their Choice**

Cases reviewed also showed that some judges instructed *mumayyiz* children to be called to the court and their opinions were taken into consideration by the court in total. This approach was seen in the case of *S v. K* (10400-028-0408-2012), which dealt with the custodial issue of two *mumayyiz* children, a boy and a girl aged 13 and 11 respectively. After several sittings, the judge asked for the two children to be called to express their opinions about the custodial dispute, and with whom they preferred to stay with. The daughter opined she was more comfortable living with her father, but would like to meet the mother every weekend. The son, on the other hand, said that he preferred to stay with his mother and

would like to meet his father and his sister several times a month.

In this case, the judge expressed his concern about the right of the children to stay comfortably with whom they prefer, and their right to meet with the non-custodial parent, their sibling and their close family members. The court also emphasised on the quality time spent together and advised the parties to have a respectful relationship for the sake of their children. The court also instructed the parties to ensure that the visiting time is observed and the children would not be prevented from meeting with the non-custodial parent. This case shows the court considered the choices of the *mumayyiz* children as important and had taken them into consideration in his decision.

In another case, *R v H* (10400-028-0466-2011), the Plaintiff (father) applied for custody of his eight-year-old daughter. Interestingly, although the child had not reached the *mumayyiz* stage as provided under section 85(1) of the EUUKIS, the court allowed for the daughter to be interviewed. In the session, the court asked the child whether she was aware her parents would not stay together anymore after the divorce and with whom she preferred to live after that. The judge also asked the child the reasons behind her choice. The child indicated she preferred to stay with her father and her choice was respected both by the court and her parents. It shows that the judge had used his discretion to ask the opinion of the child whom he thought was capable enough to give her view, though

she was below the age specified in the law, which is nine years for a girl.

### ***Mumayyiz* Children were Asked for their Opinions but the Court Considered their Choices Partially**

Findings also showed that in some cases, the court requested *mumayyiz* children to express their views but they were not considered fully. In the case of *A v. O* (10400-028-0033-2010), the Plaintiff (mother) claimed custody of her two sons aged 11 and 10. The judge instructed for the children to be brought to the court to express their views. The eldest son said that he felt more comfortable living with their father while younger one said he preferred to live with the mother. The two children also voiced their concern regarding school holidays and the availability to meet together as one big family. They would like to spend every weekend with the parent they did not stay with. They also wanted to be together once in a while and would prefer to spend school holidays with the custodial parent.

The judge listened tentatively and appreciated their views and approved some of their choices. The first son would live with the father as the custodial parent while the second would stay with his mother as his custodial parent on weekdays. However, the judge said that he could not agree with the idea of spending the weekends with the non-custodial parent and the whole school holiday with the custodial parent. The judge, instead made a different decision in which the children should spend every weekend

alternately between the two parents and shared equally school holidays.

### **CONCLUSION AND RECOMMENDATION**

This study has pointed out the different approaches taken by the judges in handling custodial cases relating to *mumayyiz* children. Some judges had listened to the children's wishes, while some did not elicit the opinions of the children. The *mumayyiz* children whose views were heard by the judges felt they were appreciated. This action honoured the children's right to speak and showed that they deserved respect. Meanwhile, there were judges who did not elicit the views of the *mumayyiz* children, which implied that in their view, the children's right to speak is not necessarily important.

The non-uniform approaches have a significant impact on the children's right to speak and to be heard which is protected by the law. The different approach can also undermine the right of *mumayyiz* children to speak, give their opinion and state their desire in matters involving them. Hence, this study recommends guidelines to be introduced, so that a uniform method can be followed as a guide for judges in making decisions. It is not only to safeguard the right of the *mumayyiz* children to express their views, but may also assist judges in handling *hadhanah* cases regarding *mumayyiz* children.

## ACKNOWLEDGEMENTS

The authors acknowledge Universiti Teknologi MARA (UiTM) for awarding them LESTARI grant (600-IRMI/MYRA 5/3/LESTARI (0114/2016). Gratitude also goes to the Selangor Syariah Chief Judge, all Syarie Judges and Sulh officers from Selangor Syariah Judiciary Department for their support given to undertake this study.

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