

An Appraisal of Selected Cases on Hadanah (Custodianship) in Niger State Shari`Ah Courts

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Abstract

The work discussed the range of family status and judgement from Shar'ah perspective in which the Glorious Qur'an and Sunnah of the Prophet Muhammad (S.A.W) has laid down specific rules for the attainment of workable system for the general good of the family and society. The study therefore, exposed the duty of the couple in marriage and the custody of the children at their tender age. This paper aims at explaining the Islamic principle of the rules of (Hadanah) and the right of guardianship in simple terms so that the readers will avail themselves of the opportunity of putting these principles into practice. It is problems over the years that people particularly some parent's do not understand their rights of upbringing of their children's after divorce under Islam. Therefore, the order for this paper examines rules governing (Hadanah) and guardianship under Islam. Hadanah which means the side or part of the body that lies below the armpit also refers to providing care and guardianship for a minor until he (or she) reaches the age of puberty. Custody and care of minors is obligatory, in order to guard their bodies, intellects and religion. Caring and upbringing of the children is the parent's obligation. If they are not available, then the closet relatives on the maternal side and so on are responsible. If they are also not present, then the government or the Muslim Community should take responsibility of the children. The actual purpose of guardianship is to maintain the child's life, and his physical, and spiritual upbringing and care. Therefore, the right of upbringing and care of the child will be taken away from whoever is not fulfilling the very aim and purpose of the guardianship. When a mother gets married to a person who is not a relative of the child, her right to custody will be lost. The period of guardianship and care is valid until the young boy reaches the age of puberty. In the case of a young girl, it is until she gets married and has sexual relations with her husband. The word is used to express the action of a mother of birds using its wings to protect the young ones. It also in tells responsibility of maintenance and cost of maintenance, according to Islamic principles.

Keywords: Appraisal, Hadanah, Shari'ah Courts.

1. Introduction

Islamic law terminology for guardianship or custody of children is known as Hadanah. It means side or part of the body that lie below the armpit. The word is used to express the action of a mother of birds using its wings to protect the young ones. The word is used to convey the protection a mother gives to her young child in Islamic law. It means the protection and shielding of the young ones from the hazards of life at their tender age.

Hadanah involves looking after a child in terms of maintaining where he lives, preparing his bed and beddings, preparing his food, taking care of his dress and taking good care of his personal hygiene. It does not leave out looking after the child at the tender age spiritually and intellectually so that when he or she overcomes the weakness of infancy and childhood, he will be able to stand on his own and face the challenges of life and perform the responsibilities demanded of him.

However, the duty of Hadanah (guardianship) is clearly distinguishable from Tarbiyya-training. The former is the right of the mother while the latter is the duty of the father. The following

authorities leave no body in doubt that the expenses of maintaining and training the child are squarely on the shoulders of the father:

وحضانة الذكر للبلوغ والأنثى للأم... وللأب تعاذه وأديه وبعثه للمكتب

“It is the right of the mother to have the custody of the male child till he attains puberty and the custody of female child, till the duty of the maintenance terminates. It is the duty of the father to bring him up well and send him to school”

Therefore, the right of upbringing and care of the child will be taken away from whoever is not fulfilling the very aim and purpose of the guardianship, when the mother gets married to a person who is not a relative of the child, her right to custody will be lost. For instance, in the case of LAARO ADE GBOYE and FALILATU ADEGBOYE APPEAL NO. KWS/SCA/28/86 of 7/4/87.

The Sharia Court of appeal allowed the appeal on the ground that respondent's aunt who was granted the custody of the children of the appellant and the respondent in Mokwa, a distance of more than 72 miles from Ilorin where both parties lived. The aunt was given the custody in the trial Court because respondent had lost the right of custody of the children because she had remarried. In the absence of any qualified maternal relative of the children, the mother of respondent was given the custody of the children.

However, the guardian should not take a major decision affecting the personality of the child then or in future without the consent of the Waliy. Many guardians have fortified the right of custody of their wards in the courts applying Shariah for putting tribal marks on the faces of their wards without the consent of their fathers or giving those names other than what their fathers gave them. The actual purpose of guardianship is to maintain the child's life, and his physical, natural and spiritual upbringing and care.

1.1. Islamic Law on the Qualification of Guardian

A woman does not qualify for guardianship automatically because she is the direct mother of the child. Her right is subject to a number of conditions. Islamic law stipulates that a woman who is to be given right of custody of her young child should be sane and mature. A minor, like a mad person, is not capable of managing her own affair and therefore cannot be trusted with the welfare of the child. She should be Rasheedah (capable), directing her affairs herself and not a woman who is put under the supervision of somebody else to manage her affairs for her because of her incapacity to look after her children.

For instance, a woman who is too advanced in age to take good care of the child will be disqualified on the ground of age. In the same manner poor sight can disqualify her as well as any deformity of the body that can make the child suffer psychologically.

A person contesting for Hadanah should be trustworthy and morally sound. A woman notorious for adultery, gambling or dealing with alcohol will on that ground, lose her right to the custody of her child. She must be in good health and be free from contagious diseases like leprosy. She must have a good and safe house to live into accommodate the child. This is very essential in respect of the female child for obvious reasons. The mother, serving as a guardian, should not be remarried to a person who is not related to the child. For instance she can retain the custody if the father of the child dies and she remarries the child's uncle or so. She forfeits the right as soon as her marriage with a man who is not related to the child is consummated.

The Maintenance of the Child and Paying the Woman who Take care of the Child

The father should pay the living expenses of the child and the wages of the woman who looks after him, according to his financial ability. This is because the woman who looks after the child is like a woman who breast feeds children and the breast feeding woman has the right to her due payment.

Allah said:

Then if they give suck to the children for you, give them their due payment (Qur'an 65:6).

If she provides the upbringing and care of the children voluntarily, then there will be no due payment for her service. The maintenance of the child and the pay of the woman for upbringing will be according to the father's financial ability or inability to pay (i.e. what he can afford).

Allah said:

let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah put no burden on any person beyond what he has given him (Qur'an 65:7).

Two kind of maintenance allowances come up for consideration in respect of guardianship. They are allowances in lieu of looking after the child and for the maintenance of the child. Unlike other three schools, Imam Malik School does not approve any pecuniary or any other benefits to any guardian who is granted custody of a child. It is viewed as a duty which the mother should perform to her child. If for one reason or the other, she cannot do it, her mother or any other person who does it too, is just performing a normal duty due to the child.

However, the school of Imam Malik shares the same view with the other schools that the maintenance of the child should be borne by the father of the child. The guardian of a child has the right to receive the cost of maintenance of the ward in respect of staple food and soup, clothing's and accommodation determined according to the discretion of the judge.

The Hierarchy of the Guardians to the Child Upbringing

When the child's parents have separated due to divorce or death, his mother has the most right to his custody for guardianship, as long as she does not get married. This is due to the statement of the prophet Muhammad to a divorced woman who complained to him that her husband wanted to take away her child.

The Prophet replied:

أنت أحق به ما لم تتكحي

you have more right to him as long as you do not marry.

If she is not available, then the mother of the mother (the child's grandmother) has the most right. If she is available, then the maternal aunt has the most right. This is because the mother of the mother is considered a mother, and the maternal aunt is considered as having the status of the mother.

The Prophet said:

الخلّة بمنزلة الأم

"The maternal aunt is in the position of the mother".

If she is not available, then the father's mother (Grandmother) has the most right. If she is not available, then the (adult) sister (of the child) has the most right. If she is not available, then the paternal aunt has the most right. If she is not available, then the brother's daughter has the most right. If the above mentioned are all not available, then the responsibility of the child's guardianship should go to his father, grandfather, brother, brother's son, uncle, then his closest male relatives in successive order. The full brother is given preference over the half-brother by the same father, and similar is true in respect of the sister and the half-sister.

Examination of a Case on the Rights of Custody of Children after Divorce

This is in the case filed in the Niger state Shari'ah court of appeal between:

Khadijah Adamu

And

Sirajo Abdurahman

The appellant and the respondent were husband and wife and blessed with four children's namely: Aisha 16 years Abdulkarim 13 years, Abdullahi 10 years and Adamu 7 years. On July, 2016, the marriage between the appellant and the respondent was terminated via a unilateral divorce by the respondent. The respondent filed a civil suit against the appellant at the upper Shari'ah Court Bida on 24- July, 2017 seeking the court to order the respondent to give him custody of his children for proper upbringing.

The trial court, concerning the issue of custody disqualified the appellant and deemed her right to custody of her four children's, the appellant dissatisfied with the decision of the trial court hence for this appeal.

Judgement: The applicant in this case is Khadijah Adamu, while the respondent is Sirajo Abdurahman, this appeal borders on issue of custody of children involving the respondent here in referred to as the plaintiff at the lower court and the appellant here in as the defendant.

The appellant dissatisfied with the decision of a presiding judge of the lower court via a judgment delivered on the 19th September 2017 granted custody of the appellant children's to the

respondent. The appellant is dissatisfied with the decision, hence appealed to this honorable court and employed the services of Barrister Y.G. Korokaesa of the summit chambers while Raji M.A represents the respondent. Having listened to the submission of both counsels of the appellant and respondent respectively, we hereby observed the following:

The right to the custody of a child is vested in both parents when they are living together in the matrimonial home.

If the mother lives apart from the father the right of the custody of their child is vested in the mother.

The right of the mother to the custody of her male child extends until puberty.

However, the right of custody is lost by the mother if the child is removed without the consent of his 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 effective when the distance is according to texts, more than 72 miles.

The learned trial judge was right in denying the appellant the right to custody of the said children.

Allah says:

O you who believed save yourself and your families from a fire whose fuel is men and stones... (Qur'an 66:6)

...And their maintenance and their clothing must be burned by the father according to usage (Qur'an 2:233)

We equally agreed that the trial judge was right in granting the custody of the children to the respondent under Islamic law, and that the respondent is the most appropriate to take care of children. We also considered that the respondent as stated without objection resides at Kebbi state of Nigeria and it is evident that he is not coming back on time as his means of livelihood is in Kebbi State. And the rule stated that if the distance is more than 72 miles according to the texts, the father takes the custody refer to the book of Hashiyat Al-Dasuki.

And that if the father moves from his usual place of residence he has the power of withdrawing the child from its custodian.

It has been further observed that (which is also common knowledge) the distance from Bida where the appellant resides to Kebbi where the respondent equally resides exceeds 72 miles. The respondent has the right to carry along all his children namely, Aisha who was 16 years old (now 17 years) Abdulkareem who was 13 years old (now 15 years) are deemed to be matured to take good care of them and their education.

In view of the foregoing therefore, we hereby affirmed the decision and judgment of the Upper Shari'ah Court Bida, which is in line with the Shari'ah and it does not go contrary to the Islamic law as it was held in the Book of As'halil Madarik which say and I quote:

ولا له ولا لغيره انقل الحكم ألا انيخالف نفس قاطعين

No to us that determines these appeals and no to the court above to determine our appeal can change this judgment unless it is contrary to the clear text.

The respondent shall continue to retain the ownership of his children namely-

Aisha

Abdulkareem

Abdullahi

Adamu

So that he can exercise his powers of supervision and control over his children if the appellant so wishes to continue looking after her children, she can join him (the respondent) in his place of work i.e. Kebbi state, it is his duty to provide the shelter, food etc. to her in order for her to have control of the said children and if not, she loses again, as it was held in the book of Hashiyat Al-Dasuki.

اتبعي محضونك إن شئت

And you should follow your custody if you wish.

In view of foregoing this appeal is hereby struck out as so held.

Thus, the judgment of the Niger State Shari'ah court of Appeal was based on the duties and responsibilities of the father according to Islamic principles, because the respondent i.e. father to exercise his responsibilities and the further education of his children since he is living at Kebbi state,

and the appellant i.e mother living at Bida, Niger State. The appellant seek the indulgence of the court to give her the right of guardian as a mother.

Allah says:

...And their maintenance and their clothing must be burned by the father according to usage
(Qur'an 2:233)

The duty of maintenance remains on the shoulders of the father till the male child is matured and capable of earning a living. In the case of a female child the duty of maintenance continue till she is married and the marriage is consummated. The right of a mother to the custody of her female child extends to the time of the consummation of the child's marriage. But the two opinions expressed in respect of the end of the Hadanah of a male child are given in Bahjah as follows:

وهي الحضانة تنتهي إلى الإصفار وفي الذكور وهذا قول أبي مصعب ومن وافقه، والاحتلام الحد المشهور

Hadanah of the male child end when he replaces the milk teeth with permanent teeth. This is the opinion of Abu Mas'ab and others who agree with him. But the consensus is attaining the age of puberty.

The Malikites including Khalil supported the attainment of the age of puberty. In Nigeria the court applying Islamic law go by the attainment of the age of puberty because it is the popular opinion and more precise.

The two ages are close but it seems that Ihtilam (الاحتلام) puberty is later than replacement of the milk teeth with permanent teeth. The ultimate goal is to mark the time that a child develops the capacity to look after himself in terms of feeding, putting on his dress and taking care of his personal hygiene.

The age is usually coupled with consciousness of his sex and distinguishing between himself and his mates of the other gender. Ordinarily, it is the time that the male child tends to stand and fend for himself, independent of the mother. Meanwhile, the judgement of Niger State Shari'ah court of appeal which upholds the judgement of upper Shari'ah court Bida was also based on the right of the father to protect his children according to Qur'anic injunction.

Allah says:

O you who believe save yourself and your families from a fire whose fuel is men and stones... (Qur'an: 66:6)

The way to shield them from the fire of hell is to bring them up well spiritually.

2. Conclusion

Custody (Hadannah) and care of children is obligatory, in order to guard their bodies, intellects and religion. The right of a mother to the custody of her female child extends to the time of the consummation of the marriage, and Hadanah of male child ends when he replaces the milk teeth with permanent teeth. This is the opinion of Abu Mas'ab and others who agree with him. But the consensus is attaining the age of puberty. The two ages are close but it seems that puberty is later than replacement of the milk teeth with permanent teeth. The ultimate goal is to mark the time that a child develops the capacity to look after himself in terms of feeding, putting on his dress and taking care of his personal hygiene.

In Nigeria, the courts applying Islamic law go by the attainment of the age of puberty because it is the popular opinion and more precise. Caring and upbringing of the children is the parent's obligation. If they are not available, then the closest relatives are responsible. If they are also not present, then the government or the Muslim community should take responsibility of the children. The actual purpose of guardianship is to maintain the child's life, and his physical, rational and spiritual upbringing and care.

3. Recommendations

At this juncture, it is pertinent to make some recommendations which if they are implemented it would put an end or minimize the problems of Hadanah (guardianship of children's). The parent should take good proper care of their children's, for proper upbringing. In the case where the parent cannot get more time for proper upbringing of their children's, they should appoint someone who will look after the child and pay him/her. Where it happens the child has been in the custody of anyone among the parent, he or she should not stop them from visiting the other parent.

Further more, the parent or the guardian should make sure the child is receiving proper rearing, physically intellectually and spiritually, consideration as intend of what Islamic law means by custody. The father as a guardian is bound to look for upbringing of the children i.e. food, shelter, education for their proper upbringing. The mother should be allowed to take care of children's, as she was first recommended by Shari'ah to be the first guardian of the child's.

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