

CHILDREN'S RIGHT TO MAINTAIN CONTACT WITH BOTH PARENTS AFTER DIVORCE: THE CASE OF MUSLIM CHILDREN IN MALAYSIA

- *Custody battle after divorce has often been marred by incidents of swearing, insults, verbal abuse and exploitation that tainted the relationship of the persons involved. Considerate parent will resort to joint custody but others prefer sole custody excluding the role of the other parent. When access right is granted to the other parent, this will either be enjoyed or unfortunately be denied by the parent having the custody. The battle then pursues dragging the children along. The law is there but it needs good implementation and enforcement. This paper is aimed at discussing the syariah legal framework of custody applicable to Muslims and the prevalence of denied access as referred to the Syariah Court in Malaysia and how has the court dealt with it. It will also present case studies where children are denied from maintaining contact with their parent and its impact on them. Finally, it will put forward suggestions for law reform, improvement of available system and the introduction of new services as practiced in Australia and some other countries to ensure better and quality contact between the children and their parent and that the children's right are not interfered and ignored.*

Definition

- Right to maintain contact refers to the right of the child to remain in personal relation, direct/ indirect/ physical/ emotional contact or stay in touch with both the father and mother
- Syariah Court- have jurisdiction over Muslims, matters which fall under the jurisdiction of the Syariah Court cannot be tried in the Civil Court

CUSTODY UNDER THE ISLAMIC FAMILY LAW STATUTES IN MALAYSIA

Person Entitled to Custody

- The mother shall be the best person entitled to custody of infant during marriage and after dissolution
- If mother is disqualified, the right is passed:
 - maternal grandmother, how- high- soever

- father
- paternal grandmother, how- high- soever
- full/ uterine/ sanguine/ sister
- full/ uterine/ sanguine/ sister's daughter
- maternal/ paternal aunt
- male relatives
- Man can only have the custody of female child if he is a muhrim
- Where there are several persons of the same degree/ equally qualified/ willing- most virtuous, great tenderness, senior age

Qualifications necessary for custody:

- Muslim
- Sound mind
- Of an age that qualifies her to bestow care, love & affection
- Good conduct from the standpoint of Islam
- Lives in a place where there is no moral and physical risk to the child

How Custody Rights Is Lost?

- Marriage with a person not related to the child
- Gross and open immorality
- Change of residence to prevent the father to exercise supervision
- Being *murtad/* apostate
- Neglect and cruelty to the child

Duration of custody with the mother

- Male- 7 years
- Female- 9 years
- Upon application:
 - Male – 9 years
 - Female- 11 years

Power of Court to Make Order for Custody

- In exceptional circumstances- order to place the child in the custody of any other person/ association
- Paramount consideration to decide custody- welfare of the child
- Have regard to:
 - wishes of parents
 - wishes of the child

- Rebuttable presumption that it is for the good of an infant to be with his/ her mother, but shall have regards to the undesirability of disturbing a child's life by changes of custody
- Not bound to place all children in the custody of the same person, welfare to be considered independently

COURT CASES OF DENIED ACCESS/ CUSTODY/ CONTACT

- In Selangor and Federal Territories of Kuala Lumpur- highest number of custody cases including application to enforce judgement- custody and access rights
- 5-7 application to enforce judgement where parents having the custody refuse to allow the other parent to exercise access rights/ parent having custody was denied rights- child looked after by other person; grandparent

- 4-6 application to vary custody order- parent having custody/ joint custody does not take custody or when parents having access never visit/ child refuse to stay with parent
- No law to make parent maintain contact with child
- No mechanism to encourage

- A parent having custody or where the child usually lives may be reluctant or refuse to allow contact with the child as he/ she may have the fear that the child will be harmed/ not returned
- There are refusal without reason- simply revenge

OTHER CASES

- Child placed in institutions; not visited, never go back to hometown
- Child given to foster parents; never visited, status never revealed, no contact
- Child abducted; relationship severed
- Imprisoned parents or where parent is detained under the ISA
- Parents moved to other states

CASE STUDY 1

- N & S were divorced, a child, H (3 years)
- Custody given to N (mother), access to S (father)
- S took H away
- N looked for H for 12 years, appeared in local paper 3 times
- H kept on changing schools (private Islamic school)- the longest being 3 months- S forced to escape- lived in car, rented room, looked after by strangers

- H- never talk to others, depressed
- N- also depressed, referred to psychiatrists
- See H again after 12 years, H never want to stay with N
- H was deprived of N and the wider family for a long time- sense of security is threatened, forced to accept change- school, friend, culture

- Problems:
- Authorities refused to act- family problem
- Public doesn't cooperate
- No action taken against S even though there was a police report

CASE STUDY 2

- A (mother) & B (father) were divorced in 2000 with one child, C (7 yrs)
- Custody given to A (Trengganu)
- B made new application in Kedah and granted custody
- B took C away
- A never meet C until today

- Problems:
 - Authorities refused to act- family problem
 - Public doesn't cooperate
 - Enforcement of court order

RIGHTS UNDER THE CRC

- Article 9: A child has the right to live with his or her parents unless this is deemed to be incompatible with the child's best interest. The child also has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest

- Denial is an infringement of rights
- Child needs both parent to fully develop
- No parent shall supersede the other parent
- Child's rights shall be respected/ honoured
- Children become victim of battle-complicated, painful, trauma
- State party shall support by providing legal aid, provide information on parent's rights, set up centre for children

SUGGESTIONS

LAW REFORM

- Law to force parent to maintain contact
- To provide support for parent to maintain contact

IMPROVEMENT OF AVAILABLE SYSTEM

- Judicial authorities making the custody/ access order shall take certain steps as far as possible to give effect to the order and that the child is returned and not removed improperly.

- Authorities to cooperate

NEW SERVICES

- Contact service to assist children of separated parents to establish and maintain relationship with their non-resident parent
- Help with handover and supervise contact