

THE RIGHT OF CHILD CUSTODY: A LEGAL AND SOCIAL ISSUE

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Abstract

The right of custody of child is a right concerning young child's nurturing, in case of conflict between his/her parents, that the child either will stay with his/her mother or father. In this regard there are different opinions among scholars of sharia. Some of them have specified various ages on the basis of gender and differentiated child. For instance the male child will stay with his mother until reach 7 years of age. And the female child will stay with her mother until her puberty on the precondition that her mother will not get married again.

Moreover, this research essay tries to ascertain that the decision of custody of child should be in view to support child's benefit and future, whether this benefit could be feasible from his father or mother. Concerning the custody of child, the ruling should be noticed that even if the child lives with his/her mother, his father will always be responsible for financial support. Since this is the decision of God.¹

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¹ Al-Quran, Al-Baqra, 233

The right of Child's Custody means that in case of the separation of a wife and husband, who will have the right of bringing up the children-the mother or the father, or any of the maternal or paternal relatives? Hanafi fiqh gives this right to the mother till the child reaches the age of seven, in case of a boy child, and the age of puberty in case of a girl child. However we do not find any direct reference from the Quran regarding this difference in ages or any exact demarcation of the ages. But still, the following verse surely gives us a logical guidance:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُنَمِّ الرِّضَاعَةَ ۗ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ۗ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارُّ وَالِدَةٌ بَوْلِدًا وَلَا مَوْلُودٌ لَهُ بِوَالِدِهِ ۗ * وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ ۚ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِّنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۗ وَإِنْ أَرَدْتُمْ أَنْ تُنْتَرِضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا أَنْتُمْ بِالْمَعْرُوفِ ۗ وَاعْتَمُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ (٢٣٣)²

Tr. "And the mothers should feed their child for a complete two years. This (order of feeding the child) is for those who want to complete the time period of feeding." Another verse also proves the two year time period of feeding the child:

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ حَمَلَتْهُ أُمُّهُ وَوَسَّأَ عَلَى وَثْنٍ ۖ وَإِلَىٰ الْوَالِدَيْكَ ۗ إِلَىٰ الْمَصِيرِ (١٤)³

Tr. "His mother carried him in weakness upon weakness and his weaning is in two years."

If the child is within the age of two then according to the Quran his/her mother is bound to feed him/her. In case she gets divorce during this period, then according to the Quran, due to the requirement of weaning, the child, the mother will have preference for custody of the child. This is actually a logical implication of the Quranic words for her right of custody. Another verse also guides us in this connection:

أَسْكِنُوا بُيُوتَ مَنْ حَتَّىٰ سَكَتُمْ مِّنْ وَّجْهِكُمْ وَلَا تَضَارُّوا بُيُوتَ الَّذِينَ عَلَيْكُمْ ۗ وَإِنْ كُنَّ أُولَاتٍ حَمَلْنَ فَانْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ فَإِنْ أَرْضَعْنَ لَكُمْ فَارْتُواهُنَّ أَجْرَهُنَّ ۚ وَاتَّمَرُوا بِبَيْتِكُمْ بِمَعْرُوفٍ ۚ وَإِنْ تَعَاَسَرْتُمْ فَمَنْ تَرْضَعُوا لَكُمْ فَسْتَرْضِعُوا لَهُنَّ ۗ أُولَٰئِكَ ۗ (٤)⁴

Tr. "(After giving divorce) keep your wives where you live yourself according to your status and do not inflict any harm to them so that you may give them (financial) problems and if they are pregnant then give them their means of living (bread and butter) till the time of delivery, then if they feed (the child) for you then give them a stipend for it and accept each other's advises (regarding the welfare of the child) with goodness. And if feel it difficult mutually then (it is better that) some other woman would feed the child."

According to this verse if a divorcee woman wants to feed her child then her right is superior to any other woman. Not only this, her husband would also give a stipend for it. The verse also considers a case when the clash between the husband and wife is too severe that both have determined to make one another's life miserable then in order to save the child from such a situation, he/she could be fed by any other

² Al-Quran, Surah Al-Baqarah, 233

³ Al-Quran, Surah Luqman, 14

⁴ Al-Quran, Surah Al-Talaq, 6

woman. This order has been given so that a woman would not be able to demand her ex-husband excessively just for feeding the child. Or it might be because if the wife might possess some bodily or moral weakness and the husband does not want her (ex-wife) to feed the child. For the milk of the mother affects the physical, spiritual, psychological and moral condition of the child.

For the right of custody, the superiority of mother over father is proven by the above verses of the Quran. However our jurists have argued about the mother's right through some Ahadith also. For example, Hazrat Abdullah b. Umer quoted a hadith.⁵

Tr. "A woman said to Our Holy Prophet (p.b.u.h.) that this is my son. (There was a time when) my womb was his abode, my breast was his water skin and my lap was his cradle. But now his father has divorced me and wants to take him from me. Then Our Holy Prophet (p.b.u.h.) said: 'you have a better right to keep the child, unless you marry (the second time)

Another tradition shows that Hazrat Umer Farooq divorced his wife Jamila bint. Sabit and wanted to keep his son Asim. Jamila refused to give him and the issue was presented before Hazrat Abu Bakr. He said: "(O'Umer!) The lap of this woman is much better than you."⁶

In another tradition we find these additional words to the above mentioned tradition.⁷

Tr. "Hence Hazrat Abu Bakr gave his decision in favor of the boy's mother. Then he said that he had heard the Holy Prophet (p.b.u.h.) saying that do not separate a mother from her child."

Giving the reason for this decision Imam Marghinani (author of Hidayah) wrote:⁸

Tr. "And since the mother is extremely kind to her child and has a superiority over the man in growing him up, Hazrat Abu Bakr pointed to this quality when he said that: O'Umer the mother's saliva would be sweeter than even your pure honey."

When Hazrat Abu Bakr gave these remarks in his decision, a good many Companions of the Holy Prophet were present there and none of them disputed that. Hence in child custody cases, ordinarily, mother would be preferred.

According to Kitab-ul-Hidayah, the right of child custody in Hanafi Fiq has been determined according to the following argument:⁹

Tr. "For child custody, the right of mother and maternal grandmother is superior to all until (the child) would be able to eat, drink, wear clothes and clean himself. The reason for this is that when he is independent (of his mother and maternal grandmother in these matters) then now he requires learning the mannerism and

⁵ Al-Sunan Abu Daud, Kitab-al-Nikah, ch.163, min ahq bilwald, rqm-al-hadith 506

⁶ Ibn Abi sheba, Abdul Razzaq, Mawatta, Behaqihi, ref. Al-Subh-al-Noori Urdu Sharha Mukhtasar Al-Quduri, vol.2, pg.181, Molana Mohammad Hanif Gunguhi, Kutub Khana Majeediah, Multan.

⁷ Al-Sunan Al-Kubra, Imam Behaqihi, vol.8, pub.Duccan, ref. Majmuah Qawaneen-e-Islam vol.3, Dr. Tanzil-ul-Rehman, Institute of Tehqiqat-e-Islami, Islamabad.

⁸ Al-Hidayah al-Darayah, vol.2, Kitab-al-Talaq, ch.Hazanat-al-walad-o-min ahqa bihi, pg.434, pub.: Quran mahal opp.molvi musafir khana, Karachi. Year of publication not mentioned.

⁹ Ibid; p.435

morals of a man. And the father is more capable (than the mother) to teach him these manners and make him smart enough.”

The age when a child becomes independent, in the above mentioned sense of the word and when he needs his father more than his mother, varies in varied cases and therefore it could be determined according to that.

However,¹⁰ i.e. Hazrat Abu Bakr Khasaf has assumed this age of independence of the child as seven years and according to him this is so in most of the cases.

But the right of custody for a girl child is determined according to the following argument:¹¹

Tr. “In bringing up a girl child, the right of mother and maternal grandmother is superior (to others) until she reaches the age of puberty (i.e. menstruation). For she needs the mother and maternal grandmother to learn the mannerism and morals of a woman (till the age of puberty). And a woman is more capable to teach these matters. However, after being mature she needs security of her honor more than anything else and the father is more capable to guard her honor and to guide her in this respect.”

Now it is obvious that in case of a girl child any particular age of puberty could not be determined and fixed. It should be determined differently in different cases. All the girls have not the same age of puberty.

According to Al-Mukhtasar al-Quduri, the description of the eligible holders of the right of custody is simply this:¹² Mother has the first preference. In the absence of mother, the maternal grandmother, then the paternal grandmother, then the sister (real), then the sister from the mother’s side, then the sister from the father’s side, then the aunt (mother’s sister), then the father’s sister (maternal and paternal aunts are in the same order of preference as the sisters). Among these women, if someone gets married then her right would become void. However, there is some exception in this regard, that is, if the mother has married the brother of her husband, elder or younger, then her right of custody remains but if she marries some stranger then her right becomes void. However, Hazrat Hasan Busri¹³ does not put these conditions. He accepts the right of mother even if she marries a stranger.

We find a precedent which supports the point of view of Hazrat Hasan Basri in a court decision in Pakistan in which Justice Mohammad Shafi wrote: “If the mother of a minor child marries a person who is a stranger (*Na mehram*) to the minor then this act (of her marriage) would not be a hindrance to her right of custody. The child’s welfare is above all considerations.”¹⁴

¹⁰ Ibid.

¹¹ Ibid.

¹² Mukhtasar-al-Quduri, Kitab-al-Nafaqat, pg.191, pub. Maktaba-e-Kher-e-Kasir, Aram Bagh, Karachi. Year of publication not mentioned.

¹³ Al-Mughni, Ibn Qadamah Hanbali, vol.8, pg.194, Dar-ul-Fikr, Liltaba’at wa-al-Nashr-wa-al-Touzih, Beirut, 1984.

¹⁴ P.L.D.,1960, Lahore, pg.1142, a similar decision was written by Justice Waheed-ul-Din Ahmed also: P.L.D., 1965, Karachi, pg.65 (Ref.: Majmua-e-Qawaneen-e-Islami, vol.3)

Allama Ibn-e-Abiden Shami holds that during the menstruation period if a woman is separated from her second husband in her food and drink even, and the child (from the previous husband) does not live with her then she will have the right of custody (for that duration). Since the second husband has nothing to do with the matters of the woman and the child.¹⁵ Similarly if the maternal grandmother marries the paternal grandfather of the child then her right of custody also remains there.¹⁶ After these important women in a child's life, the right of bringing him up would be given to the blood relatives in the following order:

First of all the father, then the paternal grandfather, then the great grandfather, then the real brother, then the brother from the father's side, then the children of the real brother, then the children of the brother from the father's side, then the real paternal uncle and then the sons of the paternal uncle.¹⁷

In the issue of child custody, our jurists have based the preference of right upon the child's welfare. This is a principle which in my view is derived from the Quran. The Quran says:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُبْرِئَ الرِّضَاعَةَ ۖ وَ عَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَ كِسْوَتُهُنَّ بِالْمَعْرُوفِ ۚ لَا تُكَلِّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارُّ وَالِدَةُ بَوْلِدِهَا وَ لَا مَوْلُودٌ لَهُ بِوَالِدِهِ ۚ * وَ عَلَى الْوَارِثِ مِثْلُ ذَلِكَ ۚ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مَبْهُمَا وَ تَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۚ وَ إِنْ أَرَدْتُمْ أَنْ تُسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا أَنْبَيْتُمْ بِالْمَعْرُوفِ ۚ وَ اتَّقُوا اللَّهَ وَ اعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ (٢٣٣)¹⁸

Tr. "No mother should be harmed through her child and no father should be harmed through his child."

Since this verse states both for man and the woman that they should not make the child a means of torturing each other, it shows that the child himself should be kept safe from any harm. As it forbids the parents to torture each other in relation to the child therefore the welfare of the child is implied from this statement. According to the linguistic rules of Arabic language the statement can also be translated like this: Not the mother should inflict any harm to her child and not the father should inflict any harm to his child.

In fact, in determining the right of custody, the concept of the welfare of the child is the most decisive factor, ignoring which, the real requirements of justice could not be fulfilled. This view derived from the Quran is also supported by various Ahadith. For example, a hadith gives the right of custody to the father rather than the mother. Obviously this decision was made according to the circumstances:¹⁹

Tr. "Hamid b. Jaffer quotes his father that his fore father Hazrat Rafey b. Sanan converted to be a Muslim while his wife refused to be a Muslim. She came to the Holy Prophet (p.b.u.h.) and said that this is my daughter and she is in her weaning or about to be weaned. Hazrat Rafey said that this was his daughter. Our Holy Prophet (p.b.u.h.) asked him to sit in one corner while the woman in another corner

¹⁵ Rad-ul-Mukhtar, Allama Ibn. Abideen Shami, vol.2, pg. 194; pub.Toghi Road, Quetta.

¹⁶ Mukhtasar-al-Quduri, Kitab-al-Nafaqat, p.191

¹⁷ Al-Subh-al-Noori, Urdu Sharha Mukhtasar-al-Quduri, Molana Muhammad Hanif Gunguhi, vol.2, pg.183, Kutub Khana Majidiah, Multan. Year of publication not mentioned.

¹⁸ Al-Quran, Surah Al-Baqarah, 233

¹⁹ Sunan Abu Daud, Kitab-al-Nikah, ch. 154, Aza Aslam Ahad-ul-Abwain liman yakun-al-walad, hadith 4

and let the daughter sit in the middle of the two. Then asked both the parents to call her, hence the girl was about to move towards her mother. Our Holy Prophet (p.b.u.h.) prayed that O' Allah! Please guide this girl. (Hence with the effect of this prayer) the girl moved towards her father and the father took her."

In the above decision, the right of keeping the girl was given to the father rather than the mother because of Islam. For in that situation the welfare of the child lied in this.

Similarly, in another hadith the freedom was given to the child to choose his mother or father and not only that, this choice was supposed to be the preferred one and very near to the right decision. The hadith states:²⁰

Tr. "Hazrat Hilal b. Usama referred to Hazrat Maimoona said that once they were sitting with Hazrat Abu Huraira when Hazrat Aub Huraira described that once a woman came to Our Holy Prophet (p.b.u.h.) and said that : 'May my mother and father be sacrificed upon you. My husband wants to take away my child from me while that child benefits me and fetches water from the well o Abi Ainia for me.' Meanwhile the husband of the woman also came and asked who is quareling over my child. Upon this Our Holy Prophet (p.b.u.h.) asked the child: 'O'boy! This is your father and this is your mother. Take the hand of whoever you want.' The boy took his mother's hand and the woman went with the boy.

It should be noted that according to Imam Shafa'I and Imam Ahmad b. Hambal the right of custody of both boy and girl goes to the mother till the age of seven and after that it should be left to the children to decide whoever they want to live with.²¹

If the above mentioned Hadith is given as the reason of these two fiqha's (i.e. Shafa'i and Hanbali) then scholars argues that the hadith shows the right of decision for a boy only and not a girl. Therefore, in case of a girl, Hanafi fiq seems to be more appropriate. Moreover, the case of the custody of a minor girl also seems fit in that scheme. Hence the decision should be taken according to that in ordinary cases, except some extra ordinary circumstances.

In case of the right of custody this Divine Law should also be kept in mind that whether the child is with her mother or any other woman, his financial requirements however be an obligation to his father. That is, if the child is in the custody of his mother practically, the actual custody goes to the father. Hence the Quran says"

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُنَمِّ الرِّضَاعَةَ ۗ وَ عَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَ كِسْوَتُهُنَّ بِالْمَعْرُوفِ ۗ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارُّ وَالِدَةٌ بَوْلِدًا ۚ وَلَا مَوْلُودٌ لَهُ ۚ بِوَالِدِهِ ۗ * وَ عَلَى الْوَارِثِ مِثْلُ ذَلِكَ ۚ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَ تَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۗ وَ إِنْ أَرَدْتُمْ أَنْ تُنْتَرِضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا أَنْبَيْتُمْ بِالْمَعْرُوفِ ۗ وَ اتَّقُوا اللَّهَ وَ اعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ (Surah ٢٣٣)
Al-Baqarah/233)

Tr. "And the food and clothing of the woman is obligatory to the father of the child according to the custom."

²⁰ Sunan Nisai, vol.2, ch.Islam Ahad -al- Zaujain-wa-Takhyeer-al-walad, Raqam-ul-hadith 3528

²¹ Al-Mughni, Ibn. Qadamah Hanbali, vol.8, pg.191-193, Dar-ul-Fikr, Beirut.

This verse shows that in relation to the child, his/her mother's food, clothing, medical treatments, bedding etc. hence every responsibility has been given to the father. When just in relation to the child so much care has been shown for the mother then we could imagine how much care would be given to the child himself in Islam. Similarly, after giving divorce, the husbands have been kept responsible for the food and lodging and other necessary expenses of their pregnant wives until they give birth to the child. More so, it has been ordered not to inflict any harm to them during this period. Not only that, but the women should be given the stipend also for feeding their children. It shows (Surah al-Talaq/1) that although the mother does all the care of bringing up a child practically, but the financial responsibilities in any way go to the father.

In our time, we see that after divorce or separation if the mother gets the right of custody then the father immediately stops the financial support or actual care of the child out of revenge and left the mother (mostly) to live in a poor condition. For this negligence of the man it is necessary to make such powerful laws in effect of which the mother could fulfill her responsibilities, regarding the right of custody, satisfactorily and could prevent herself and her child from the cruelty of the man.

Conclusion

In our view the welfare of the child means that in any decision about the right of his custody, his benefits and future should be kept in mind. May this welfare be implied in giving him to the mother's custody or to the father's or to give a freedom to the child to decide himself. For we find the precedence of all the three decisions in Ahadith. But it should be kept in mind that this right should be decided after determining the age of the child which is mostly considered as seven, for a boy, and after the age of puberty for a girl.