



THE IMPACT OF RELIGION DIFFERENCE BETWEEN THE CUSTODIAL MOTHER AND HER CHILD A STUDY ON THE UAE PRIVATE STATUS LAW

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Abstract

This research sheds light on one of the most important topics, which is the religious difference between the custodial mother and her child, whether male or female, and its impact on the establishment or revocation of custody. This is done through studying some provisions of the UAE Federal Law No. 28 of 2005 concerning Personal Status, as amended by Federal Decree-Law No. 29 of 2020. The topic holds great significance, especially after the significant openness witnessed by the UAE, the multicultural environment, and some men resorting to marrying non-Muslim women who maintain their own religion. This leads to the formation of a family consisting of a Muslim father, a non-Muslim mother, and Muslim children. In the event of divorce, the parents dispute the custody of the children, and the mother may have a stronger claim to custody, especially if the children are in their early childhood stages and she has not remarried. However, the religious difference between the mother and the children poses a threat to the religious upbringing of the child. Does custody continue despite the religious difference or does it fall?

Keywords: religion, custodial mother, child custody, law.

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1. INTRODUCTION

All praise is due to Allah, the Lord of all worlds. He has prescribed for us the upright religion of Islam, revealed to us His noble book, and guided us to the straight path. He completed His blessings upon us with the mission of the Seal of Prophets and the Leader of Messengers, Muhammad, peace be upon him, his family, his companions, and those who follow them until the Day of Judgment.

After praising Allah, I would like to emphasize the importance of the family in Islam. Islam places great emphasis on the well-being of the family and seeks to resolve any emerging problems within it. Married life can encounter conflicts and challenges that may make the continuation of the marital life difficult. In such cases, divorce may seem like the optimal solution. However, marriage can also result in children who require care, nurturing, and discipline to ensure their proper upbringing and well-being. Out of His mercy towards children, Allah, the Exalted, entrusted custody primarily to women because they are generally more compassionate and empathetic than men. They are better suited for caregiving, patience, and nurturing. Once the children reach an age where they no longer require the assistance of women, custody may be transferred to men to assume the responsibility of discipline and supervision. Imam as-Sarakhsi affirmed this by saying, "Know that due to the helplessness of children in taking care of themselves and meeting their needs, the Shari'ah granted authority in this matter to those who show compassion towards them. The right of decision-making was given to the fathers based on their sound judgment combined with compassion. Decision-making requires strength of opinion. The right of custody was granted to the mothers due to their tenderness towards children, their compassion, and their ability to handle such responsibilities by staying at home. It appears that the mother is more affectionate and compassionate towards the child than the father, and she bears more hardships in fulfilling these duties than the father. Entrusting custody to her provides additional benefits for the child." [1]

The fiqh text refers to several educational issues, the most important of which are: The circle of responsibility that falls on the parents towards their children, manifested in good upbringing and managing their affairs. This stems from compassion and love.

The mother's role in this is attributed to several reasons:

- 1- Her abundant compassion and patience in caring for and raising children.
- 2- Her natural inclination towards child custody and care, and her ability to provide the affection and tenderness they need.[2]

This arises from the psychological and social nature of women, characterized by nurturing and compassion, especially towards their children. Additionally, their ability to spend most of their time caring for the children and managing their affairs.

Al-Kasani clarified that custody is initially granted to women at a certain time, and then transferred to men at another time. The default is that custody belongs to women because they are more compassionate, tender, and suitable for the upbringing of young children. Then it is transferred to men because they are responsible for protection, maintenance, and ensuring the interests of the children.[3]

By considering the rights and duties of both mothers and fathers towards their children, a balance is achieved between compassion, tenderness, concern, protection, and defense. This contributes to the psychological and social well-being of the child, ensuring emotional stability and fulfilling their needs. It is important for children, especially females, to acquire qualities of compassion, mercy, protection, and responsibility from their mothers, and qualities of fathers if they are males. This helps them learn values such as kindness, compassion, maintenance, and responsibility.[4]

On the other hand, several fiqh texts have emphasized the right of the mother to custody of the child in the event of separation from the father. One of the texts states: "Indeed, she is more deserving because the entire Ummah (community) has agreed that the mother has more right to the child as long as she does not marry another husband... And because when children are unable to look after their own interests, the Shari'ah has entrusted their guardianship to others. The authority to make decisions regarding their person and property has been given to the fathers, as they are stronger in their views, with complete compassion. The obligation of financial support has been placed on them because they are more capable of fulfilling it. The custody has been entrusted to the mothers because

they are more compassionate, tender, more capable, and more patient in bearing the hardships associated with children throughout the entire period. They also dedicate themselves to their service. Thus, entrusting custody to them and other matters related to the children provides additional benefits for the child.[5]

This text is beneficial from an educational perspective as it emphasizes that childhood is not a stage of accountability. Based on their minor guardianship over themselves and their authority to handle their finances and interests, it is a stage of preparation and training to reach the stage of accountability at puberty.[6]

Affirming the Mother's Right

Further affirming the mother's right to custody is the Hadith of Amr ibn Shu'aib, narrated from his father, from his grandfather, that a woman came to the Messenger of Allah (peace be upon him) and said, "Indeed, my womb was a vessel for him, my lap was his cradle, my breast was his nourishment, and now this man intends to take him away from me." The Prophet (peace be upon him) responded, "You are more entitled to him as long as you do not remarry." [7] [8]

If we contemplate this topic, we will find that it points to many benefits, including:

1. The mother has the right to custody of the child over the father, as long as the child is in the custody stage and she is not married.
2. If the mother gets married and her second husband enters the picture, her custody rights are forfeited because she becomes preoccupied with her husband's companionship, and he has more right than anyone else to dedicate himself to the child.
3. This detail from the wise law considers the rights of the child and the rights of the new husband. Before marriage, the mother is fully dedicated to the child and taking care of their affairs, and her obligation to the child remains. However, after marriage, she will neglect one of the two rights: either her husband's right or the care of the child, who needs constant attention.
4. Prioritizing the mother over the father in custody, as long as she is fully dedicated, is of utmost wisdom and benefit. This is because the mother's knowledge, experience, and patience with children cannot be matched by anyone else, even the child's relatives, who are the first of them the father.

5. It is a manifestation of Allah's kindness towards His creation that He shows concern for the vulnerable among them, those who have no support or power. He instructs and cares for them, providing them with the care they lack due to their own weakness.

6. The reasons mentioned by the complaining woman to justify her preference in custody make her eligible to have more right to custody of the child than the father. Her womb was the child's abode when they was a fetus, her breast became his nourishment after birth, and her lap is the soft place that shelters him. The Prophet (peace be upon him) acknowledged the woman's description of herself and recognized her eligibility for custody based on her circumstances.[9]

As for the guardianship over the child and the guardianship over their property, if they have any, Allah has designated it to the father. Due to his maturity, experience, and practical life skills, the father is deemed more suitable for this guardianship than the mother. Along with the responsibility of guardianship, the father is also obligated to provide for the child, taking into consideration what is in the child's best interest.

The UAE Private Status Law has given special attention to the topic of custody, starting with its definition, the conditions for the custodian, who can prove their right to custody, traveling with the child, termination of custody, and other detailed provisions that safeguard the well-being of the child and ensure a dignified life for them.

Article 142 of the UAE Private Status Law defines custody as: "The preservation and upbringing of the child, in a manner that does not contradict the guardian's right to guardianship over the person." [10] Furthermore, the law emphasizes prioritizing the mother over the father in custody. Article 146 states: "The right of custody of the child is established for the mother and then for the female mahrams."

2. General Law And Discussion

The law also establishes general conditions for the custodian. Article 143 stipulates that the custodian must possess the following: 1-Sanity 2-Legal maturity 3-Trustworthiness 4-Ability to raise, maintain, and care for the child 5-Freedom from serious infectious diseases. The problem of the research at hand lies in

the impact of the difference in religion between the mother and her child on the issue of custody. Specifically, whether the mother's or custodian's custody of the child continues despite the difference in religion, or if the difference in religion nullifies the custody.

The UAE Private Status Law did not overlook addressing this important issue. Article 144 states: "Additional conditions are required for the custodian, in addition to the conditions mentioned in the previous article:

1. If the woman is the custodian:

- a. She should not be married to a foreigner husband co-habited with her who is not related to the child, unless the court deems it otherwise in the best interest of the child.
- b. She should have the same religion as the child, while considering the provisions of Article 145 of this law."

Article 145 emphasizes the requirement of religious compatibility between the custodian and the child, even if the custodian is the mother of the child. It states: "If the custodian is the mother and she follows a different religion than that of the child, her custody is forfeited unless the judge deems it otherwise in the best interest of the child, provided that the duration of her custody does not exceed the completion of five years, whether the child is male or female."

Based on the previous legal article, we can conclude that the default is that the difference in religion between the custodial mother and the child is a reason for the termination of custody for the mother. Custody is granted to the party with a superior religion, except in cases where it is deemed in the best interest of the child to remain with the mother who provides intense care and where there is no suitable alternative caregiver. For example, if the child would be adversely affected by being separated from the mother, such as experiencing psychological or health issues due to dependency on breastfeeding or rejection of other nursing methods or formula. In such cases, the UAE legislator allows the custody to remain with the non-Muslim mother, provided that the child is not more than five years old.

The reason behind this is that after reaching the age of five, children begin to ask religious questions about the divine self, prophets, heaven, hell, and other

matters. They imitate the prayer practices they observe from their parents. If the mother is non-Muslim, she can instill love for her religion in the child by taking them to churches. However, she may have conflicting ideas about religion that could influence the child at this age. She may even feed the child pork or give them alcohol, which could lead the child to consider them permissible as they grow older due to their observations of their mother's consumption.

This is what Ibn Qayyim mentioned when he said: "Among the child's essential needs is the utmost care in the matters of his upbringing. He grows up based on what his caretaker accustomed him to in his early years, such as impatience, anger, restlessness, hastiness, light-heartedness, whims, recklessness, solitude, and greed. These traits and behaviors become deeply rooted in him, and if he is fully protected from them, they will eventually manifest. That is why you find most people deviating in their character, due to the upbringing they were exposed to." [11]

Upon contemplating the provisions regarding custody in the UAE Private Status Law, one can observe that the best interest of the child takes precedence over any other consideration. In the case of a difference in religion between the custodial mother and the child, the UAE legislator allows, for the benefit of the child, the custody to remain with the non-Muslim mother due to the child's need for compassion and affection. The legislator also considered the child's religious interest when terminating custody for the non-Muslim mother after the completion of the five years. The UAE legislator also took into account the concept of interest in other matters, such as the duration of custody when there is a benefit for the child. Article 156 states:

1. The custody of females ends when the male child reaches the age of eleven and the female child reaches the age of thirteen unless the court extends this age for the benefit of the child until the male reaches adulthood or the female gets married.
2. The custody of females continues if the ward is mentally impaired or severely ill, unless the benefit of the child requires otherwise.

The termination of custody for the non-Muslim mother was not an unanimously agreed-upon matter among Islamic jurists. They were divided between those who affirmed her custody and those who terminated it. The Shafei [12] and Hanbali [13] jurists stipulated the

requirement of religious conformity between the custodian and the child because the difference in religion constitutes an obstacle to custody. On the other hand, the Hanafi [14] and Maliki [15] schools did not require religious conformity between the custodian and the child, as custody is based on compassion, which is found in every mother.

The main disagreement revolves around whether the right to custody belongs to the mother or to the child.

Those who argue that custody is a right of the mother believe that a non-Muslim mother has the right to custody of her Muslim child because compassion, mercy, affection, and care are inherent qualities found in all mothers. On the other hand, those who argue that custody is a right of the child believe that a non-Muslim mother does not have the right to custody of her Muslim child because it may lead to confusion or harm to the child's religious upbringing.[16] The UAE Private Status Law adheres to the viewpoint that custody is a right of the child, resulting in the termination of custody for the non-Muslim mother. This viewpoint is based on their interpretation of religious evidence, including:

1. The verse from the Quran: "And never will Allah grant to the disbelievers a way [to triumph] over the believers." [17] This verse indicates that Allah has severed guardianship ties between Muslims and non-Muslims, and custody is one of the strongest forms of guardianship.
2. The narration from Abd al-Hamid ibn Salama al-Ansari, From his father, from his grandfather who said that he embraced Islam while his wife refused to do so. They had a young child who had not yet reached the age of discernment. The Prophet Muhammad (peace be upon him) placed the father on one side and the mother on the other side, then asked the child to choose between them. So he (the Prophet) said: 'O Allah, guide him. so he went to his father. [18] The child chose his father upon the Prophet's supplication. This incident implies that being with a non-Muslim may contradict Allah's guidance.
3. The purpose of custody is to raise the child and protect them from harm, and the greatest form of upbringing is to preserve their religion. The most crucial form of protection is to keep them away from disbelief. If the child is under the custody of a non-Muslim, they may be tempted away from their religion by being taught disbelief or raised upon it. This would

result in significant harm, as custody is granted to protect the child and should not be established in a manner that leads to their destruction, including the destruction of their religion.[19]

And among what confirms the termination of custody for the non-Muslim mother that the Hanafi and Maliki schools, which do not require religious conformity between the custodian and the ward, did not universally allow the child to remain with the non-Muslim mother. They differed regarding the duration of the child's stay with the non-Muslim mother. The Hanafi school stated that the child remains with the mother until they reach the age of understanding (around seven years old), or until it becomes evident that their stay poses a danger to their religion by being exposed to the mother's religious practices, taking them to her places of worship, encouraging them to consume alcohol or eat pork.[20]

The Maliki school of thought states that the child remains with the custodian until the legally prescribed period of custody ends. However, the custodian is prohibited from feeding the child with alcohol and pork. If there is a fear that the custodian may engage in prohibited acts, the right of supervision can be given to a Muslim to protect the child from corruption.[21].

3. Conclusion

After reviewing the four schools of Islamic jurisprudence regarding the impact of religious difference between the custodian and the child, and considering the approach taken by UAE legislation, it can be concluded - and Allah knows best - that the UAE legislator has given priority to the best interest of the child over the custodian. However, a combination of the opinions of jurists suggests that custody should not be terminated for the non-Muslim mother due to her natural compassion towards the child, which is a shared attribute with the Muslim custodian. However, the custodian must have the authority to supervise the child to protect them from corruption. If it is evident that the custodian is engaging in corrupt practices that harm the child, then their custody may be terminated.

4. References

1. Muhammad ibn Ahmad as-Sarakhsi, "Al-Mabsut," Dar al-Sa'adah Press, Egypt, 5/207.

2. Mustafa al-Khinn, Mustafa al-Bagha, and Ali ash-Sharabaji, "Al-Fiqh al-Manhaji 'ala Madhab al-Imam ash-Shafi'i," 4th edition, Dar al-Qalam, Damascus, 1992, 4/192.
3. Abu Bakr ibn Mas'ud al-Kasani, "Bada'i as-Sana'i fi Tartib ash-Shara'i," vol. 1, Dar al-Kutub al-Ilmiyyah, Beirut, 4/41.
4. Raida Naseerat, Walid Masa'adeh, and Youssef Ash-Sharifin, "Al-Madamin al-Tarbawiyah li-Ahkam al-Hadana fi al-Fiqh al-Islami wa Qanun al-Ahwal al-Shakhsiyyah al-Urduni No. (36) of 2010," p. 550.
5. 'Uthman ibn 'Ali az-Zayla'i, "Tabiin al-Haqa'iq Sharh Kanz ad-Daqaiq," vol. 1, Al-Matba'ah al-Kubra, Cairo, 3/46.
6. "Al-Tarbiyah al-Islamiyyah lil-Awlad Manhajan wa Hadafan wa Uslooban." 2nd edition, Dar al-Ma'arifah, Beirut, 2004, p. 70.
7. Suleiman as-Sajistani, "Sunan Abi Dawood," Tahqiq/ Shuayb al-Arnawut and Muhammad Kamal, 1st edition, Dar ar-Risalah al-'Alamiyyah, 2009, 3/588.
8. Ahmad ibn Hanbal, "Musnad Imam Ahmad ibn Hanbal," Tahqiq /Shuayb al-Arnawut and Adel Murshid, 1st edition, Maktabat ar-Risalah, 2001, 11/311.
9. Abdullah al-Bassam, "Tawdih al-Ahkam min Bulugh al-Maram," 5th edition, Maktabah al-Asadi, Makkah, 2003, 6/60.
10. Federal Law Decree No. (29) of 2020 on Personal Status in the United Arab Emirates, 6th edition, 2023, Dubai Judicial Institute Publication, p. 55.
11. Ibn Qayyim al-Jawziyyah, "Tuhfat al-Mawdud bi Ahkam al-Mawlid," edited by Abdul Qadir al-Arnawut, 1st edition, Maktabat Dar al-Bayan, Damascus, p. 240.
12. Ali al-Mawardi, "Al-Hawi al-Kabir," 1st edition, Dar al-Kutub al-Ilmiyyah, Beirut, 1999, 11/503.
13. Ibrahim ibn Muflih, "Al-Mubdi' fi Sharh al-Muqni'," 1st edition, Dar al-Kutub al-Ilmiyyah, Beirut, 1997, 7/185.
14. Abu Bakr ar-Razi al-Jassas, "Sharh Mukhtasar at-Tahawi," 1st edition, Dar al-Basha'ir al-Islamiyyah, 2010, 5/326.
15. Ali ibn Muhammad al-Lakhmi, "At-Tabsirah," edited by Ahmed Abdul Karim, Ministry of Awqaf and Islamic Affairs, Qatar, 1st edition, 2011, 6/2570.
16. Ali Al-Rajraji, Manahij al-Tahseel wa Nata'ij Lata'if al-Ta'weel fi Sharh al-Madawanah wa Hall Mushkilatiha, 1st edition, Dar Ibn Hazm, 2007, 4/153.
17. Ahmad ibn Shuayb al-Nasa'i, Sunan al-Nasa'i, 1st edition, Al-Maktabah al-Tijariyyah al-Kubra, Cairo, 1930, 6/185.
18. M. Hamed M. Said, Rabie I. M. H., Shaaban A. Hameed Refae M., Shehata H. M. El Sheikh, Sabah Ayeshe Aljohani, Youssef A. Baker El-Ebiary. "A Contemporary Technical Vision of the Characteristics of Islamic Systems". JCR. 2020; 7(16): 1133-1140. doi:10.31838/jcr.07.16.144.
19. Abdullah Al-Bassam, Tawdeeh al-Ahkam min Bulugh al-Maram, 6/64.
20. Badr al-Deen al-Ayni, Al-Binayah Sharh al-Hidayah, Tahqiq Aymen Saleh Shaban, 1st edition, Dar al-Kutub al-Ilmiyyah, Beirut, 2000, 5/651.
21. Muhammad ibn Ahmad Alish, Minah al-Jaleel Sharh Mukhtasar Khalil, 1st edition, Dar al-Fikr, Beirut, 4/427.