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RAHAT-UL-QULOOB

Bi-Annual, Trilingual (Arabic, English, Urdu) ISSN: (P) 2025-5021. (E) 2521-2869
Project of RAHATULQULOOB RESEARCH ACADEMY,
Jamiat road, Khiljiabad, near Pak-Turk School, link Spini road, Quetta, Pakistan.

Website: www.rahatulquloob.com

Approved by Higher Education Commission Pakistan

Indexing: » Australian Islamic Library, IRI (AIOU), Tahqeeqat, Asian Research Index, Crossref, Euro pub, MIAR, ISI, SIS.

TOPIC:

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in light of Islamic Law**

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How to Cite: Saeeda Mirbaz, Dr. Muhammad Sohail, & Dr. Saqib Jawad. (2022). ENGLISH: Custody of Children: An Analysis of the Guardian and Wards Act in light of Islamic Law. *Rahat-Ul-Quloob*, 6(2), 19-30. <https://doi.org/10.51411/rahat.6.2.2022/436>

URL: <http://rahatulquloob.com/index.php/rahat/article/view/436>
Vol. 6, No.2 || July–December 2022 ||English - Page. 19-30
Published online: 24-08-2022

QR. Code



Custody of Children: An Analysis of the Guardian and Wards Act in light of Islamic Law

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Abstract:

Law on the custody of children, though the most important aspect of family law, appears to be neglected the most. The principles have been derived from the Guardian and Wards Act, 1890, but said Act primarily deals with the Guardianship and not the custody of children and both are independent and distinct subjects. The detailed principles on the law of custody of children have not been given in this Act either, which has resulted into conflicting views of the courts on the custody of children in Pakistan. The custody children is also the matter of Muslim personal law, but the Courts even acknowledging the said fact, have neither consulted original sources of Islamic law nor applied the same in the matters pertaining to the custody of children, which further leads to inconsistent application and deviation from the principles of Islamic law in these matters. Therefore, it is imperative to amend, rather restructure the law pertaining to the custody of children absolutely in accordance with original sources of Islamic law.

Key words: Custody, guardianship, Islamic law, courts, welfare.

Introduction:

Generally, the concepts of custody and guardianship of children are intermingled and applied interchangeably, but actually both are independent and distinct aspects having separate rules and principles. In dictionary meaning, custody has been defined as “the care, control, and maintenance of a child, which a court may award to one of the parents following a divorce or separation proceeding.”¹ On the other hand “guardianship means the power to effect legal transactions and contracts with responsibility for the legal consequences”.² In other words, “guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor”.³ Courts have also interpreted these concepts. For instance, in *Nosheeba Nazeer v Sajjad Ahmad*, honourable Lahore High Court defined that in Arabic language, guardianship was termed ‘*wilayat*’ and custody was termed as ‘*hidhanat*’. Custody meant physical or material possession of children, and its Arabic equivalent ‘*hidhanat*’ literally meant training or upbringing.⁴ Honourable Islamabad High Court has also distinguished between custody and guardianship in *Shazia Akbar Ghalzai v Additional District Judge, Islamabad (East)* and held that:

“Custody” alludes to bringing up and nurturing a child and taking care of his/her personal and emotional needs on day-to-day basis. “Guardianship” refers to obligation of maintaining child and effecting legal transactions in his/her name and retaining constructive custody over his/her person or property for purposes of discharging obligations as guardian”.⁵

Based on above, there is twofold difference between guardianship and custody. Firstly, in custody, physical custody of the minor is important, meaning thereby that in case of having custody, the minor must live with the custodian. Whereas in case of guardianship, physical custody of the minor is not a matter of concern. Secondly, in case of custody, mother has been given preferential right during tender age both under Islamic law and domestic law of Pakistan. Whereas, in case of guardianship, father being the natural guardian, has been given preferential right.⁶ On the basis of this difference, both concepts have different principles and parameters to be applied while deciding the matter. In Pakistan, both custody and guardianship are regulated under the Guardian and Wards Act, 1890 and it appears that sometimes both these concepts are used and applied interchangeably, which is not correct.

According to the general law of custody, as applicable in Pakistan and interpreted by the courts, paramount consideration is given to the welfare of the child while awarding his/her custody to any of the custodians.⁷ However, as a general rule, during tender age of the minor, welfare of the minor is interpreted in favour of mother and accordingly mother has been given preferential right. In this regard, honourable Peshawar High Court held in *Basri Hayat v Tauqir Hayat* that:

The lap of mother was a heavenly place and she had an inherent right to keep her children close to her bosom. Mother was a symbol of sacrifice for her children and there was no substitute of her love and affection, who showered her love and affection upon her children from cradle to grave.⁸

For this reason, different principles are applied in guardianship and custody matters. Highlighting the same, it was held in *Nosheeba Nazeer* case that “two types of guardianship existed in Islamic law, in one father prevailed over the mother in matters of money and marriage while in the other, mother prevailed over father in matters of nourishment and upbringing of minor children”.⁹ In *Shazia Akbar Ghalzai*, it was further held that “father is natural guardian even when mother is bestowed with child’s custody. “Custody” of minor is not precondition or requirement for being guardian of his/her person or property”.¹⁰

In Islamic family law, the term ‘*hidhana*’ is used for the custody and ‘*wikala*’ for guardianship. The term ‘*hidhana*’ has been derived from the Arabic word ‘*hadhana*’ which literally means “the distance between the armpits to the loins”, “the chest and the two arms and what includes in between” and can be said to mean “embrace”. Accordingly, the term can be defined in its contextual meaning as “to clasp the baby to one’s breast”, “to nurture the baby” and “to embrace the baby”. In other words, ‘*hidhana*’ means ‘nursing a baby’. Islamic law uses the term in its legal and not literal meaning, thus, when used, it would be meant ‘nursing a child’ and cannot be used in any other meaning including ‘*wikala*’, which is a separate concept.¹¹

According to the general principles of Islamic, custody of a child belongs to the mother during tender age and thereafter reverts back to the father, if both are alive. Tender age has been defined differently by the jurists in case of male as well as female and

the same shall be discussed later. However, the dispute arises if either of the parents dies. If the mother dies during tender age of the minor, custody will be given to the father. Jurists are of the view that since the father is primarily responsible for the maintenance and custody, if mother dies, nobody else can be given preference than the father of the child and handing over the custody to maternal grandmother, as Ibn-e-Barraaj asserted, would not be correct. On the other hand, if father dies, there is no known difference of opinion that the custody shall be reverted back to the father on the basis of the verse “the blood relatives are more entitled to inherit from one another in the Book of Allah”, and the verse “neither the mother shall be made to suffer harm on her child's account, nor the father on account of his child”, the consensus (*Ijama*) of jurists, tradition of Dawud b. Husayn, tradition of Ibne Sanan, the principle of continuance (*Istishab*), the emotional condition of mother and all the traditions concerning custody (*hidhanat*).¹² Apart from this, persons entitled to the custody of minor, religion of the parents, choice of minor and some other issues with regard to custody of child are also important and have been discussed in Islamic family law by the jurists and those shall also be discussed in details.

Right to Custody of Minor:

In Pakistan, the primary law dealing with the custody of children is the Guardian and Wards Act, 1890. As already discussed, there is a huge difference between the custody of children and their guardianship both under Islamic law and ordinary domestic law, therefore, we can say that there is no special law for the custody of children. However, the same is regulated under section 12 and 25 of the Guardian and Wards Act. For the custody of minors, petition can be filed under section 25 and till pendency of the same, interim custody can be claimed under section 12 of the same Act.¹³ Guardian Judges have been vested with the powers to be exercised under the Act, however, a Civil Judge, while exercising the powers of the guardian judge, could also hear the cases under the Act.¹⁴ Provisions of the Guardian and Wards Act are silent regarding the custody of minors being regulated on the basis of gender, age, religion and financial or social status of the parents and the only criterion given in section 7 of the said Act is that the Court can order the guardianship of the person or property of the minor if the welfare of the minor demands the same.¹⁵ Furthermore, the term ‘welfare of the minor’ has not been defined in the Act and the same has been interpreted by the honourable Superior Courts.

Interpretation by Superior Courts:

Honourable Superior Courts in Pakistan have also interpreted the preferential right of custody based on the welfare of the child. According to the case of ‘*Tahmina Ansari v Rafique Ahmed alais Gulzar Lakho*’ age as well as gender of the minor are the determining factors for the purpose of handing over the custody of the minor to either of the parents. However, if the circumstances demand any other factor in favour of welfare of the minor, then due weightage is required to be given to those factors that are in favour of welfare of the minor and not otherwise as the paramount consideration

for the purpose of awarding the custody of the minor is to be given to the welfare of the minor and not to any other factor.¹⁶ With regard to age of the minor for handing over the custody, it was held in the case of '*Gulzar Khan v Mst. Rahima*' that in case of a female child, mother is entitled to her custody even after her attaining puberty and until she gets married and in the case of a male child, father is entitled to claim his custody after the age of seven years. However, it has also been held in this case that the prime consideration is required to be given to the welfare of the minor and the Court is required to look into the age, gender, religion and welfare of the minor for the purpose of awarding his/her custody to either of the parents.¹⁷ Furthermore, in the case of '*Mst. Zainab v Urooj Ahmed*', male child was eight years old and his custody was shifted from his mother to father on the ground that after attaining the age of seven years, father had the preferential right to claim his custody coupled with the fact that the mother of the minor contracted second marriage with a person not related to the minor.¹⁸ With regard to the matter of handing over the custody of the minor to the mother married to a person not falling within prohibited degree, Pakistani Courts are deciding the matter of custody keeping in view the welfare of the minor. For instance, it was held in the case of '*Shabana Kausar v District Judge*' that when mother was married to a person not falling within prohibited degree and the father was also remarried, custody of the minor girl was handed over to the mother on the basis of bonding of minor with her mother and on the basis of social and financial status of the father and his remarriage having two daughters from the other marriage. It was also held in this case that the mother shall be entitled to the custody of the minor until she attains puberty and thereafter, her father can claim her custody.¹⁹ However, as a general principle, the approach adopted by Pakistani Courts is that in case of a male child, mother has the preferential right until the minor attains the age of seven years and in case of a female child until she attains puberty unless the mother remarries. The same principles were laid down in the case of '*Taimur Ali Tiwana v Mehr-U-Nisa Malik*'.²⁰ Pakistani Courts have also adopted the view that the religion of parents is immaterial for the purpose of awarding the custody of the minor. For instance, it was held in the case of '*Nasira v Judicial Magistrate*' that the religion of parents does not, *ipso facto*, deprive a parent from claiming the custody of the minor if welfare of the minor otherwise lies in awarding the custody in his/her favour. It was further held that religion of a person is a matter of heart and on the basis of the same, a person does not lose his/her right regarding the custody of the minor.²¹

By summarising the above-mentioned principles of Superior Courts of Pakistan while interpreting the law on the custody of children, it appears that as a general principle, the age of minor male child for the purpose of awarding his custody to the mother is seven years and thereafter the same shall revert back to the father. On the other hand, custody of female child shall remain with the mother till her puberty and thereafter shall revert to father. However, in exceptional cases, deviation can be made from these principles on the ground that welfare of the minor lies otherwise. Furthermore, remarriage

of either of the parents is a determining factor from deviation from the general principles, particularly if the marriage is performed by the parent with someone not related to a male child and not one falling within the prohibited degree of a female child. According to the view adopted by Pakistani Courts, religion of parents is immaterial for the purpose of awarding the custody of the minor as it is their personal belief and a matter of their heart which does not affect the welfare of the minor.

Islamic Law on the Custody of Children:

Custody in Islamic law denotes '*hidana*' and this word has been derived from '*hadana*' which literally means to embrace or hug. In the legal meaning under Islamic law, custody or '*hidana*' means raising or upbringing of a child. For the purpose of custody of children, generally women are considered more suitable for raising and upbringing of children as they are more affectionate, compassionate and close to their children unlike men who do not take more serious interest in upbringing of children. However, in case of dispute over the custody of the child, both women and men have been given right of custody of the child based on his/her age and other factors. In other words, the basic principle has been set that the benefit and interest of the child should be given the paramount consideration. This principle of Islamic law is also available in the law of the land and in Family Law of Pakistan, this principle has been introduced as welfare of the child.²²

The basic principles for the custody of child have been derived by the jurists from the verse of the Holy Quran dealing with the breastfeeding of the suckling baby that states:

“And mothers should breastfeed their children for two whole years, for those who want to breastfeed perfectly.”²³

Based on above, the jurists are agreed that for a period of first two years, the right of custody of the child belongs to the mother. However, in case of death or re-marriage of mother, the case may differ. Moreover, even when the mother is alive, parents are allowed to arrange breastfeeding of the child from a woman other than the mother of the child based on the following verse of the Holy Quran:

“Don't a mother suffer because of her child and neither should a father (suffer) because of his child. Heirs (obliged) like that too. If both of them want to wean with agreement and deliberation between the two, then there is no sin on both. And if you want to feed your child to others, then there is no sin for you to pay in an appropriate manner.”²⁴

According to Muslim jurists, after the first two years from the birth of the child, custody of child belongs to the mother until the age of seven years, whereafter, the same would revert to the father. However, in case of death of any of the parents, close relatives starting from the mother side shall be entitled to the custody of child and this principle is based on the following verse of the Holy Quran:

“Some people who have relatives are more entitled to each other (than non-relatives) according to the Book of God.”²⁵

Detailed principles on the custody of children under Islamic law have been prescribed in the Traditions of the Holy Prophet (ﷺ). These principles narrate that mother has a preferential right for custody of children under Islamic law in ordinary circumstances. Various jurists have prescribed the age of nine years for the said purpose. It has been reported that:

“A woman came to the Prophet (ﷺ) and said: O Messenger of Allah! I carried my son in my womb, suckled him my breast and hold him on my lap; yet his father has divorced me and wants to take him away from me”. The Prophet (ﷺ) replied: “You are more rightful of the child as long as you don’t marry”.²⁶

On the basis of this *hadith*, some scholars are of the opinion that even being a polytheist is not a bar nor disentitles anybody from claiming this preferential right, but a few others are of the opinion that being a Muslim is the first and foremost condition for claiming any such right.

Preferential Right in Custody:

Dispute over custody of children always occurs in case of dispute between the spouses. According to the consensus of Muslim jurists, if a separation occurs then mother has a preferential right of custody of the child. This superior right of mother is based on a hadith where a woman was reported saying:

"O Messenger of Allah, this child of mine, for him my belly is like a cradle, my lap like a tent, and my breast like a beaker, but now his father wants to separate him from me." The Prophet (God bless him and grant him peace) said, "You have a superior right to him, as long as you do not wed."²⁷

It is also said that mother has been given superior right of custody for the reason that she is more loving, caring and suitable for bringing up the child and nobody else could replace her in this regard. On the basis of the same, justice demands that custody of the child, at the first instance, should be given to mother. For the same reason, Abu Bakr Al Siddique (God be pleased with him) said:

“Her saltva has greater blessing in it than the nectar and honey you will give him, O Umar: He said this when a separation occurred between him and his wife making the statement when a large number of Companions (God be pleased with them) were present”.²⁸

Like the ordinary law, with regard to custody of the child, preference has been given to women over men and within the categories of women and men, preference is to be given to those who are closer to the child and are considered more affectionate, compassionate, merciful and desirous to protect the interest and benefit of the child. Within the main categories, following order has been introduced in women and men:

“Women: i) The mother unless she is unfit.

ii) Grandmothers: from the mother’s side first and then from fathers.

iii) Sisters: Full sister, half-sister from the mother's side and then half-sister from the fathers.

iv) Aunties: from the mother's side and then from the fathers.

v) Nieces: from the mother's side and then from the father's".²⁹

If there are no women among the above-mentioned categories, then the right of custody of the child is shifted to men as per following order:

“Men: (i) The father, and then the grandfathers.

(ii) The brothers and then their children (nephews).

(iii) The uncles and then their children (cousins)".³⁰

However, the order among each category of males and females has also been defined, but there is some difference of opinion over this order among each category. According to *Hanafis*, “first right of custody belongs to mother and then to the mother's mother, then to the father’s mother, then to the full sisters, then to the uterine sisters, then to the paternal sisters, then to the full sister's daughter, and so on till it reaches the maternal and paternal aunts”. On the other hand, according to *Malikis*, “the right of custody is transferred from the mother to her mother, how high so ever; then to the full maternal aunt; then the uterine maternal aunt, then the mother's maternal aunt, then the mother's paternal aunt, then the father's paternal aunt, then his (father's) mother's mother, then his father's mother and so on”. Whereas, according to *Shafi'is*, “the right of custody is the right of the mother, then the mother's mother, how high so ever, on condition that she inherits: then the father, then his mother, how high so ever, on condition that she inherits; then the nearest among the female relatives, and then the nearest among the male relatives”. As far as opinions of *Hanbalis* are concerned, according to them, “the mother is followed by her mother, then her mother's mother, then the father, followed by his mother: then the grandfather followed by his mother; then the full sister; then the uterine sister; then the paternal sister; then the full maternal aunt; then the uterine maternal aunt, and so on”.³¹

According to opinions of the jurists, with regard to the custody of a girl, the mother and the grandmother have the superior right of custody of the girl until she starts menstruating. The reason given in this regard is that until she becomes independent, she is in need of learning the ways of living of women and mother is more capable to teach these things and impart such training to her. However, after her puberty, she is in need of protection more than training and in this regard, father is more capable to do the same. The principle has been based on the saying of the Holy Prophet (ﷺ), when he said that after puberty, a girl is to be given to her father for the purpose of her protection and security. With regard to preference of right, all women from the mother side have been given right of custody of a girl other than mother and maternal grandmother until she reaches the age of desire and the reason is that they cannot employ her on work and cannot give her services on hire.³²

However, it is also said that a mother cannot be forced to take custody of the child if she does not want to do. In some cases, she might be unable to bring up the child. If there is no mother, then the mother’s mother how high so ever shall have the right of custody and the reason is that the right of custody of children belongs to mother how remote she might be and has superior right over father’s mother. However, if there is

no mother and mother's mother, then the right of custody shall belong to father's mother as she has the superior right over sisters and for the reason that she also falls within the definition of mother and mothers are always loving and caring towards the offspring.³³

In case when there is no paternal grandmother, then sisters will have superior right regarding the custody of the child over maternal and paternal aunts for the reason that they are the daughters of both parents. It is also stated that in one such opinions, maternal aunt has the superior right of custody over sisters and this reason is based on the words of the Holy Prophet (God bless him and grant him peace) as he said: "the maternal aunt is a mother". The opinion is also supported by the words of the Exalted: "and he raised his parents high on the throne," and the reference has been made to the maternal aunt. However, among the sisters, a sister from both parents has been given preference over all other sisters for her love and affection as the same is natural in every human being. Then sister from the mother side and lastly a sister from the father side shall have the right of custody.³⁴

After sisters, maternal aunts shall have superior right of custody on the basis of their close relationship with mother. Then paternal aunts shall be given this right. However, the difference is that maternal aunts shall descend with regard to the custody of child just like descending order of sisters has been given, meaning that the one closer to the relationship of mother shall have superior right. As far as paternal aunts are concerned, their descending order shall be the same.³⁵

It is also stated that each of these extinguishes her right to custody if she marries on the basis of reasons mentioned by the jurists and for the reason that the husband of mother, when he is a stranger, will look down at him and will not take care of him which is against the custody of a child. However, there is one exception in this general rule which has been mentioned by the jurists and that is when paternal grandmother is married to paternal grandfather for the reason that he stands in the capacity of father and is eligible to look after the custody of the child.³⁶ Likewise, it has also been stated that when a woman loses her right to custody on the basis of her marriage, her right of custody shall revert back to her when the marriage is dissolved for the reason that the obstacle in respect of custody of child shall stand removed in that case.

If the child does not have women among the relations and the men disagree about his custody, then preference shall be given to the close relations on the basis of *asabiyyah* (residuaries) for the reason that the custody belongs to the closest and the grades among the residuaries have been defined in other places dealing with the matters of inheritance. However, in such case, an infant girl cannot be given to any male member who is not within a prohibited degree, even if he is closest, in order to avoid temptation such as custody of a girl cannot be given to uncle's son as he is not within prohibited degree.³⁷

Period of Custody in Islamic Law:

It is stated in *Al-Hidayah* that mother and grandmother shall have superior right with

regard to custody of a male child until he is able to eat, drink, dress and perform *istinja*’, all by himself. In *Al-Jamye’ Al-Saghir*, the statement is that until he is independent and is able to eat, drink and dress up all by himself. However, while analysing, meaning of both the statements appears to be same as a child shall be considered completely independent when he is able to perform *Istinja*’ by himself. Thereafter, the custody shall be given to the father for the reason that by that age and time, he shall be independent and he needs to be taught the habits and manners of a man and to be disciplined and the same can most appropriately be done by the father. Therefore, father is more suitable to teach all these things to a child than his mother. Majority of the scholars have determined the age of independence as seven years where-after, custody of a child shall be reverted to the father.³⁸

In accordance with different opinions of the jurists over the period of custody according to their entitlement in each one of the abovementioned categories, according to *Hanafis*, the period or age of custody of a boy is seven years and of a girl is nine years. *Malikis* say that a mother is entitled for the custody of a boy until his puberty and the mother is entitled for the custody of a girl till her marriage. *Shafi’is* are of the opinion that there is no specific age or period of a child and the custody of the child, at the first place, shall remain with the mother until such child is able to choose his/her living with any of the parents and the matter shall be decided accordingly. However, this principle has been further elaborated that after attaining the age of majority, if the child chooses to live with his mother, he shall stay with his mother during night and shall spend his day with his father. In case of child being a girl at this stage, she will stay with her mother during day as well as night. *Shafi’i* jurists have further stated that if a child chooses to live with the both simultaneously, lots will be drawn among parents, but a child cannot be compelled to live with either of the parents even after lots and still if he/she wishes to live with both of them, then custody shall be given to the mother. According to *Hanbalis*, the period of custody of a child is seven years irrespective of sex and thereafter the child can choose his/her living with either of the parents. According to *Imamiyyah*, the initial period of custody for a boy is two years and for a girl is seven years. Thereafter, the custody of the child shall revert to the father till the age of nine years in case of a girl and fifteen years in case of a boy, whereafter the child can choose living with either of the parents according to his/her own choice.³⁹

Conclusion:

The abovementioned analyses of the Guardian and Wards Act, 1890, being the applicable law on the custody of minors in Pakistan, and the principles of Islamic law on the custody of children reflect that detailed principles for awarding the custody of children have not been prescribed in the abovementioned Act. Detailed principles have been laid down by the honourable Superior Courts of the country keeping in view the principles of Islamic law, English law and societal norms and customs. Most of the principles, if not all, have been prescribed under Islamic family law and a few

details have also been mentioned in this paper. However, the domestic Courts, to some extent, have deviated from the principles of Islamic law on the custody of minors. For instance, with regard to preferential right of custody, the Courts are not following the scheme of Islamic law adopted by either of the schools of thought and mentioned *supra* in details. Remarriage of the parent with any person not related to a male minor and not falling within a prohibited degree of a female minor is not considered fatal for the said parent as compared to Islamic law where the same has been considered fatal. Religion of the parent is considered immaterial for the purpose of awarding the custody of the minor in most of the cases, unlike Islamic law, where, according to majority point of view, it is considered the foremost requirement to claim the custody of the minor. The main reason for this difference is that in domestic law of Pakistan, paramount consideration is given to the welfare of the minor, whereas, in Islamic law, the principle has been recognized if not found in conflict with the basic principles of *Shari'ah* (Islamic law). Therefore, it is apparent that the Courts in Pakistan are not following the scheme of Islamic law in the matters of custody of children and the same amounts to conflicting views even in case of same proposition as no codified detailed principles are available for the guidance of the Courts elsewhere. Whereas, Pakistani Courts, being guardian of the Constitution and the law, are required under Article 227 of the Constitution of Pakistan and section 4 of the Shariat Application Act, 1993 to interpret all the laws in accordance with injunctions of Islam as laid down in the Holy Quran and *Sunnah* of the Holy Prophet (ﷺ). Therefore, it is imperative either to codify these principles of Islamic law in the statutory law of Pakistan or to prescribe the same for the guidance of the Courts either through case law or a policy matter for avoiding the conflicting views, confusion, for the purpose of clarity of principles and for compliance with the injunctions of Islam.

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²⁹ Al-Hussein, “the Custody of Children in Shari’ah”.

³⁰ Ibid.

³¹ Muhammad Jawad Mughniyyah, the Five Schools of Islamic Law: the Hanafi, al-Hanbali, al-Ja’fari, al-Maliki, al-Shafi’i, (Ansariyan Publications-Qum, 2017), 273.

³² Nyazee, Al-Hidayah, 1041.

³³ Ibid, 1038.

³⁴ Ibid, 1039.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid, 1040.

³⁸ Ibid.

³⁹ Mughniyyah, the Five Schools of Islamic Law, 274.