

## Shari'ah Court's Decision and Respondent's View on Child Custody After Divorce in Kuala Lumpur and Selangor

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### ABSTRACT

*The importance of child custody after divorce in family law is evident. The important issues in child custody include the best interest of the child, custody arrangements, the residence of the child, contact arrangements, parental responsibility for the child, and child maintenance. Islamic law through the Shari'ah court, in general, have to determine the issues based on specific principles. This article examines empirical research on the Shari'ah court's decisions and the selected respondents' views in Kuala Lumpur and Selangor, Malaysia. In the court, the research analysed 103 selected court cases. On the other hand, the research also involved two children of divorce. Several patterns were derived from the research namely: (a) the preference of sole custody over joint custody, (b) the preference of the mother over others in the residence of the child, (c) the recognition of the joint residence of the child, (d) the recognition of joint contact apart from sole contact, (e) the recognition of joint parental responsibility for the child, and (f) the award of child maintenance. The most important thing extracted from the pattern was the role of mutual consent in determining child custody. Thus, mutual consent will influence the party to adopt a harmonious way of settling their disputes.*

### KEYWORDS

*Residence of the child, Parental Responsibility for the Child, Mutual Consent, Child Custody*

### ABSTRAK

*Kepentingan hak penjagaan anak selepas perceraian dalam undang-undang kekeluargaan Islam amat jelas. Antara isu-isu berkaitan hak penjagaan anak ialah kepentingan anak, jenis hak jagaan anak, hak kediaman anak, hak lawatan anak, tanggungjawab kepada anak, dan nafkah anak amat merentasi agama dan adat. Isu-isu ini ditangani oleh undang-undang Islam melalui mahkamah Syariah mengikut prinsip-prinsip yang ditetapkan. Artikel ini menilai kajian empirikal yang mengkaji keputusan mahkamah Syariah dan pandangan responden yang terpilih di Kuala Lumpur dan Selangor, Malaysia. Kajian ini telah menilai 103 kes mahkamah Syariah yang terpilih. Manakala itu, kajian juga dijalankan ke atas dua orang responden kanak-kanak yang ibu-bapa mereka telah bercerai. Beberapa paten telah dihasilkan daripada hasil dan dapatan kajian iaitu: (a) keutamaan hak jagaan persendirian ke atas hak jagaan bersama, (b) keutamaan ibu dalam mendapat hak kediaman anak, (c) pengiktirafan hak bersama kediaman anak, (d) pengiktirafan hak bersama lawatan disamping hak lawatan persendirian, (e) pengiktirafan hak bersama dalam tanggungjawab dan kasih sayang kepada anak dan (f) nafkah anak. Perkara yang paling penting didapati daripada paten-paten ini ialah peranan persetujuan bersama dalam menentukan hak jagaan anak dan hak lawatan anak. Persetujuan bersama akan mempengaruhi pihak-pihak berkaitan untuk menyelesaikan pertikaian mereka dalam kaedah yang harmoni.*

### KATA KUNCI

*Kediaman kanak-kanak, hak bersama dalam tanggungjawab dan kasih sayang kepada anak, persetujuan bersama, penjagaan kana-kanak*

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## INTRODUCTION

Child custody after divorce for Muslims involves the residence of the child, parental responsibility for the child, and contact. The residence of the child concerns with whom the child will live after the divorce. The upbringing of the child which involves matters such as education, healthcare, and finance is governed under parental responsibility. Contact involves the continuous relationship between the child and the other parties not living with the child. These three aspects are interpreted based on the best interest of the child. Currently, the best interest of the child is recognised by Islamic law as the main consideration (Ibn 'Abidin (d. 1252 H), 1998; Ibn Qudamah (d. 620 H), 2004).

The best interest prioritises the rights, interests, and welfare of the child over those of the parents and other related parties. Islamic law recognises this consideration earlier than Civil law (Zaydan, 1985). Civil law only started to recognise it in the 19<sup>th</sup> Century (See for instance, English case of *Gillick v. West Norfolk and Wisbech Health Authority [1985] 3 All E.R. 402*; Coltrane and Collins, 2004; Dadomo, 2004; Douglas, 2004; Gallo, 2004; Lauer and Lauer, 2004; Wright, 2002; Black, Bridge, and Bond, 2000; Lowe and Douglas, 1998). In the Holy Qur'an, the child's suckling is a recommended practice to protect the child's rights, interests, and welfare (Al-Qur'an, Al-Baqarah, verse 233). In the *Sunnah*, there are two narrations of *Ahadith*. The first narration stipulates that the child will live with the mother after the divorce as long as she does not remarry. The second narration establishes the rights of the child to choose to live with the mother or the father after the divorce (Abu Dawud (d. 275H); Ibn Majah (d. 275H); Al-Bayhaqi (d. 458H); Al-'Asqalani (d. 852H)).

Approaches to child custody are sole custody and joint custody. In sole custody, one party will live with the child and have parental responsibility whereas the other party will have contact with the child. The other party may include the non-parents (Akbar, 2013; Carper, Mietus, and West, 2000; Leonoff and Montague, 1996;). On the other hand, joint custody implements joint parental responsibility. Joint custody establishes that the child may live with one or more than one party (Akbar, 2013; McKenzie, 2007; Middleton, 2007; Rathus, 2007; Harris, Teitelbaum, and Carbone, 2005; Prest and Wildblood, 2005; Smith, 2003; Ehrlich, 2002; Hahn, 2001; Bond, Black, and Bridge, 2001). Interestingly, Islamic law recognises physical sole custody and joint legal custody. It means that the child will live with a parent and both parents will have parental responsibility (Akbar, 2013).

In Malaysia, child custody for Muslims is a state matter. It means each state has its own version of Islamic law. For non-Muslims, there is only one Civil

law governing child custody. Both Islamic and Civil laws recognise sole custody as an automatic presumption. It means the parties do not need to petition for it. The courts will grant them sole custody. As for joint custody, the parties must petition for it before the courts (See for instance, Section 87, *Islamic Family Law (Federal Territory) Act*, 1984 (IFLA 1984) (This law is recognised as the source of reference of the other state Islamic family law legislations); Sections 88 (1) and 89, *Law Reform (Marriage and Divorce) Act*, 1976 (LRA, 1976) ; Zaleha, 2005; Mimi Kamariah, 1999; Ahmad, 1997). Interestingly, Islamic law in Malaysia generally recognises that after divorce, parental responsibility is given to a parent in contradiction with the general position of Islamic law.

In Malaysia, the types of resolutions in child custody for Muslims are single and joint petitions. A single petition means one party unilaterally petitions for child custody. A joint petition involves both parties. In the single petition, it involves a long court trial because the parties are in conflict and intend to beat each other in the trial. The joint petition means the resolutions are based on mutual consent. Mutual consent means the parties will determine the fate of the child in a good manner. It will also generate a faster solution in child custody . However, the Shari'ah court will determine whether the terms under mutual consent are in line with Islamic law. For instance, the court will reject a term stating the willingness of the mother to accept waiver by the father to provide maintenance to the child. On the contrary, the Civil court will accept any terms proposed under mutual consent (See for instance, *Re Goh Hoe Ling & Anor [1996] 1 MLJ 137*; Section 52, LRA, 1976; Randawar, Nur Ezan, and Akbar, 2018).

Social studies involving Muslim and non-Muslim respondents suggest that child custody may affect the best interest. The preference of sole custody over joint custody by the court generates problems. For instance, Akbar (2013), Segrin and Flora (2005), Lamanna and Riedman (2003), and Bidwell and Vander Mey (2000) suggested that among the problems are lack of contact between the party and the child as well as lack of payment of child maintenance.

Therefore, this article has three objectives. The first objective analyses the pattern of the Kuala Lumpur and Selangor Shari'ah courts' decisions in child custody. The second objective studies the effects of the decisions through the views of the selected respondents. Lastly, the third objective expounds conclusion and recommendations.

## BRIEF LITERATURE REVIEW

Child custody after divorce literature under Islamic law focuses on many aspects namely, the methods of study, approaches, the best interest of the child, and related issues. In the methods of study, the preferred

methods are the doctrinal, qualitative, quantitative, and hybrid methods (Nur Zulfah, 2018; Akbar, 2013). The hybrid method encompasses all the doctrinal, qualitative, and quantitative methods. In the doctrinal method, the principles of child custody are the main discussions. Empirical analyses exist in the qualitative and quantitative methods. The hybrid method discusses the principles of child custody and the empirical discussions. These methods are important and serve as a guideline to those writing on child custody.

In approaches, discussions are exclusive, comparative, and regional. The exclusive discussions concentrate on one single law (Al-Zuhayli, 2004). The comparative discussions involve more than a law analyses on child custody (Akbar, 2013). The regional discussions focus on child custody based on the practices of a particular country (Ahmad, 1997).

Discussions on the best interest is important to Islamic family law. Present-day child custody survives on the application of the best interest. The best interest entails studies on the historical development of the law and the principles. In the historical development of the law, studies are varied and diverse. Islamic law advocates consistency and continuity. Consistency and continuity mean that the best interest has been the main consideration in child custody since the beginning of Islam. It shows that Islamic law was earlier than civil law in recognising the child's best interest (Zaydan, 1985). In civil law, discussions reveal the process of evolution. It means that civil law has taken a long time to recognise the child's best interest as the main consideration in child custody. Before to the child's best interest, civil law recognised parental preference as the main consideration (Wright, 2002).

The principles of the best interest include the best interest's concept, child custody arrangements, and the best interest's factors. In the concept of the best interest, Islamic law states that the child is prioritised over the parents and the other parties. Analyses under Islamic law involve the understanding of the Holy Qur'an and the Sunnah of the Prophet Muhammad (s.a.w) (Ibn 'Abidin (d. 1252 H), 1998; Ibn Qudamah (d. 620 H), 2004). The process of *ijtihad* further expands the meaning and the understanding of the Holy Qur'an and the Sunnah.

In child custody arrangements, discussions focus on the types of custody granted by the Shari'ah court. Discussions highlight the two types of custody arrangements namely, sole and joint custody. Sole and joint custody approach differently in the residence of the child. However, the main consideration is the best interest. Discussions explain that the child's best interest determines whether the child resides with one or more parties after the divorce. Islamic law agrees that custody arrangements do not affect parental responsibility for the child. Both parents will continue to provide the child with parental responsibility after the divorce (Al-Nawawi (d. 676H), 2001; Al-Kasani (d. 587H), 1997; Ibn Muflih (d. 884H), 1997; Ibn 'Abd

al-Rahman al-Maghribi (d. 954 H), 1995; Al-*Dasuqi* (d. 1230 H), 1996).

In the best interest factors, analyses concern factors that guide the Shari'ah court to determine child custody. Islamic law discussions provide various factors such as religion, moral character, income, the wishes of the child, the wishes of the parents, and the fitness of the parties. These factors are not absolute. It means that the court could consider other factors which are in line with the best interest. For instance, the parties and the child's religions are important. Some discussions advocate that the non-Muslim party cannot have child custody. The other discussions allow the non-Muslim party to have child custody. However, both discussions agree that the child's Islamic religion must be protected. In the event of a converted Muslim, the Shari'ah court for instance in Malaysia recognises his or her rights to have child custody and convert the child to Islam (Nur Zulfah, 2018; Akbar, 2013; Al-Nawawi (d. 676H), 2001; Al-Kasani (d. 587H), 1997; Ibn Muflih (d. 884H), 1997; Al-*Dasuqi* (d. 1230 H), 1996).

In short, the above studies, discussions, and analyses prove that child custody is important in Islamic family law. Diverse methodologies, approaches, and issues confirm the importance. It is important to recognise that the best interest in child custody takes precedence over the interests of the parents and the other parties.

#### A BRIEF ON ISLAMIC LAW GOVERNING CHILD CUSTODY IN KUALA LUMPUR AND SELANGOR

Child custody after divorce in Kuala Lumpur and Selangor exists in the Islamic family law legislations (IFLA 1984 representing Kuala Lumpur; Islamic Family Law (State of Selangor) Enactment 2003 representing Selangor ( IFLSSE 2003)). The laws provide guidelines to the Shari'ah courts in determining child custody. The best interest in the laws is known as the welfare of the child (Section 86, IFLA 1984; Section 87, IFLSSE 2003). The welfare of the child allows the courts to consider many factors. The wishes of the parents and of the child are also important. The courts shall ensure the two wishes are in line with the welfare of the child (Section 86, IFLA 1984; Section 87, IFLSSE 2003). Children have a different context of the welfare principle. Therefore, the courts shall determine the welfare of the children based on the context.

Parties who can have child custody manifest the laws as not being gender biased. The laws practise the concept of priority. The mother shall be the best person to live with the child after the divorce. The next best persons include the grandmothers, father, sisters, aunties, and male siblings (Section 81, IFLA 1984; Section 82 IFLSSE 2003). The dominance of the female gender in the list of parties having child custody shows that women demonstrate more love and care for children than men. The courts may also grant

an order for the child to live with any other person and government agencies. This order shows that child custody involves family, community, and the government.

An important issue is a rebuttable presumption concerning an infant. The presumption requires the child to live with the mother (Section 86, IFLA 1984; Section 87, IFLSSE 2003). The presumption is important because the period of infancy involves a child's suckling, breastfeeding, etc. The other important issue is custody involving children. The courts may place them together with a party or place them separately with more than a party (Section 86, IFLA 1984; Section 87, IFLSSE 2003).

It is an important responsibility for the party who has child custody. The laws do provide important qualifications for the party to be considered fit to live with the child. Among the qualifications are Muslim, sound mind, age of maturity, good conduct, and a safe home (Section 82, IFLA 1984; Section 83, IFLSSE 2003). The qualification of Muslim establishes that child custody in Islamic law is not only a contract but also a religious act. The other qualifications manifest the importance of the child having adequate protection to his physical and spiritual needs.

The laws state clearly that child custody is not absolute. Qualifications come with disqualifications. A party is disqualified from living with the child if she remarries, practises immoral acts, changes her residence, renounces the Islamic faith, and abuses the child (Section 83, IFLA 1984; Section 84, IFLSSE 2003). It is an issue if the remarriage affects the welfare of the child. By practising immoral acts, her acts could influence the child to later practices the same acts. Changing residence is also a challenge if it could prevent the father for instance from supervising the child. Renouncing Islam means she could not be trusted to protect the child's Islamic religion. Abusing the child is a sin that does not warrant a place in Islam.

Mothers and fathers are always mothers and fathers until death. However, child custody has its duration. Initially, the child would live with the mother. Upon the male child reaching the age of seven years and the female child, the age of nine years, they would live with the father. However, the courts have the final say on this matter and have to ensure it does not affect the welfare of the child. The child may also propose his or her preference of residence upon reaching the age of discernment (Section 84, IFLA 1984; Section 85, IFLSSE 2003). The proposal is not absolute and may be rejected by the courts if it is not on the best interest of the child.

In short, the laws provide substantive and procedural aspects of child custody. Mostly, the aspects revolve around the School of Shafi'is, the dominant school of Islamic jurisprudence in Kuala Lumpur and Selangor. The other important aspect is that the Shari'ah courts in the two states do not practise binding judicial precedence or stare decisis as practised by the Civil courts. A Shari'ah court unlike a Civil court is not bound to follow the other Shari'ah

court's decision. It means a Shari'ah court judge is allowed to determine a case based on his knowledge of Islamic law freely and with the School of Shafi'is. In the event of emergency or non-solution, the judge may resort to the other schools of Islamic jurisprudence.

## RESEARCH METHODOLOGY

This article adopts quantitative, and qualitative research methodologies. The quantitative research methodology involves court cases and the qualitative research method involves selected respondents.

### 1. Court Cases

Table 1.0: Selected Shari'ah Court Cases (n=103)

Year	Numbers	Percent (%)
2010	26	25.2
2012	16	15.5
2013	16	15.5
2014	19	18.4
2015	21	20.4
2016	5	4.9
Total	103	100

Court cases involved the *Shari'ah* courts in Kuala Lumpur and Selangor. A survey was conducted on 103 court cases on child custody after divorce. The years of the cases were from 2010 until 2016 (Tables 1.0). Muslim parents and their children were the selected parties of the cases. Arrangements, the types of decision, the residence of the child, contact, parental responsibility for the child, and child maintenance were the contents of the survey. The court cases were selected based on convenience sampling, a part of the non-probability sampling method. This sampling method was adopted because the selection of the cases was based on their availability in the courts. There were court cases unavailable because they were still on trial. The analysis of the survey was done by way of a descriptive method. The descriptive method was done by using the SPSS application. The reasons for selecting the courts in Kuala Lumpur and Selangor because: 1) no responses from other courts, 2) only 6 months were available to conduct the survey, 3) the friendly attitudes of the courts' staff, and 4) the main intention was to know the pattern of the courts' decisions.

### 2. Selected Muslim Respondents

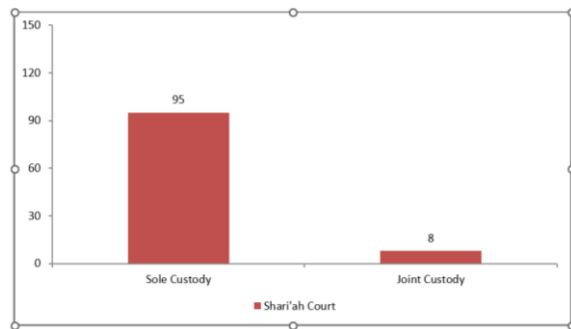
The involvement of the respondents was significant to this article. Interviews were conducted on two children of divorce. The researcher had targeted five parents and five children of divorce but managed to get only two children of divorce as the respondents. The main reason for this situation was their reluctance to be interviewed as child custody is recognised as a private matter. Both the respondents were 22 years old, of the Malay race. The first respondent had only one sibling and the parents had been divorced for more

than 20 years. On the other hand, the second respondent also had one sibling but the parents had been divorced for more than 5 years. Child custody arrangements, parental relationship, and parental responsibility for the child were the contents of the interviews. The researcher emailed the interview questions to the respondents. They filled in the answers to the questions and emailed them back to the researcher within a week. The reason for this email because they were not available to have a face-to-face interview because of personal and work commitments. The outcomes of the interviews were analysed through the narrative analysis methods.

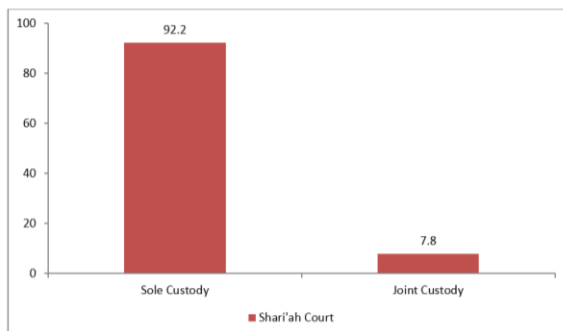
**FINDINGS**

**1. Outcome of Survey**

Child custody after divorce cases involved six aspects namely, arrangements, the types of decision, the residence of the child, contact, parental responsibility for the child, and child maintenance.

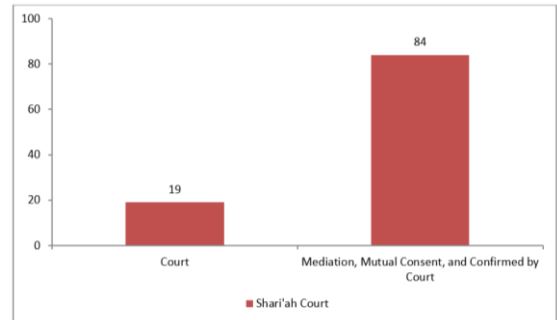


Graph 1.0: Child Custody Arrangements by Numbers (n=103)

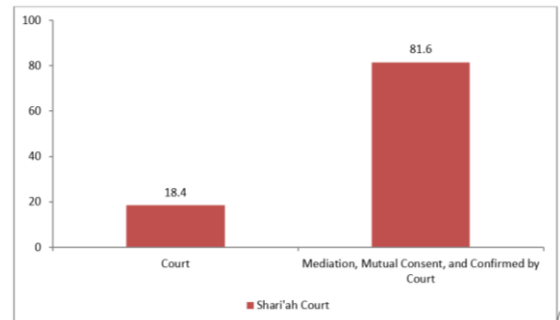


Graph 1.1 Child Custody Arrangements by Percentages (n=153)

Based on the above Graphs 1.0 and 1.1, the cases state that the most popular arrangement in determining child custody was sole custody (n=95 or 92.2%) while the less popular one was joint custody (n=8 or 7.8%).

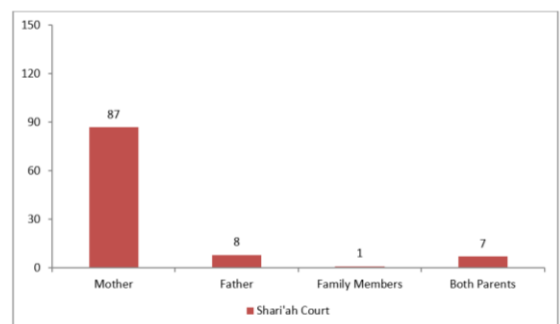


Graph 1.2 Types of Court Decision by Numbers (n=103)

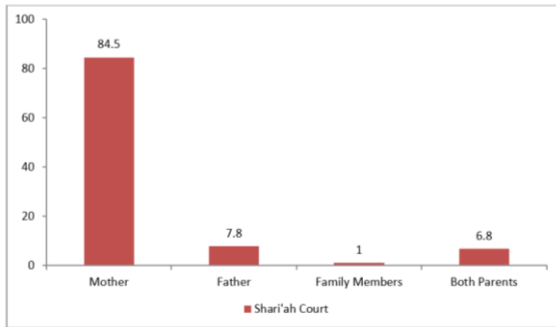


Graph 1.3 Types of Court Decision by Percentage (n=103)

Based on the above Graphs 1.2 and 1.3, the types of decision are divided into two namely, (i) court, and (iii) mediation, mutual consent, and confirmed by court. Court means that the court decided the case based on evidence and facts. Mediation, mutual consent, and confirmed by court explained that the parties underwent the process of mediation that led to their mutual consent. Later, the court approved the mutual consent and made orders based on the consent. Mediation, mutual consent, and confirmed by the court (n=84 or 54.9%) were the most popular type of decision. The other popular type of decision was by court (n=19 or 18.4%).

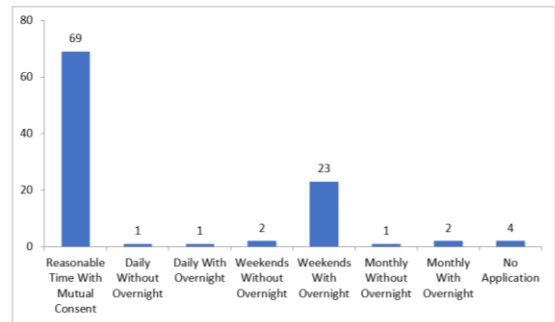


Graph 1.4 Residence of the Child in Courts by Numbers (n=103)

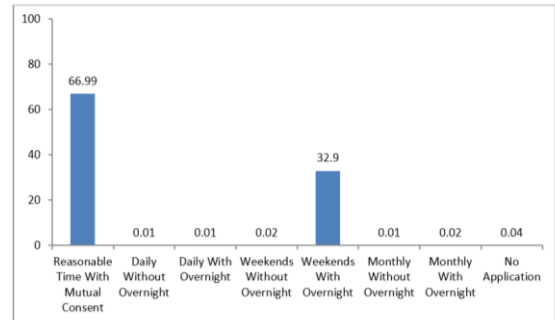


Graph 1.5 Residence of the Child in Courts by Percentage (n=103)

One important aspect in child custody is the residence of the child. After the courts have determined child custody, they will order the child to live with the selected party. Based on the above Graphs 1.4 and 1.5, the child would mostly reside with the mother (n=87 or 84.5%). In some cases, the child would also reside with the father and the family members (n=8 or 7.8% for the father and n=1 or 1% for the family members). The award of the residence of the child to both parents was also recognised by the court (n=7 or 6.8% for the *Shari'ah* court). The child residing with both the parents normally involved joint custody.

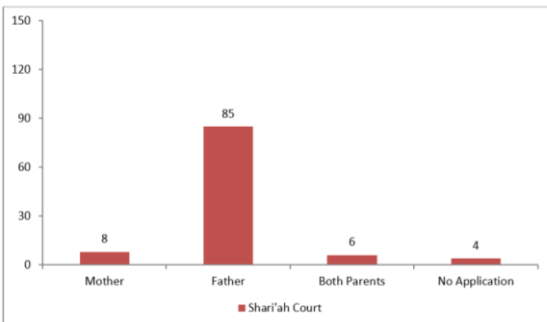


Graph 1.8 Types of Contact in Courts by Numbers (n=103)

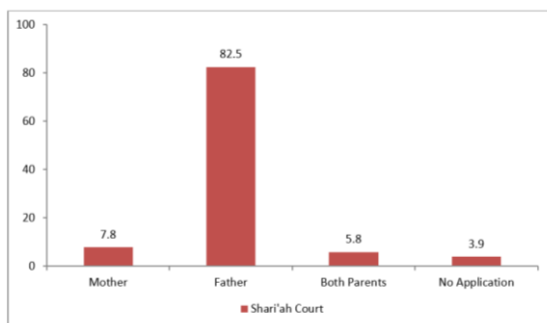


Graph 1.9 Types of Contact in Courts by Percentage (n=103)

Another important aspect of child custody is contact. Contact means that the child will have a continuous relationship with the parties not having the residence of the child. The parties having contact with the child and the types of contact are the aspects of contact. Under the parties, based on the above Graphs 1.6 and 1.7, the court awarded contact mostly to the father (n=85 or 82.5%). Then, contact was also granted by the court to the mother (n=8 or 7.8%) and both parents (n=6 or 5.8%). There were also cases in which the court did not determine contact because the parties did not apply for it (n=4 or 3.9%).

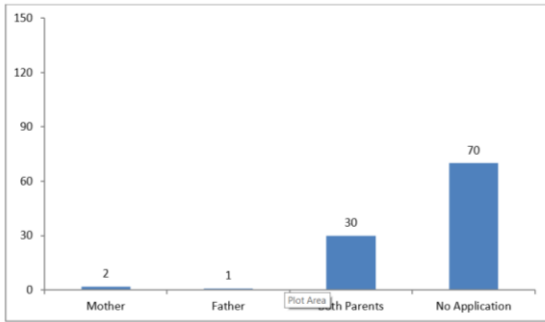


Graph 1.6 Parties with Contact in Courts by Numbers (n=103)

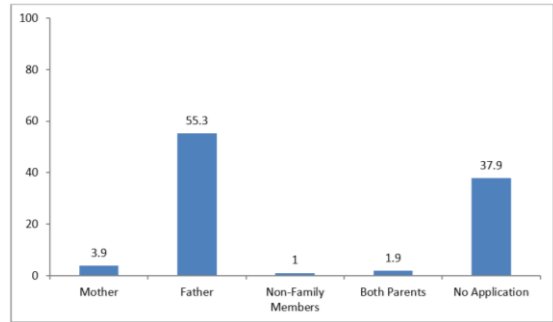


Graph 1.7 Parties with Contact in Courts by Percentage (n=103)

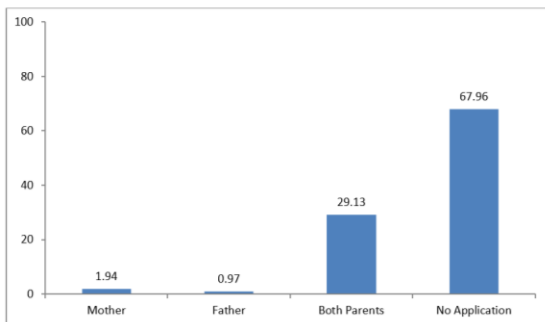
Under the types of contact, based on the above Graphs 1.8 and 1.9, the most preferred type granted by the court was reasonable time with mutual consent (n=69 or 66.99%). It means that the parties would mutually agree as to the day and time of the child to have continuous relationships with the parties. The second preferred type was weekends with overnight (n=23 or 32.9%) followed by weekends without overnight (n=2 or 0.02%), daily without overnight (n=2 or 1.3%), monthly with overnight (n=2 or 0.02%), daily with overnight (n=1 or 0.01%), and monthly without overnight (n=1 or 0.01%). There were also cases in which the court did not determine the types of contact because the parties did not apply for it (n=4 or 0.04%).



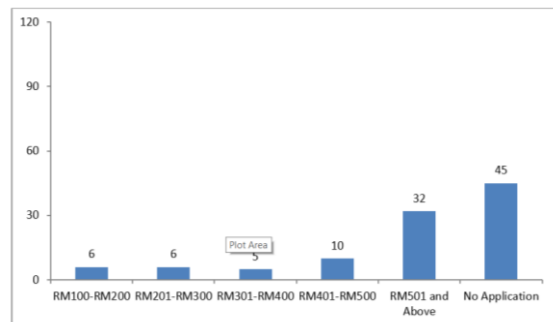
Graph 1.9 Parental Responsibility for the Child in Courts by Numbers (n=103)



Graph 1.12 Parties with Child Maintenance in Courts by Percentage (n=103)

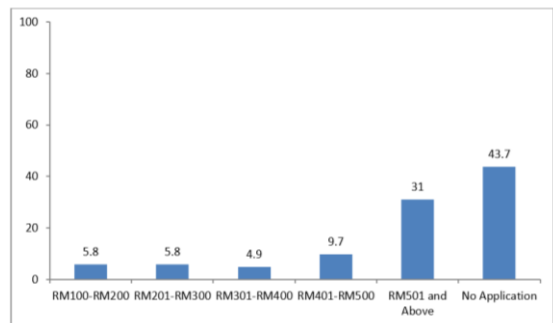


Graph 1.10 Parental Responsibility for the Child in Courts by Percentage (n=103)

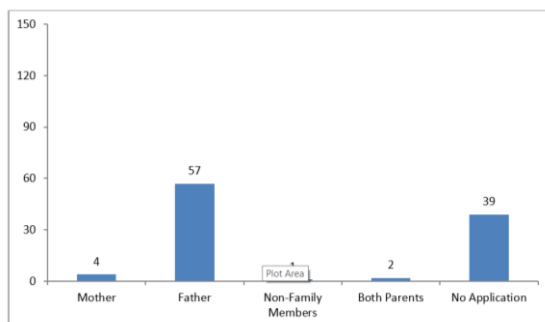


Graph 1.13 Amount of Child Maintenance by Numbers (n=103)

Parental responsibility for the child is another important aspect in child custody. It means that the party with the parental responsibility will decide the rights, interests, and welfare of the child. Based on the above Graphs 1.9 and 1.10, a unique pattern is derived from both the court in which the parental responsibility was granted to both parents (n=30 or 29.13%). Thus, the rights, interests, and welfare of the child would be jointly decided by the parents. The parental responsibility was also awarded by the courts to the mother (n=2 or 1.94%) and also the father (n=1 or 0.97%). Thus, under this situation, only one parent would decide the rights, interests, and welfare of the child whereas the other party would have the right to propose suggestions and recommendations. There were many cases that the court did not determine parental responsibility because the parties did not apply for it (n=70 or 67.96%).



Graph 1.14 Amount of Child Maintenance by Percentage (n=103)



Graph 1.11 Parties with Child Maintenance in Courts by Numbers (n=103)

The last aspect under child custody is child maintenance. Child maintenance is divided into two sub-aspects namely, the parties with and the amount of the maintenance. Under the parties, based on the above Graphs 1.11 to 1.14, child maintenance was awarded to the father (n=57 or 55.3 %) followed by the mother (n=4 or 3.9%), both the parents (n=2 or 1.9%), and the non-family members (n=1 or 1%). There were also cases in which the courts did not determine the maintenance because the parties did not apply for it (n=39 or 37.9%). Under the amount, the most preferred amount granted by the courts was RM 501 and above (n=32 or 31%). This was followed by RM 401 to RM 500 (n=10 or 9.7%), RM 201 to RM 300 (n=6 or 5.8%), RM 100 to RM 200 (n=6 or 5.8%), and RM 301 to RM 400 (n=5 or 4.9%). There were also many cases in which the courts do not determine



the amount because the parties did not apply for it (n=45 or 46.1%).

## 2. Outcome of Interviews

As stated above, the contents of the interviews concerned three aspects namely, child custody arrangements, parental relationship, and parental responsibility for the child.

Under custody arrangements, the first respondent and the sibling resided with the mother and the father would exercise contact. Unfortunately, the father normally visited them once every 5 to 7 years. They indicated that the amount of contact with the father was inadequate. The reason was that the father normally visited them only at the request of the father's grandmother. Despite the inadequate amount of contact, they accepted the current pattern of contact with the father. However, the inadequate amount of contact made them strangers to the father. They thought that contact made by the father might be a form of courtesy on his part. They were also satisfied with sole custody because it gave freedom to the visiting parent in executing contact. They disagreed with the shared residence of the child because of the discomfort that it would cause to each other's lives (Responses from the first respondent and the sibling).

On the other hand, the second respondent and the sibling lived with the mother, and the father was given contact. The father normally visited them during the medical appointments of the children and every Friday of the week. Contact was conducted at the mother's house, the university, and restaurants. They were satisfied with the amount of contact done by the father. They did not want to trouble the father because he lived far away from their current residence. They were also happy with the amount of contact with the father because they believed that both parents were quite busy with their own lives. They were satisfied with sole custody because the arrangement was flexible. There were no specific times and conditions attached to contact and it worked for them. The respondent also disagreed with the shared residence of the child because both of the parents had remarried and had their partners to live with (Responses from the second respondent and the sibling).

Under the parental relationship, the first respondent believed the relationship of the mother and the father was at the level of strangers. They had never talked or met with each other since the divorce. The respondent was satisfied with the amount of co-operation between both parents in the upbringing of the children. The level of co-operation should be maintained because both parents were never being together at one time in the same place. For them to improve their relationship would be very strange for the children to testify and see (Responses from the first respondent and the sibling).

On the other hand, the second respondent believed that the relationship of the mother and the father was improving, maybe because they did not see each other every day. The respondent was not satisfied

with the amount of co-operation between the parents in the upbringing of the children. The non-satisfaction was due to the difficulty of the father in understanding the respondent. Furthermore, the father was a close-minded person. Nevertheless, the level of relationship should be maintained. The respondent also described the parents' relationship with one another as being best friends with each other, were on good terms, and their relationship had improved after the divorce. Thus, the parental separation was because they believed that they were no longer meant for each other, and there was no need to fight over it (Responses from the second respondent and the sibling).

Under parental responsibility for the child, the first respondent and the sibling were not satisfied with the father's parental responsibility. The father had never provided daily allowances for them. On the other hand, they were happy with the mother's parental responsibility. They were angry with the amount of child maintenance given by the father. The father had not provided them with child maintenance even though he had the means to do so. Concerning shared parental execution, they believed that the father and the mother never discussed together in executing parental responsibility for the children in education, discipline, clothing, food, and other related areas. The reason was that both parents had never talked to each other since the divorce. They disagreed on the question of joint parental responsibility. They believed that the mother could provide them with parental responsibility more than enough (Responses from the first respondent and the sibling).

The second respondent and the sibling were not satisfied with the father's parental responsibility. The father was sensitive to understand the inner struggles faced by the children living in a broken family. On the part of the mother, they were satisfied with her parental responsibility. Since being remarried, the mother's focus was a balance between the children and the new husband. She had spent more time with him than with them. They were unsatisfied with the amount of child maintenance given by the father. The children got less affection after the divorce from the father. They needed more allowances as they were both still studying and had no income of their own. Concerning shared parental execution, they believed that the father and the mother jointly executed parental responsibility for the children in education, discipline, clothing, food, and any other related areas. But in decision-making, the mother held a stronger influence in decisions concerning them. They agreed that parental responsibility should be jointly shared between the parents. They stated that it was the result of the parent's marriage to each other. Parental responsibility should be shared in terms of financial, physical, and emotional well-being (Responses from the second respondent and the sibling).

## DISCUSSIONS

The above findings involving court cases and interviews establish several themes. In court cases, there are six themes. First, the decisions of the courts in determining child custody after divorce was contested and non-contested. Contested means that the court will decide the cases based on facts. The court determine the facts based on the best interests of the child. For instance, the court interpret the best interest of the child through the welfare principle. Non-contested means that the courts will decide the cases based on the mutual agreements of the parties. The majority of the decisions were made by mediation and mutual consent. This situation is positive because the parties were willing to discuss matters on child custody in a harmonious way for the best interest of the children. In addition, it also manifested the supports of the court in encouraging a harmonious settlement in child custody. However, the court will ensure that the mutual agreement do not contradict Islamic law and the provisions of the law.

Second, sole custody is still the dominant approach in child custody. The minority approach is joint custody. This situation is because the law establishes sole custody as an automatic legal presumption. The parties must apply for joint custody because it is not an automatic legal presumption. The second theme also establishes the application of mutual consent by the parties. The parties by a joint petition also apply for either sole or joint custody. The parties are aware of the possible legal effects of them preferring sole or joint custody. Sole or joint custody arrangements could vary. Examples of the variation are: (a) sole residence of the child, parental responsibility, and contact, (b) sole residence, contact, and joint parental responsibility, (c) joint residence, sole parental responsibility, and contact, (d) joint residence and parental responsibility, and (e) joint residence, parental responsibility, and contact.

Third, the laws prefer the mother as the best person to have the residence of the child. For instance, the law indicates that there shall be a rebuttable presumption that an infant shall live with the mother after the divorce (Section 81, IFLA, 1984). However, the parties may challenge the rebuttable presumption. The recent social studies also indicated the same pattern on the matter. For instance, Akbar (2013) suggested that the majority of the Muslim mothers in Malaysia will live with the child after divorce. Likewise, Lamanna and Riedman (2003), Strong, DeVault, Sayad, and Cohen (2001), as well as Cox (1999) indicated that eighty-five to ninety percent of the divorced mothers in the United States of America were awarded with the residence of the child by the courts. It is also not a surprise to note that the above cases also manifest the same pattern. However, the court also awarded the child's residence to the father and the family members. In some cases, the mother, father, and the family members obtained the child's residence by mutual agreements. Under joint custody,

both parents also obtained the child's residence. The child will reside with both parents based on the terms agreed upon by the parents. Flexibility and pragmatism influence the parties to arrive at this variety of settlements. The role of the court was to ensure that the settlements did not contradict Islamic law and the provisions of the law,

Fourth, parental responsibility for the child was not determined in the majority of the cases. Therefore, two presumptions could be established. First, based on the laws, the party having the residence of the child will also have the parental responsibility i.e. sole custody. Second, the parties will have joint parental responsibility under joint custody. The cases established that parental responsibility was mostly awarded to both parents. There was also the award of parental responsibility to the mother or the father. It is interesting to note that awarding parental responsibility to both parents is in line with the rights, interests, and welfare of the child. The child deserves care and love from both parents. Thus, Islamic law is clear on this matter. Both parents must take care of the child as it is not only a legal but also religious duty as well.

Fifth, in contact, the cases stated that it was given to the father. This is similar to the other social studies conducted by Akbar (2013) for Muslims and Lamanna and Riedman (2003), Strong, DeVault, Sayad, and Cohen (2001), as well as Cox (1999) for non-Muslims. Contact was also awarded to the mother and both parents. The award to the father, the mother, and both parents in some cases was arrived at by mutual agreement. The award to both parents indicates that the child would have a continuous relationship with both parents through contact based on mutual agreement of the parents under joint custody. It means two situations. First, the father will have contact with the child when he or she resides with the mother. Second, when the child resides with the father, the mother will have contact with him or her. These situations are positives for the upbringing of the child. Mutual agreements also influence the types of contact. The parties showed flexibility and establishing the best way to ensure that contact was a success. At the same time, the parties also understood that contact should also consider each party respected living arrangements and means.

Sixth, the cases on child maintenance established that the court would grant the maintenance to the father. Among the parties awarded with child maintenance were the mother and the non-family members. Interestingly, joint child maintenance was also awarded to both parents. The joint child maintenance was achieved through the mutual agreements of the parents.

Under the interviews, there are sixth themes. First, non-satisfaction with the amount of contact occurs although one parent is awarded contact. The non-satisfaction had influenced the children to view the parent as strangers. Second, convenience is the basis of satisfaction with one party having the

residence of the child. The children understood that the living arrangements of the parents made it very difficult to have joint residence of the child. Third, the children were satisfied with sole custody because its arrangement was flexible and would not cause a burden to them and the parents.

Fourth, satisfaction and non-satisfaction with the parental relationships after divorce are related to the attitude of the parents. The satisfaction with the relationship occurred because the parents were still best friends even after the divorce. The parents who do not communicate with each other in the upbringing of the children was a situation which concerns the non-satisfaction. Fifth, the children also manifested the patterns of satisfaction and non-satisfaction in parental responsibility. The children indicated that the parents did not provide them with adequate parental responsibility. The parents should be obliged to provide them with parental responsibility. The main concern was the financial aspect which was important to the children. Thus, the children wished for more maintenance and allowances from their parents. Some of the children believed that parental responsibility should be shared by the parents. Some children did not agree with the sharing if one parent could provide enough parental responsibility. Sixth, the children manifested positivity and negativity of circumstances of the divorce. Child custody should be given to the most reliable party. On the other hand, divorce would have negative effects on the children forever in their lives.

#### CONCLUSION AND RECOMMENDATIONS

This article answers two objectives. The first objective analyses the pattern of the Kuala Lumpur and Selangor Shari'ah courts' decisions in child custody. The second objective studies the effects of the decisions through the views of the selected respondents. The analysis and the study also highlight the role of mutual consent in the settlement of child custody after divorce.

Under the first objective, the best interest of the child is the main consideration in child custody. The best interest is recognised through the welfare of the child. The courts recognise sole custody as the most preferred approach. However, the courts also recognise joint custody. The mother mostly obtains the residence of the child. The sharing of the child's residence by both parents is also recognised. The father is mostly granted contact. There is also a situation where the parents share contact. In parental responsibility for the child, most of the cases do not indicate the recipients. The minority of the cases highlight the sharing of parental responsibility by the parents. Child maintenance is mostly given to the father. In some situations, the parents share the discharge of the maintenance. These patterns are mostly influenced by mediation and the mutual consent of the parties. The parties will determine whether child custody, the residence of the child,

contact, parental responsibility, and child maintenance are given to one party or shared by both parties. The courts are open to this kind of settlement. However, the main concern is the possible attitude of the courts in recognising mediation and mutual consent that may affect the child's best interest. Thus, the courts will ensure that the settlement does not contradict Islamic law.

Under the second objective, there is non-satisfaction with contact executed by the party. Sole custody is preferred because it suits the lives of the parties. The residence of the child should be awarded to one party based on convenience. Parental relationships after the divorce will generate benefits to the children's upbringing if the parties are still best friends. Parental responsibility for the child should be borne by the parties and the children should get an adequate amount of child maintenance. Divorce is a scar to the children that will not heal. The living arrangements of the parties and the relationships between the parties after the divorce would probably ensure child custody protects the rights, interests, and welfare of the children. Another issue is that sole custody generates the above problem of lack of contact and neglect of parental responsibility.

In short, there are two recommendations. First, the Islamic laws in Kuala Lumpur, Selangor, and also other states in Malaysia should recognise joint custody as an automatic legal presumption. There are three reasons for the first recommendation. The first reason is that there are countries which recognise it as the automatic legal presumption in their laws. The second reason is that there are social studies that highlight joint custody as protecting the best interest of the child. The third reason is that the Shari'ah courts themselves recognise joint custody. Thus, they have to interpret indirectly the laws to validate joint custody orders. Therefore, the laws must make it very clear as to avoid burdening the courts with complex interpretations. However, the laws and the courts must ensure that joint custody does not contradict Islamic law. Second, mediation and mutual consent should be recognised continuously by the laws and the courts. The laws and the courts should give an impression to the society that they intend to have child custody to be settled harmoniously. However, mediation and mutual consent should not be recognised by the laws at the expense of the children. This situation means that if mediation and mutual consent affect the best interest of the child and also Islamic law, the courts must reject them.

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