

# The Right of Custody (Hadanah) for Young Children of Interfaith Couples

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## ABSTRACT

This study discusses the issue of the right of custody (*hadanah*) for young children of interfaith couples following divorce. The title elaboration clarifies that this discussion centers on determining who has the greater right to custody, particularly when one parent converts to Islam while the other remains in their original religion, with reference to an incident during the time of the Prophet Muhammad (peace be upon him). The research problem arises from the dispute over whether Islam is a mandatory condition for obtaining the right of *hadanah* over a Muslim child, leading to significant differences of opinion among the schools of Islamic jurisprudence (*madhahib*). The study's objectives are to analyze the differing views of the major schools of jurisprudence (Hanafi, Maliki, Shafi'i, and Hanbali) regarding the condition of Islam for the right of *hadanah*, and to evaluate the strength of each school's arguments and evidence to determine the most preponderant (*rajih*) and contextually appropriate opinion. The methodology employed is a qualitative library-based study using a content analysis approach on primary sources of jurisprudence such as authoritative classical texts and textual evidence (*naqli*), namely the Quran and Hadith, relied upon by each school. The study's findings reveal two main opinions. The Hanafi and Maliki schools hold that Islam is not an absolute condition; a non-Muslim mother who is a *dhimmi* (a protected non-Muslim citizen in an Islamic state) has the right to custody of a Muslim child, provided the child is not yet *mumayyiz* (around the age of seven) and there is no fear of the child being influenced by the mother's religion. However, the Shafi'i and Hanbali schools firmly maintain that Islam is a fundamental condition; the right of *hadanah* is exclusively for a Muslim custodian to protect the child's faith (*aqidah*) and best interests. The study concludes that the opinion of the Shafi'i school, which makes Islam a mandatory condition, is more preponderant and suitable for application in the contemporary context to guarantee the preservation of the child's religion, which is the highest priority, thereby protecting the Muslim child from exposure to elements that could harm their faith.

**Keywords:** Grave Relocation, application, terengganu

## INTRODUCTION

An incident concerning the right of child custody for an interfaith couple occurred during the time of the Prophet Muhammad (peace be upon him). Among these incidents is the one narrated by Abu Dawud in his *Sunan* (al-Sajastani, n.d., 1:267):

From Rafi' bin Sinan that he embraced Islam while his wife refused to embrace Islam. She came to the Prophet (peace be upon him) and said, "My daughter, she is weaning or of similar age." Rafi' said, "My daughter." The Prophet (peace be upon him) said to him, "Sit in one corner," and said to her, "Sit in another corner." The Prophet (peace be upon him) then placed the girl between them and said, "Call her." The girl inclined towards her mother. The Prophet (peace be upon him) said, "O Allah, guide her." Then she inclined towards her father, and he took her.

When divorce occurs involving an interfaith couple and a dispute arises regarding the right to custody, the question emerges: Is Islam a condition for obtaining the right of *hadanah* for interfaith couples? Jurists (*fuqaha'*) have differing opinions on this matter, among which are the following:

According to the Hanafi scholars, Islam is not a condition for a non-Muslim woman to obtain the right of *hadanah*, provided she meets other necessary conditions such as being sane, free, trustworthy in religion, and so on, regardless of whether she is Muslim or non-Muslim and whether she is the mother, grandmother, etc., except if the woman apostatizes Noor, Z. (2019); Nasir, N. M., Zin, N. M., & Sitiris, M. (2021); Firdaus, F. (2018).

Therefore, a non-Muslim mother has the right to custody of a Muslim child, whether male or female. Their right is equal to that of a Muslim. However, they must be a *dhimmi* residing under an Islamic state. Otherwise, the right of *hadanah* cannot be granted to non-Muslims.

In the book *al-Dur al-Mukhtar wa Rad al-Muhtar* by Ibn 'Abidin, it is stated: "A *dhimmi* woman, even if she is a Magian, is like a Muslim woman in obtaining the right of *hadanah* as long as the child does not recognize religion, i.e., around the age of seven, because his/her Islam is established at that time, or there is no fear of the child inclining towards the mother's religion, such as being taken to places of worship, etc. If that occurs, then the right of *hadanah* should be revoked even if the child does not yet recognize religion."

They argue based on the aforementioned hadith narrated by Abu Dawud in his *Sunan*. Additionally, they argue that what is required in *hadanah* is affection, gentleness, compassion, mercy, patience, and so on. These qualities do not differ based on difference in religion (al-Zuhayli, 1994, Vol. 10, p. 7306).

However, their scholars place two important conditions for a non-Muslim woman to obtain the right of *hadanah*:

1. As long as the child does not recognize religion, i.e., until the age of seven.
2. There is no fear of the child inclining towards the mother's religion.

If either of the above conditions is absent, the non-Muslim wife loses the right of *hadanah*, and the right should be given to the eligible Muslim according to the hierarchical order of those entitled to *hadanah* (Zaydan, n.d.).

The Maliki school holds an opinion similar to the Hanafi school, that Islam is not a condition for obtaining the right of *hadanah* over a Muslim child. The mother has a greater right to custody, whether she is Muslim or non-Muslim.

However, they state that if there is concern about the child being exposed to the non-Muslim mother's religion, it becomes obligatory upon Muslims to supervise the mother until the end of the *hadanah* period, which is puberty for males, after which the child is handed over to the father or his substitute, such as the grandfather, paternal uncle, etc. As for female children, they remain with their mother until they marry.

Al-Dardir mentions in his book *al-Sharh al-Kabir* that Islam is not a condition for obtaining the right of *hadanah*, whether the custodian is male or female. If there is fear of the child being exposed to harm, such as being served alcohol or pork, etc., then the child should be placed under the supervision of a Muslim (Zaydan, 1994, 10:35).

As for the Shafi'i and Hanbali schools, they hold that Islam is an essential and primary condition for obtaining the right of *hadanah* over a Muslim child (male or female). Therefore, the right of *hadanah* should be granted only to Muslims, whether male or female. According to al-Nawawi, if one of the parents is non-Muslim, their right to *hadanah* is invalidated because a non-Muslim cannot care for a Muslim child (al-Nawawi, n.d., 17:326).

They argue that the purpose of legislating *hadanah* is to safeguard the child's best interests (*maslahah*). Therefore, there is no *maslahah* for a Muslim child to be in the care of a non-Muslim, as the child is exposed to trials concerning their religion, which is a great harm (al-Sharbini, 1995, 5:195).

If the child is non-Muslim due to following the lineage of a non-Muslim father, a Muslim still has the right to custody over that child.

He also said: "If the mother is a slave or a non-Muslim, while the father is a Muslim, then the mother has no right to custody over that child. If the mother is a free Muslim woman, she has the right to custody over a child, whether the child is Muslim or not, as long as she does not marry."

As for the hadith stating that the Prophet (peace be upon him) gave the child a choice between staying with the mother or the father during a divorce caused by differing religions, it has been abrogated (*naskh*). This is because there is consensus (*ijma'*) among Muslims that a Muslim child cannot be handed over to a non-Muslim, even if it is the biological mother, as stated in the words of Allah the Almighty (Quran, al-Nisa' 4:141): "And Allah will never grant the disbelievers a way over the believers."

Therefore, the right of *hadanah* should be given to the most entitled person among the child's Muslim relatives according to the order established by Islamic law. If none is found, then the right of *hadanah* is given to a Muslim who is not among the relatives. This is the strongest opinion within the Shafi'i school (al-Nawawi, n.d., 19:421-422).

As for the Hanbali school scholars, they state that a non-Muslim has no right of *hadanah* over a Muslim child because it leads to great harm, namely exposing the child to the custodian's religion, who will distance him/her from Islam by teaching and raising him/her according to a non-Islamic religion (Yunus, n.d., 5:498).

After examining the arguments and evidence presented, as well as the resolution approaches taken by the schools of jurisprudence, the author is of the opinion that the view of the Shafi'i school, which places Islam as a condition for obtaining the right of *hadanah* over a Muslim child, is the strongest and most preponderant (*rajih*) compared to other opinions, based on the evidence brought by that school.

Although according to the Hanafi school, Islam is not a condition for a non-Muslim to obtain the right of *hadanah* over a Muslim child, they stipulate that the non-Muslim must reside in an Islamic state, referred to as a *dhimmi*. Otherwise, the right cannot be granted to a non-Muslim to safeguard the child's best interests.

Therefore, the opinion of the Shafi'i school is appropriate and suitable for application in the current context, where Muslims are exposed to elements contrary to Islam even if they grow up and are educated in a Muslim environment, let alone if they grow up in a non-Muslim environment.

To safeguard the best interests and priority of religion, which is the foremost demand compared to other interests and benefits, a Muslim child or a child with a blood relation to a Muslim should be placed under the care of Muslims so that they may grow up and receive education in line with the requirements of Islam while being protected from elements of sin and wrongdoing.

## CONCLUSION

Based on the discussion, it can be concluded that the issue of child custody (*hadanah*) for interfaith couples involves a deep consideration between maintaining natural familial bonds (such as a mother's affection) and the principle of safeguarding the child's faith (*aqidah*) and religious best interests as the highest priority. Although there are differing approaches among the schools of jurisprudence, an analysis of the arguments and evidence indicates that the opinion of the Shafi'i (and Hanbali) school, which makes Islam a mandatory condition for possessing the right of *hadanah* over a Muslim child, is stronger and more preponderant. This opinion aligns with the objectives of Islamic law (*maqasid al-shari'ah*) in preserving religion (*hifz al-din*) and the contemporary reality that exposes Muslim children to various influences that could endanger their faith if under the care of a non-Muslim. Therefore, to ensure upbringing and education consistent with the demands of Islam, the right of *hadanah* should be granted to a custodian who is Muslim, whether from among the closest relatives or an appointed Muslim guardian. This decision reflects a commitment to prioritizing the protection of the child's spiritual well-being and religious identity as a collective responsibility of the Muslim community.

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