

CUSTODY OF CHILDREN (*HIDĀNAH*)

12.1 *The meaning of ḥidānah (custody)—Hizanat in Urdu*

The term *ḥidānah* means placing a thing on the side or clasping a thing on the side. In the first sense it implies separating the child from the father and placing it to one side, while in the second meaning it implies the holding of the child on one side like a mother carries a child in one arm on the side. In the legal sense it means custody of the child for purposes of protecting, feeding, bathing, clothing, and in general bringing up the child.

The meaning does not include breastfeeding the child as the mother is not to be compelled to do so, and the father has to make alternate arrangements in case the mother refuses to breastfeed the child. Nevertheless, the *fatwā* is that she should feed the child to prevent injury to it. She is, therefore, to be compelled if no one can be found for wet-nursing the child.

The custody of children belongs to women at certain stages of the child's life, and it belongs to men at other stages of the child's development, depending upon the welfare of the child. Welfare of the child is the governing standard on the basis of which custody can be taken away from one parent or person and given to another.⁶¹

12.2 *Custody of children (ḥidānah)*

The primary right of custody of children belongs to the mother. In the case of females, other than the mother, it is a condition that custody cannot be awarded to females who are not within the prohibited degree of marriage. Thus, it cannot be granted to paternal or maternal cousins of the child.

61. In *Firdous Iqbal v. Shifaat Ali*, 2001 SCMR 838, the Supreme Court set aside the order of the High Court whereby the High Court had set aside orders of the two courts below by holding "Right of the father to hold custody of his minor son was not an absolute right, but qualified by the paramount consideration for the welfare of the minor. The father may disentitle himself to custody on account of his conduct and in the light of facts and circumstances of each case."

The priority for the custody of children awarded to related females is as follows: mother, mother's mother, father's mother, child's real sister (from the same parents), child's sister through mother (from another husband), child's sister through father (from another wife), maternal aunt,⁶² paternal aunt.

The custody of children, in the absence of the father, is awarded to the residuaries (*'aṣabāt*) in order of inheritance for the male child. In the case of the female child such a person must be within the prohibited degree of marriage and must also be a reliable person who is not a *fāsiq*, otherwise the *qāḍī* is to award custody to one of the reliable female relatives. An additional condition, in the case of both children, is that the residuaries be Muslims, that is, have the same faith as the children.

Where the mother marries a man, who is not related to the child and is a complete stranger for the child, custody is to be taken away from the mother. Where the mother becomes an apostate custody is to be taken away from her.⁶³

When the mother loses the right to custody, the right passes to the father, because the females mentioned in the priority above derive their right through the mother.

12.3 Duration of custody (*ḥiḍānah*) granted to mother

According to most jurists, the male child is to remain in the custody of the mother till he becomes independent of the female, that is, when he

62. In *Nighat Firdous v. Khadim Hussain*, 1998 SCMR 1593, the lower courts had granted custody of the minor to the father on the grounds that the father has an absolute right to claim custody of a child over seven years of age, and that maternal aunt has no such right. The Supreme Court observed that the maternal aunt had taken care of the child when he was fifteen days old at the time of the death of the minor's mother. Throughout this period the father had not taken any interest in the minor but after the maternal aunt filed an application for maintenance of the minor child, the father filed a custody petition.

63. The courts have mostly presumed that the welfare of the minor lies in giving custody to the mother, subject to supervision and control of the father. The grounds for disqualification of right of mother to custody are not strictly followed if the same are not affecting the welfare of the minor. In *Muhammad Tahir v. Raees Fatima*, 2003 SCMR 1344, the Supreme Court disallowed the father's petition for custody of the minor children and disagreed with his contention that he was allowed to take custody from the mother because the mother was illiterate, had no source of income and that she had developed an illicit relationship with another person. The court held that a mother who had not contracted marriage after divorce was a fit person to hold custody.

can eat and drink independently and can dress up independently. Some jurists say that he is to remain with the female till he can perform ablution (*wuḍʿ*) independently, that is, he can perform *istinjā'* independently. According, to al-Khaṣṣāf, he is to stay with her till the age of seven, which is generally the age when the male child can perform the above tasks.

In the case of the female child, the mother exercises custody till the child starts menstruating. When custody is exercised by females other than the mother or one of the grandmothers, the rule for the female child is the same as that for the male child, and both are to be delivered to the father for custody when they reach the age of seven.⁶⁴

The rule of analogy requires that the male child too should stay with the mother till the age of puberty, however, this analogy has been given up in favour of *istiḥsān*, which in turn is based upon the consensus of the Companions (God be pleased with them).

12.4 Duration of custody (*ḥiḍānah*) granted to father

The custody granted to father, and to other males, in the absence of the father, begins with the age of seven for the male child and extends up to his puberty. In the case of the female child, when custody was being exercised by the mother or a grandmother, the custody of the father begins at the age of puberty (but the girl is really a major at this age and acquires independence for many things). When custody was being exercised by a female other than the mother or one of the two grandmothers, the father acquires custody of the female child in the same manner as he acquires that of the male child, and in both these cases the custody extends up to the age of puberty.

Although custody, technically, terminates at the age of puberty, it depends upon whether the child is trustworthy for being granted independence. This applies to the male child as well the female child when they are sane. When the children are trustworthy, it is they who exercise the choice of where they will stay.

64. In *Khalida Parveen v. Muhammad Sultan Mehmood*, PLD 2004 SC 1, the Supreme Court set aside the orders of the High Court whereby it had disallowed the petition of the mother under section 491 Cr.PC. for recovery of her minor daughter aged 2 years on the ground that the minor was too attached to her father. The court held that the custody of the two-year old daughter by the father was illegal and improper and that the mother was entitled to custody.

12.5 Location for exercising custody

As long as the parents of the child are married to each other, the place of custody is where the parents reside. If the husband wishes to take the child with him to another town, he cannot do so as long as the child is of the age in which custody belongs to the mother. If the mother wishes to leave town, with or without the child, while the custody of the child is with her, the husband has the right to prevent her from doing so. Likewise, if the woman is undergoing her waiting period, she is not entitled to move out of the place of custody with or without the child, nor does the husband have the right to expel her from the house.

When the waiting period is over and the woman wishes to move with the child to another town which was her original town, she may do so if that is the town in which her marriage took place and she wishes to return to it. In case of any other town, she cannot do so unless the father of the child permits it. Nevertheless, the father cannot forcibly take away the child from the mother.⁶⁵

A woman cannot move the child in her custody to the *dār al-ḥarb* even if she was married to the father of the child there, because doing so is considered harmful for the child. She may do so if both parents belong to the *dār al-ḥarb*.

65. In *Shaista Naz v. Muhamamd Naeem Ahmad*, 2004 SCMR 990, the Supreme Court held that the High Court has the power to issue directions in the nature of *habeas corpus* under section 491 Cr.P.C if the child is illegally or improperly removed. The High Court had granted custody to the father on the ground that the mother, on contracting second marriage, had lost the right to *Hizanat*, and was no more entitled to custody of the minor, but the Supreme Court set aside the order of the Court, holding that even on remarriage the mother was entitled to retain custody and the custody would not, *ipso facto*, devolve on the father. The High Court should have been directed to approach the Guardians Court.