



**08th Asia-Pacific International Conference on Quality of Life,
Dokez Eylul University, Izmir, Turkiye, 22-24 May 2024**

Child Maintenance after Divorce: Review on the practices in Malaysian Shariah Courts

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Abstract

This paper reviews the practices of the Shariah courts in Malaysia in determining child maintenance applications. It adopts the qualitative legal research methodology, where data was collected from international treaties, legislation, and child maintenance cases decided by the courts and analyzed descriptively and thematically. The study reveals the existence of non-standardization practices related to the assessment of the needs of the child and the father's ability due to the general provisions and the absence of guidelines for judges. This study highlights the need for establishing guidelines to ensure children can enjoy a better quality of life even after divorce.

Keywords: divorce, child maintenance, Malaysia, Shariah courts

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DOI: <https://doi.org/10.21834/e-bpj.v9i29.6024>*

1.0 Introduction

Under normal circumstances, when both parents are still together, they typically share the responsibility of caring for their children under one roof and providing for their needs. The position of who will take care of and provide for the needs of the children becomes a significant question after the couple is divorced. In an ordinary post-divorce proceeding involving Muslim children in Shariah courts in Malaysia, the first issue to be decided is who will be given custodial rights. In many cases, child custody is awarded to the mother. After the custody decision is made by the court, the custodial mother usually applies for child maintenance from the non-custodial father to cover the children's expenses (Shanizah, 2023; Zainul & Nurhidayah, 2018). The court will determine an amount after considering some criteria prescribed in the law.

2.0 Literature Review

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From the Islamic perspective, the responsibility to provide maintenance for children is the inherent obligation of a father to his children, both during marriage and after divorce. This injunction is based on the Quranic verse which says, 'clothing and maintenance must be borne by the father, reasonably' (al-Baqarah:233) and a hadith where a wife, Hind bint Utbah, came to the Prophet and lodged a report against his husband (Abu Sufyan). The wife claimed that her husband had failed to provide sufficient maintenance for her and her son. She said, "Abu Sufyan is stingy. He does not give enough for my son and me unless I take it secretly". The Prophet then said, "Take what you and your son need on a reasonable basis (bi al-ma' ruf)" (Narrated by al-Bukhari, 5049).

Receiving maintenance is a right of children, as stated in the United Nations Convention on the Rights of the Child (UNCRC) 1989. Article 27 provides that the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the living conditions necessary for the child's development (<https://www.unicef.org/child-rights-convention/convention-text>).

In Malaysia, several provisions have been introduced to regulate children's rights to maintenance. The Islamic Family Law Act 1984 (IFLA) has provided seven specific sections on child maintenance. Section 72(1) is considered the main provision that states:

'Except where an agreement or order of Court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention, and education as is reasonable having regard to his means and station in life or by paying the cost thereof.'

It shows that the law has listed five aspects to be prepared by the father; accommodation, clothing, food, medical attention, and education. In addition, Section 73 lists situations when the court can intervene in child maintenance issues: if the father neglects to provide reasonable maintenance to the children, if he has deserted his wife and the children are under her custody, while any matrimonial proceeding is still pending; when a decision relating to custodial rights to the children is still in the process; and before approving any polygamy application made by the father. Meanwhile, Section 76 of the IFLA provides: "The Court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether such agreement was made before or after the appointed date, notwithstanding any provision to the contrary in the agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do." In a normal situation, a child is entitled to receive maintenance from the father until he or she turns 18. However, Section 79 of the IFLA allows the age limit to be extended under several circumstances: "If the daughter who has not been married; if the child has a mental or physical disability; or if the child is pursuing a higher education or training."

Upon receiving the applications, the courts will make a decision after considering the child's needs, the father's means, and his station in life. However, the current provisions are too general. Because of this generality, judges use their own discretion to interpret the provisions based on their understanding and knowledge (Bahiyah, 2015).

Nurhidayah and Lindsey (2016), in a study conducted on more than 25 child maintenance cases decided by the Shariah courts, found that the amounts determined were not consistent, between RM100 and RM200 per child per month, and quite low compared to the amounts claimed by the mothers. In many cases, the amounts also did not reflect the non-custodial father's true ability to pay. Moreover, Bahiyah Ahmad et al. (2020) strengthened the claims that the amount determined in child maintenance cases was generally low and not consistent. Through interviews with Shariah judges, wives, and academics, the authors proposed a maintenance rate that is considered more suitable for a child every month; RM498 for a child below 4, RM340 for a child aged 4-6, RM429 for a child aged 7-12, RM460 for a child aged 13-17, and RM600 for a child aged 18.

This study aims to review the practices of the Shariah court in Malaysia. The objectives are to identify the approaches of the Shariah courts and highlight the need to establish proper guidelines to ensure children can enjoy a better quality of life even after the divorce.

3.0 Methodology

This study adopts the methodology of qualitative legal studies with a doctrinal approach. The main data is obtained from primary sources, namely the United Nations Convention on the Rights of the Child (UNCRC) 1989 as one of the international treaties that highlighted the rights of children and legal provisions from the Islamic Family Law (Federal Territory) Act 1984 (IFLA). Additionally, this study refers to child maintenance cases reported in *Jurnal Hukum* (JH), Shariah Law Report (ShLR), the online databases of the Malayan Law Journal (MLJ), and unreported cases decided by the Shariah courts in order to review the practice and the approaches taken by the judges. Data was also collected from secondary sources, such as legal books, academic articles, thesis reports, and websites. The data collected was analyzed descriptively and thematically to comprehend the development of child maintenance law and issues surrounding the practice. Access to unreported cases is quite difficult as we are subjected to certain policies and ethics. The data collected are considered sufficient and constitute a valid representation of the general views of the practice and approaches taken by the courts.

4.0 Findings

4.1 Evaluating the needs of the child

As mentioned earlier, the IFLA has provided several provisions concerning child maintenance. Upon receiving applications, the courts will determine a specific amount to cover the child's needs for five aspects prescribed in the law: accommodation, clothing, food, medical

attention, and education. However, the law does not provide a clear definition of the 'needs of a child' or a procedure for evaluating a child's real needs.

4.2 Evaluating the father's means and station in life

Even though the IFLA in Section 72 states that 'the father's means and station in life' are to be assessed before the decision is made, it is found that there are no meanings provided in the law concerning the terms of 'means or salary or income.' Likewise, no guidelines are given on how to evaluate the financial ability of a father.

4.3 Heavy burden placed on the mother

The common practice of the Shariah courts is that the custodial mothers, who act as the plaintiffs in child maintenance proceedings, are also burdened with many other heavy and difficult procedures, some of which can be considered unrealistic, starting with looking after the children and ending with obtaining evidence showing the father's financial ability.

5.0 Discussion

5.1 Evaluating the needs of the child

Based on the data, it seems that courts recognize three forms of needs; first, 'indispensable needs', or something we must have in order to survive (*daruriyyat*); second, 'required needs' or something we want to have in order to enjoy a quality life (*hajjiyyat*); and third, 'luxuries' or something we wish to consume in order to enjoy a beautiful life (*tahsiniyyat*). However, the judges are not given any guidelines as to which type is considered the real interpretation of children's needs. As such, judges are free to apply their discretion in choosing any type they think is suitable, which leads to non-standardization in the decisions made. This study found two different approaches among judges; some accepted that the 'needs of the child' refer to 'the indispensable needs' only, which normally refer to the minimum basic needs to survive. But some others accepted that it is not limited to 'the indispensable needs' but also 'the required needs', which are meant to make life more comfortable.

The approaches taken affect the decisions made; the first group tends to assess more rigidly, evaluate claims strictly, and discard any items they believe are not included in the definition of the term. As a result, they usually grant a low amount of child maintenance. On the other hand, the second group tends to assess more generously, consider the child's quality of life, prefer a more compassionate and flexible approach, and usually grant a higher amount of child maintenance.

The case of *Rohana v Mohd Faizal* [2009] illustrates the first approach in assessing the child's needs. The mother applied for the maintenance of three children, aged 2, 4, and 7, and informed the court that the father used to pay RM100 to RM300 randomly, but it was insufficient. Due to the insufficient amount, the mother had to contribute almost RM600 per month. As such, she applied for RM1350 for the children and presented a list of expenses needed, including formula, milk, diapers, tuition fees, clothing, school fees, and uniforms. However, the court rejected most of the claim and said; 'The main focus of the court is the 'indispensable needs' of the children; claims for items that exclude that category will not be considered. Attending tuition classes is not 'indispensable needs' of children, and the mother should pay the costs if she wants her child to be tutored.'

Meanwhile, the second approach can be seen in the case of *Sarah v Adam* [2018], where the mother sought RM13,205 monthly from the father, who earned around RM27,000 per month for the maintenance of two children (RM8,700 for the first child and RM4505 for the second child). Here, the court was more flexible and generous. Although the amount decided was slightly reduced from the amount claimed by the mother, the judge clearly explained his stand that in dealing with the needs of children, the amount decided should include 'indispensable needs' as well as 'required needs' that could help the children have a comfortable and quality life.

5.2 Evaluating the father's means and station in life

Although the law states the father's means and station in life are the important criteria to be assessed by the courts, our study found that Shariah courts do not evaluate those criteria thoroughly. The courts generally consider that the father's income refers to a monthly salary from his employment, assuming he is employed. Therefore, the payslip issued by his employer is considered the main proof to be presented in court. Normally, the payslip states the basic pay, allowances received, and compulsory deductions made by the employer, such as income tax, car loan, *zakat* deduction, the Employee Provident Fund (EPF), and other optional deductions. After these deductions, the final amount left is the father's net salary, which will usually be treated as the basis for the maintenance of the children.

This approach can be seen in the case of *Maryam v Hithir* [2006], where the mother applied to increase the amount decided in the earlier proceeding from RM200 for two children to RM1,000 per month and argued that the increase was intended to cover the increasing cost of schooling and other needs of the growing children. The father was an insurance agent, self-employed, and ran his own company with some staff under him. Nonetheless, the court did not evaluate the father's station in life, the mother was required to bring the father's payslip from his employer as proof of his financial capacity, which the father did not have. As such, the mother failed to obtain any. Refusing to entertain the reality of the situation, the judge nonetheless said: 'In assessing the amount of maintenance, the court shall accrue based on the financial capability of the father compared to the needs of the children. As Plaintiff failed to prove Defendant's financial capability, the court will rely on the oral defense of the father.'

It is found that no extra evidence concerning the father's financial strength- such as bank statements, assets owned, credit card statements, or the status of living enjoyed by the father, has been considered by the courts. This approach creates big problems when

dealing with self-employed fathers, businessmen, or 'freelancers' who receive no employer payslips. This study found that the courts nonetheless follow the common assumption that 'income' refers to salary from employment and expects a payslip to be submitted as evidence.

5.3 Heavy burden placed on the mother

As the Plaintiffs in the child maintenance applications, the mothers have been burdened with several heavy tasks. First, they are the custodial mothers who look after the children. Second, they apply to the court for child maintenance from the fathers. Third, they must prove the expenses needed by the children by producing all relevant documents and bills. Fourth, they must bring proof to show that the father has the capacity to pay the amount claimed; to some extent, they might need to apply for additional court orders to obtain the documents. If the father is an employee with a monthly salary, the mother is responsible for obtaining the father's payslip. Suppose other documents are needed, for instance, an Employee Provident Fund (EPF) report or other financial documents relating to the father, the onus is also placed on the mother to obtain and submit them to the court. Not only that, the mother has to apply for another court order, namely an order for the disclosure of documents by the father or a subpoena, which is an order to ask a person to testify or produce documentation in court.

This issue can be seen in the case of *Zashahhana v Nabil* [2020], where the mother who claimed maintenance for her children was asked to bring proof of her ex-husband's monthly payslip, but she failed to do so. As such, she had brought her two brothers as witnesses, who testified to their views of the defendant's financial capabilities. However, the brothers' testimony was rejected, and the judge said: 'The witnesses failed to convince the Court of the defendant's financial ability to pay child maintenance as claimed.' Ironically, the judge then added, 'It is difficult for the court to determine the defendant's ability because the defendant did not cooperate well in disclosing his ability.'

It shows that, instead of assisting mothers who have acted on behalf of their children to acquire maintenance from their fathers, the approaches taken by the courts seem to defeat this purpose. These practices do not portray the objectives of the law, which is to protect the rights of the children to receive sufficient maintenance from their fathers after the divorce.

6.0 Conclusion & Recommendations

The current practices of the Shariah courts create difficulties for the mother as the plaintiff and the children. It makes the proceedings of child maintenance applications longer and more costly, especially for mothers who must engage lawyers to assist them. This paper recommends that the current practices should be improved by providing comprehensive binding guidelines to assist judges in handling child maintenance applications. The guidelines should provide a clear definition of 'income' and what constitutes an income for both employed and self-employed fathers. For instance, income should include any money received from work, earnings from employment, overtime and bonuses, earnings from self-employment, or investment (such as renting out property or dividends from shares). It should also include any funds received from government schemes, benefits, and entitlements. The guidelines must provide comprehensive provisions concerning children's needs. Their needs for the five items mentioned in the law must be clearly prescribed. They should not only cover their 'indispensable needs' but also their 'required needs.' The guidelines should also provide comprehensive provisions and methods for assessing the father's financial ability, including the mechanism and documents needed to be presented by the fathers to the courts, as well as clear steps to be taken against non-compliant parents. It is hoped these reforms could make child maintenance applications in the Shariah courts become more child-centric, assist children in having a better quality of life, and prevent them from becoming victims of a complicated and difficult process of reclaiming their rights to maintenance.

Acknowledgments

The authors thank the Institute of Leadership & Development (ILD) Universiti Teknologi Mara (UiTM) for their approval and support.

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