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CUSTODY OF MUSLIM INFANTS

In an article on "Custody of Muslim Infants" (1977) J.M.C.L. 19 reference was made to two cases decided in Kelantan on the subject. In this note it is proposed to refer to a Kedah decision¹ and some decisions of the Saudi Arabian courts on the same subject.

In the Kedah case of *Rosna binte Ismail v. Mohamed Nor bin Hashim*² the plaintiff, the mother of the child, Duratul Ambiyak binte Abdul Hamid, claimed custody under S.41(3) of the Kedah Administration of Muslim Law Enactment, 1962. It seemed that the father of the child died on the 6th of March 1974 and after his death, his grandmother Cik binte Akib and his brother, Mohamed Nor bin Hashim came to his house and took away the child. The child was looked after by the grandmother and the defendant, Mohamed Nor, claimed that his brother had said before he died that the child should be looked after by him. The Kathi after hearing the plaintiff and the defendant and two witnesses called by the defendant, held that the mother was entitled to the custody of the child; He relied on a statement in a book by Mohamed Amin Alkuwai to the effect that when there are male and female claimants, priority is to be given to the mother, then to the mother's mother and so on how high soever who are entitled to become heirs. The matter was taken up on appeal³ but the appeal was dismissed.

In the Saudi Arabian case of *Abdul Qadir v. Suban*⁴ Suban, being the maternal grandmother was the legal custodian of Maryam, as her mother had remarried after the death of Maryam's father. As Suban intended to move to Madina, where her daughter, the child's mother was living, Abdul Qadir, the paternal uncle of Maryam applied to the court claiming the right of custody over Maryam as he was the 'asaba and therefore legal representative of his brother in matters of custody. According to the classical Hanbali doctrine, if one of the separated parents or his legal representative in his absence, intends to change residence to a place over

¹ I am indebted to Encik Ishak bin Ahmad B.A. (Hons.) University Kebangsaan Malaysia from whose thesis the case is obtained.

² Alor Star Kes Mal No. 22 of 1974. See Appendix 1.

³ Alor Star Kes Rayuan No. 1 of 1974. See Appendix 2.

⁴ High Court of Mecca, Case No. 53 Vol. 46 (1376 A.H. 1956 A.D.). See Ibrahim Ahmad Ali and Abdul Wabab Abu Sulaiman, Recent Judicial Developments in Saudi Arabia, (1969) 3 Journal of Islamic and Comparative Law, p. 13.

the distance of *masafat al qasr*⁵, the father or his representative is entitled to the custody over his child in preference to the mother or her representative. The judge however preferred another opinion expressed by Ibn Al-Qayyim⁶. In his statement the judge declared "The grandmother has the right of custody of Maryam, as the latter's mother has remarried. As regards the grandmother's intention to move to Madina, I chose to apply the opinion of Ibn Al-Qayyim to the effect that the change of residence should not affect the right of custody. Therefore Suhan will remain Maryam's custodian, for it is to the benefit of the child to be near to his mother especially in the early days of her life". In choosing this opinion, the judge considered the fact that although the distance between Mecca and Medina, exceeded *masafat al-qasr* i.e. two days travel by ancient means of transport, it is now less due to modern means of transport. Thus it should not be permitted to affect the child's future, since the uncle could easily see her whenever it was necessary.

In another Saudi Arabian case, *Bagazi v. Awwad*⁷, the child Abdullah, aged 10 years, the son of the plaintiff, chose to live in the custody of his mother. In such a case although the law gives the right of custody to the mother, it also gives the father the right to look after his son during the day time. Complications arose when the father intended to change his residence for a time and asked his son to accompany him. The judge gave the following decision —

"The son's choice to live with his mother has given her the right to look after him at night and although the father possesses the right to look after his son during the daytime he is not permitted to take him away. Since the father has the intention to travel to Hadramaut, the ward will be left in his mother's care day and night. This is according to the classical legal principle which states "If the changing of residence is for temporary purposes the ward will be entrusted to the care of the settled parent regardless of sex."

Ahmad Ibrahim

⁵The distance is given as given as two *marhalah* or the distance that can normally be covered by a camel travelling a day and a night. The equivalent distance is given as 88½ kilometres or 48 miles.

⁶Ibn Al-Qayyim, *Zad al-Ma'ad* Vol 4 p. 191-192.

⁷High Court of Mecca Case No. 83 Vol. 1 (1380 A.H. 1960 A.D.) See Ibrahim Ahmad Ali and Abdul Wahab Abu Sulaiman, *op. cit* p. 14.

APPENDIX 1

ROSNAL BINTE ISMAIL v MOHAMED NOR BIN HASIIM

(Mahkamah Kadi Besar, Alor Star (Shaik Abdul Aziz bin Ahmad W. Besar)
Disember 1974).

*Undang-Undang Keluarga - Tuntutan Pelibara Anak - Kebajikan anak -
Enakmen Pentadbiran Undang-Undang Islam, Kedah, 1962, S.41(3).*

Perkara: Tuntut pelihara Duratul Ambiyak Bt. Abdul Hamid, umur 4 ta-
hun 7 bulan dibawah fasal 41/3/b/III undang Pentadbiran Agama Islam
nombor 9 tahun 1962, Negeri Kedah.

Pada 1hb. Disember 1974 Tuntutan dan Jawapan hadir. Tuntutan tidak
membawa saksinya manakala Jawapan dua orang sebagai saksi bagai pihak-
nya.

Tuntutan memberi keterangan melalui penolong pembicara Mahkamah
iaitu Syikh Al Haj Hamzah B. Ahmad Dahalan. Tuntutan berkehendakkan
kepada anaknya iaitu Duratul Ambiyak Bt. Abdul Hamid untuk dipelihara
yang sekarang ini berada kepada Jawapan iaitu Mohd. Nor B. Hasyim.
Sebelum ini anak itu berada bersama ibunya iaitu Rosna Bt. Ismail.

Pada 6hb. Mach 1974 bapa anak itu meninggal dunia maka anak itu
diambil oleh Cik B. Akib dan diberi kepada Jawapan dengan cara datang
kerumah Tuntutan. Mereka datang bertiga iaitu Cik Binti Akib, Mohd. Nor
B. Hasyim dan Yaakub pada 4hb April 1974.

KETERANGAN JAWAPAN

Anak itu iaitu Duratul Ambiyak Bt. Abdul Hamid sebenarnya dipelihara
oleh Cik B. Akib sejak dari kecil lagi. Di antara sebab-sebab mengapa anak
ini mesti berada di dalam peliharaan saya ialah:—

- a) Anak ini adalah waris saya.
- b) Abang saya Abdul Hamid telah wasiat sebelum ia meninggal dunia
bahawa anak ini hendaklah dipelihara atau di jaga oleh saya.
- c) Anak ini tidak dapat memutuskan kasih sayang saya kerana di peli-
hara sejak dari kecil lagi.

KETERANGAN SAKSI I JAWAPAN:

Setelah memberi ikrar katanya: Saya Daud B. Jusuh ada mendengar wasiat
bapa anak ini kepada adiknya iaitu Mohd. Nor B. Hasyim.

KETERANGAN SAKSI II JAWAPAN:

Setelah memberi ikrar katanya: Saya Cik B. Akib bahawa Jawapan (Mohd. Nor B. Hasyim) adalah cucu saya, kedua dua mereka ini adalah anak-anak kepada anak saya iaitu Cik Tom Bt. Cik.

ALASAN DAN HUKUMAN:

Setelah aku halusi kedua dua pihak iaitu Tuntutan dan Jawapan bahawa sebenarnya anak itu anak yatim dan dipelihara oleh Mohd. Nor sekarang ini, setelah ditimbang dan berpegang kepada nas yang berbunyi maksudnya: Apabila berhimpun lelaki dan perempuan maka keutamaan hendaklah diberi kepada ibu kemudian ibu-ibu hingga keatas yang menjadi ahli waris.¹

Dan tiada sabit apa-apa halangan daripada menyerahkan anak itu kepada ibunya pada syarak. Maka aku hukum hendaklah diserahkan pemeliharaan Duratul Ambiyak Bt. Abdul Hamid kepada ibunya Rosna Bt. Ibrahim dan hendaklah Mohd. Nor B. Hasyim membayar ganti rugi perbicaraan ini.

¹ Muhammad Amin Alkuwai' Al-Arbaa Ash-Shafii *Tanwin Al-Qulub mua' matat alamul-ghuyub.*

APPENDIX 2**MOHAMED NOR BIN HASHIM v. ROSNA BINTE ISMAIL**

(Mahkamah Rayuan Syariah, Alor Star (Datuk Sheikh Haji Abdul Majid Mohamed Nor, Datuk Haji Wan Ibrahim bin Wan Soloh, dan Haji Tajuddin bin Haji Abdul Rahman, February 27, 1975).

Undang-Undang Keluarga – Tuntutan Pelihara Anak – Rayuan – Enakmen Pentadbiran Undang-Undang Islam, Kedah, 1962, S.41(3).

PERKARA:

Tuntutan seorang anak perempuan bernama Duratul Ambiak di bawah seksyen 41(3) b cerai III. Pentadbiran Undang-Undang Agama Islam Kedah yang telah di hukum oleh Tuan Kadi Besar pada 1/12/1974.

KENYATAAN DAN HUKUMAN:

Pada 27/2/1975 Jawatankuasa Rayuan bersidang di Jabatan Hal Ehwal Agama Islam, Alor Star, dan telah mengkaji dengan teliti buku tidak puas hati perayu dan perjalanan perbicaraan serta bayan hukum kadi berdasarkan hujah-hujah dan nas oleh Jawatankuasa bersetuju dengan sebulat suara hukuman Kadi Besar pada 1/12/1974 dalam kes mal 22/74 yang berbunyi, inilah aku hukum hendaklah diserahkan pemeliharaan Duratul Ambiak Binti Abdul Hamid itu kepada ibunya mulai dari hari ini adalah berbetulan menurut hukum syarak. Oleh itu Jawatankuasa ini mengesahkan hukuman Kadi Besar itu.

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THE ADMINISTRATION OF MUSLIM LAW ENACTMENT, SABAH, 1977 (No. 15 of 1977)

In an article on the administration of Muslim law in Sabah, (1975) J.M.C.L. 309 the view was expressed that there appears to be a gap in the administration of the Muslim Law in Sabah and that this gap appears to have been only partially filled by the enactment of the Administration of Muslim Law Enactment, 1971. In particular no provision had been made for civil jurisdiction in Muslim matters.

That gap has now been filled by the enactment of the Administration of Muslim Law Enactment, 1977 (No. 15 of 1977). There was some confusion before as to whether it was the Muslim law or the Native Customary law that was applicable to Muslims; this also appears to be resolved by the fact that jurisdiction is given to the Courts of the Kathi Besar and the Kathi under the new enactment, thus separating the administration of the Muslim law from the administration of the Native Customary Law.

Before dealing with the detailed provisions in the Enactment it might be useful to consider the constitutional position. The Constitution (Amendment) Enactment, 1973 of Sabah amended the Sabah Constitution to provide that Islam is the religion of the State. In 1976 the Federal Constitution was amended (by Act A354) to provide in effect that the Constitution of the State of Sabah shall make provision for conferring on the Yang di Pertuan Agong the position of Head of the Muslim Religion in that State. No such amendment has yet been made in Sabah and the Constitution (Amendment) (No. 2) Enactment, 1976 (No. 17 of 1976) which appears to have been enacted to bring the State Constitution into conformity with the amendments made by Act A354 of 1976 does not have such a provision. It is also strange to find that although Article 161D (relating to freedom of religion) has been repealed by Act A354 of 1976, the Constitution (Amendment) (No. 2) (Enactment), 1976, has amended paragraph (6) of Article 24 of the Sabah Constitution instead of repealing it.

The Administration of Muslim Law Enactment, 1977, in effect regards the Yang di Pertuan Negeri as the Head of Islam in Sabah. The President and Members of the Majlis Agama Islam, Sabah are appointed by the Yang di Pertua Negeri on the advice of the Chief Minister (S. 3). The Yang di Pertua Negeri appoints the Mufti on the advice of the Chief Minister (S.9). The Kathi Besar, the Kathis and the Members of the Syariah Court of Appeal are appointed by the Yang di Pertua Negeri on the advice of the