



KARAMAH

MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS

Ask Zahra

Welcome to the Ask Zahra advice column! Sister Zahra is ready and willing to answer your questions about Islam. Her answers are based on years of studying Islamic scholarship and culture throughout the Muslim world. Zahra welcomes your questions, and looks forward to providing balanced and credible access to information on the many issues that are important to Muslim women. If you have you have more questions about Islam or Islamic law, contact us [here](#).

Question: Could you provide some insight into the mother's right to the custody, *hadanah*, of her children, male and female, in the case of divorce in Islamic law? Does she have the right to keep them with her? Is there an age limit as to how long she can do so? What if the mother wishes to remarry? Does she loose her right to the custody of her children?

Answer:

In the event of divorce, the term *hadanah* in Islamic law refers to the **upbringing of a minor child by the mother or by someone who is legally entitled to it**. The Arabic root of the word *hadanah*, literally means to hold in one's arms, to embrace, and to place on the lap. A broader definition of the word refers to nursing, bringing up and raising a child. The concept of *hadanah* therefore refers to taking physical care of a child who is not able to do so by him/herself. It includes protection, love and care, education, and sheltering. In this context, *Hadanah* does not entail any legal responsibility or rights over the child. Legal and financial guardianship is referred to by the term *wilayah*, and has different rules in Islamic law.

The Qur'an did not address the question of *hadanah* directly, but general guidelines can be found in verses such as "And whatever the messenger has given you take, and whatever he has forbidden you refrain from"^[1]. There are however numerous hadiths that dealt with the issue, in one instance for example, a woman came to the prophet and complained that her husband divorced her and wishes to take her child away from her. She said: "Messenger of God, this is my son, my womb contained him, my lap held him, and my breasts nurtured him; but his father divorced me and wishes to take him away from me. The prophet said: "You have the first right to him as long as you do not remarry."^[2] Subsequently, records of the *sahabah* show that the mother was

always given preference over the father in matters of *hadanah* in the early stages of her children's life. In an interesting incident, Abu Bakr, the first khalifah, ruled in favor of Omar's ex-wife, Um 'Assim, and granted her the custody of her child saying: "I heard the prophet say: a mother should not be separated from her child." [3]

Needless to say that the emphasis in dealing with all *hadanah* matters is on **the best interest of the child**. Giving priority to the mother is therefore based on the assumption that it serves the child's best interest, the mother being best at nurturing her child and meeting his/her needs. In fact, Muslim scholars have been so driven by the child's best interest that they concluded that *hadanah* is the right of the child not the parents. Subsequently, it falls on the shoulders of the parent who is best qualified to meet the physical, emotional and educational needs of the child, the mother being better qualified during the early stages of life. The Shafi'is parted from this view and decided that it is a joint right of the mother and the child.

Muslim Sunni schools of legal thought differ on the age limit

of *hadanah*. Here again as in other instances where women's status and rights are an issue, cultural influences have transcended Qur'anic principles in shaping Muslim scholars' understanding and rulings. The *Hanafis* for instance, ruled that in case the mother has the *hadanah* of her children, she keeps her daughter until the age of nine (9), at which age the girl becomes the object of sexual desire for men and needs her father's protection. Worst yet, the Hanbalis define the age limit of *hadanah* for the girl at seven (7), at which age her *hadanah* goes to the father. The latter is in their view more trusted to protect and preserve his daughter until she gets married. Surprisingly, the Malikis differ from both views and rule that the girl stays with her mother until she marries. Their reasoning, however, falls in the same patriarchal trap as they justify their ruling by the fact that the mother is more likely to understand her daughter's needs as she steps into womanhood and teach her the skills that would enable her to be a good wife. Only the Shafi'is steer away from this line of thinking and state that the child, female or male, stays with his/her mother until the age of seven (7), at which age they can choose whether to stay with the mother or live with their father. Modern scholars generally agree that the age limit for the mother's *hadanah* is seven years for boys and nine for girls, after which they move to their father's care.

There is a consensus among Muslim scholars from all Sunni schools that **the mother always comes first in the line of females granted the *hadanah* of a child in the early years of life unless she is morally unfit to assume such responsibility or she willingly forfeits it.** *Hadanah* moves in this case to the next female in the line, generally the maternal grandmother or the maternal aunt. The father comes after a long line of females alternating between the maternal and the paternal sides. The Hanafis for instance give priority to the mother, her mother, the father's mother, then come the sisters: sister from the mother and father, maternal sister, and paternal; then the maternal aunt, and finally the paternal aunt.

The Malikis give priority to the mother, the mother's mother, then the maternal aunt. *Hadanah* goes next to the females from the father's side, starting by his mother then her mother, his sister, his aunt, and finally it goes to his niece. The Shafi'is start with the mother, then her mother and the mother's mother, then it is transferred to those who inherit of her mother, then the sister, the maternal aunt, and finally the paternal aunt. Finally the Hanbalis state that after the mother, *hadanah* goes to her mother, then grandmother after which it goes to the father and females from his side.

In case the mother wishes to remarry, Most Sunni scholars rule that she lose her right of *hadanah*, which moves to the next female in line, unless she marries someone related to her child, his/her paternal uncle for instance. This puts the mother between a rock and a hard place as she has to choose between her children and starting a new life for herself. Imam Ibn Hanbal slightly parts from this view and rules that in case the mother remarries, the boy's *hadanah* goes to the father, but the girl stays in the care of her mother.^[4] They justify their ruling by the fact that caring for children is a big responsibility that no man will tolerate sharing his wife's attention with her children from a previous marriage. However, this consensus has been questioned by two great Muslim scholars, first al-Hasan al-Basri, states that the mother keeps the right to the *hadanah* of her children, male and female, regardless of whether she remarries or not^[5].

The second scholar, Ibn Hasm al Andalussi, engages in a long counter-argumentation to refute the arguments used to rob the mother from her right to care for her children and yet have a new life for herself. He starts by the strong affirmation that: "The mother is more entitled to the *hadanah* of her young son and young daughter until they reach puberty and they are mentally able and physically fit whether she (the mother) is a free woman or a slave, got remarried or not, and whether the father lives in the same city or moves to a different one.^[6]" After this strong introduction, he exposes the flaws in the Muslim scholars' consensus about this issue. Not only there are no valid arguments from the Qur'an or Sunnah that support their position, but to the opposite, there are verses and hadiths that support the mother's right to keep her children's *hadanah* even in the event of her remarriage. First, the Qur'an says: "Mothers shall suckle their children for two full years.^[7]" It therefore the mother's divine right to keep their children for the whole breastfeeding period regardless of whether they remarry or not and it is not permissible for anyone to take away a right granted by God. Second, there are many hadiths that imply that mothers are entitled to their children's *hadanah* even after they remarry. In one instance, the step father of Anas ibn Malik came to the prophet and asked him to take Anas as a personal assistant. Anas was 10 years old at the time and he was living with his mother and her husband Abu Talhah, the step father in question. In another instance, hadith shows that Umm Salamah married the prophet and yet kept her children from her previous marriage with her. Finally, there is no hadith sahih [authentic hadith] stating that the mother loses her children's *hadanah* if she remarries ^[8]. As to the hadiths that are usually quoted to support the argument that the mother's remarriage cancels out her right to *hadanah*, Ibn hazm

dismisses them for obvious flaws in the chain of narration or the credibility of narrators, including the record involving Abu Bakr and Omar. He then concludes: “We therefore state that the mother’s remarriage does not cancel out her right to *hadanah* provided she is trustworthy and her new husband is trustworthy as well and this is supported by the texts to which we referred^[9].”
And God knows best.

Raja El Habti

[1] The Qur’an, 59:7.

[2] Sunan Abi Dawood, hadith 2276 (Hassan).

[3] Al-Bayhaqi, as-Sunan al Kubraa, 8:5. In Arabic.

[4] Ibn al-Qayyim al Jawziyyah, Zaad al-Ma’aad fi Hadyi Khayre al-’Ibaad, 5: 455 (in Arabic)

[5] Ibn Abi Shaybah al ‘Absi, Musannaf ibn Abi Shaybah, 5:327 (in Arabic)

[6] Ibn Hazm, al-Muhalla, 10:323.

[7] The Qur’an 2:233

[8] Ibn Hazm, al-Muhalla, 10: 325-327.

[9] Ibn Hazm, al-Muhalla, 10:325