

[Home](#) > [Marriage according to the Five Schools of Islamic Law](#) > [Custody \(Al-Hidanah\)](#) > Surrendering of the Right to Custody

Custody (Al-Hidanah)

Custody has no connection with guardianship (*wilayah*) over the ward with respect to marriage; it is limited to the care of a child for its upbringing and protection for a period of time during which it requires the care of women. Custody is the right of the mother by consensus, though there is a difference of opinion regarding: the period after which it expires, the person who is entitled to custody after the mother, the qualification for a woman to act as a custodian, her right to receive a fee for it, and other aspects which we shall discuss subsequently.

The Right to Act as a Custodian

If it is not possible for a mother to act as the custodian of her child, to whom will this right belong?

The Hanafis observe: It is transferred from the mother to the mother's mother, then to the father's mother, then to the full sister's, then to the uterine sister's, then to the paternal sister's, then to the full sister's daughter, and so on till it reaches the maternal and paternal aunts.

The Malikis say: The right is transferred from the mother to her mother, how high so ever; then to the full maternal aunt; then the uterine maternal aunt, then the mother's maternal aunt, then the mother's paternal aunt, then the father's paternal aunt, then his (father's) mother's mother. then his father's mother and so on.

The Shafi'is say: The mother, then the mother's mother, how high so ever, on condition that she inherits: then the father, then his mother, how high so ever, on condition that she inherits; then the nearest among the female relatives, and then the nearest among the male relatives.

According to the Hanbali, the mother is followed by her mother, then her mother's mother, then the father, followed by his mother: then the grandfather followed by his mother; then the full sister; then the uterine sister; then the paternal sister; then the full maternal aunt; then the uterine maternal aunt, and so on.

The Imamiyyah observe: The mother, and then the father. and if the father dies or becomes insane after he has taken the child's custody, the right to custody will revert to the mother on her being alive, because she is better entitled than others—including the paternal grandfather—even if she has married a stranger. If the parents are not there, the custody of the child will lie with the paternal grandfather, and if he isn't there nor has an executor, the child's custody will lie with its relatives in order of inheritance, the nearer taking precedence over the remote. If there is more than one relative of the same class, such as the maternal and paternal grandmothers or maternal and paternal aunts, the matter will be decided by drawing lots in the event of contention and dispute. The person in whose name the lot is drawn becomes entitled to act as the custodian till his death or till he forgoes his right. ¹ This is also the view of the Hanbalis (*al-Mughni*, vol. 9, *bab al-hidanah*).

The Qualifications for Custody

The scholars concur regarding the qualifications required for a female custodian, which are: her being sane, chaste and trustworthy, her not being an adulteress, a dancer, an imbibor of wine, or oblivious to child care. The purpose of these requirements is to ensure the proper care of the child from the viewpoint of physical and mental health. These conditions also apply if the custodian is a man.

The schools differ as to whether being Muslim is a condition for custodianship. The Imamiyyah and the Shafi'i schools say: A non-Muslim has no right to the custody of a Muslim.

The other schools do not consider Islam as a requirement for a custodian, except that the Hanafis say: The apostasy of a custodian, male or female, terminates his/her right to custody.

The Imamiyyah state: It is compulsory that the female custodian be free from any contagious disease.

The Hanbali school says: It is compulsory that she should not suffer from leprosy and leukoderma, and that which is important is that the child should not face any harm.

The four schools have said: If the mother is divorced and marries a person who is unrelated to the child, her right to custody shall terminate. But if the husband is of the child's kin, the right to custody remains with the mother.

The Imamiyyah observe: The right to custody terminates with her marriage irrespective of whether the husband is related to the child or not.

The Hanafi, the Shafi'i, the Imamiyyah and the Hanbali schools have said: If the mother is divorced by the second husband, the disability is removed and her right to custody reverts after its earlier termination due to her marriage.

According to the Maliki school, her right to custody does not revert.

The Period of Custody

The Hanafis say: The period of custody for a boy is 7 years, and for a girl 9 years.

The Shafi'i school observes: There is no definite period of custody; the child shall remain with its mother until it is able to choose between the two parents; and when it has reached the discriminating age it will choose between the two. If a boy chooses to stay with his mother, he will stay with her during the night and spend the day with his father, so that the father can arrange for his instruction. If a girl chooses to stay with her mother, she will continue to stay with her during the day as well as in the night. If the child chooses both the parents together, lots will be drawn between them, and if the child keeps quiet and does not choose any one of them, the custody shall lie with the mother.

The Malikis consider the period of custody for a boy to be from birth until puberty and for a girl until her marriage.

According to the Hanbali school, it is 7 years irrespective of the child's sex, and, after that, the child can choose to live with one of the parents.

The Imamiyyah have said: The period of custody for a boy is 2 years, and for a girl 7 years. After this, the custody shall lie with the father until the girl reaches the age of 9, and the boy the age of 15; there after they can choose to live with one of the parents.²

Fee for Custody

The Shafi'i and the Hanbali schools state: A female custodian has the right to claim a fee for her services irrespective of whether she is the mother or someone else. The Shafi'i's clarify that this fee shall be paid from the child's assets if any; otherwise it is incumbent upon the father, or upon whoever is responsible for the child's maintenance.

The Malikis and the Imamiyyah³ observe: The female custodian is not entitled to any fee for her services. But the Imamiyyah add: She is entitled to be paid for breast-feeding. Therefore, if the child has any assets she shall be paid out of that; otherwise, the father shall pay it if he is capable of doing so (*al-Fiqh 'ala al-madhahib al-'arbdah*, vol.4: *al-Masalik*; vol.2).

The Hanafi school has said: The payment of fee for custody is *wajib* if: there does not exist any marital relationship between the female custodian and the child's father: if she is not in the course of observing the *'iddah* of a revocable divorce given by the child's father: if she is observing the *'iddah* of an irrevocable divorce of an invalid marriage, in which case she is entitled to receive maintenance from the child's father. If the child has any property, the payment shall be made from it: otherwise the payment shall be made by the one responsible for the child's maintenance (*al-Ahwal al-shakhsiyyah* by Abu Zuhrah).

Travelling With the Child

In case the mother takes the child under her custody, and the father intends to travel with his child to settle down in another town, the Imamis and the Hanafis say: He cannot do so. The Shafi'i, the Maliki and the Hanbali schools observe: He can do so.

But if it is the mother who intends to travel with the child, the Hanafi school gives her the right to do so if the two following conditions are met: (1) That she be migrating to her own town; (2) that the marriage contract should have been recited in the town to which she is migrating. If any of these two conditions is not met, she is forbidden to travel except to a place so near that it is possible to return before it gets dark.

The Shafi'i and the Maliki schools, and Ahmad in one of the two traditions narrated from him, observe: The father has greater right over the child irrespective of whether he is moving or she (*Rahmat al-'ummah fi ikhtilaf al-'a'imah*).

The Imamiyyah state: A divorced mother is not permitted to travel with the child under her custody to a far-off place without the consent of the child's father. The father, too, is not permitted to travel with the child to any town which is not the mother's hometown while the child is in her custody.

Voluntary Breast-Feeding and Custody

The difference between custody and breast-feeding (*al-ridad*) is that by 'custody' is meant only the upbringing and care of the child: it excludes breast-feeding, which involves the infant's nourishment. Because of this difference, it is valid for a mother to forgo her right to breast-feed while her right to custody remains intact. The Imamiyyah and the Hanafi schools concur that if a woman volunteers to breast-feed a child gratuitously while the mother refuses to breast-feed without recompense, the woman volunteering shall be given precedence over the mother, whose right to suckle her child is lost. But her right to the custody of her child shall remain as it is, and the child shall be under her care while the nurse comes to feed it or it is taken to the nurse to be fed.

If a woman volunteers to act as a child's custodian, the child shall not be separated from the mother, according to the Imamiyyah and the other schools which do not require compensation for a custodian's services.

But the Hanafis, who consider the payment of compensation for custody as *wajib*, observe: Where the mother refuses to act as a custodian unless she is paid and another woman volunteers to act as a custodian, the mother is better entitled to custody if the compensation is to be paid by the father, or if the woman is an outsider and there are no women custodians among the child's relatives. But if the woman volunteering is related to the child and the compensation lies upon an indigent father, or is to be paid from the child's property, the other woman shall be preferred, because, in such a situation, the child is

saved from payment of fee out of its assets by the woman volunteering. Therefore, she shall be given preference over the mother in the child's interest (*al-'Ahwal al-shakhsiyyah* by Abu Zuhrah).

Surrendering of the Right to Custody

Is the right to custody specifically the right of a female custodian that terminates on her surrendering it—similar to the right of pre-emption which can be surrendered— or is it a right of the child that binds the female custodian precluding her right to surrender it, as in the case of a mother's right which cannot be surrendered?

The Imamiyyah, the Shafi'i and the Hanbali schools observe: Custody is the specific right of a female custodian, and she can surrender it whenever she pleases and she shall not be compelled to act as a custodian on her refusing to do so. There is a tradition from Malik regarding this. and the author of *al-Jawahir* has argued on its authority that the legists have not concurred that a female custodian can be compelled to act as a custodian, and the Shari'ah does not expressly mention such compulsion; on the contrary, the texts of the Shari'ah apparently consider custody similar to breast-feeding, and, consequently, she has the right to surrender her custody at will.

The same principle applies where a child's mother seeks a divorce from her husband by surrendering in his favor her right to custody of the child, or when the husband surrenders to her his right to take away the child after the expiry of her period of custody. This form of divorce is valid and neither of the two can refrain from discharging their agreement after it is concluded, except by mutual consent. Similarly, if the two compromise and she surrenders her right to custody or he surrenders his right to take away the child, the compromise is binding and its fulfillment is *wajib*.

Ibn 'Abidin has reported a difference of opinion amongst the Hanafis on this issue. He has pointed out that it is better that custody be considered as a right of the child, so that the mother does not have the right to surrender her responsibility to act as a custodian to make compromise over it, or to exchange it for securing a divorce.

The Sunni Shari'ah courts in Lebanon consider a divorce of this kind as valid, but consider as invalid the condition that she would surrender her right to custody; any compromise which includes the surrendering of her right to custody is considered void *ab initio*. But the Ja'fari Shariah courts consider the divorce, the condition and the compromise as valid.

[1.](#) Al-Jawahir and al-Masalik, bab al-zawaj: al-hidanah.

[2.](#) The child's right to choose to live with the father or the mother on reaching this age is not in conflict with the (Lebanese) law according to which the age of majority is 18 years; because this age has been considered by the law as a condition for marriage and not for choosing between the parents.

[3.](#) The author of al-Masalik has inclined towards the absence of any compensation for custody, and the author of al-Jawahir has inclined towards its presence. Considering that there is no explicit reference in the Shari'ah about compensation being *wajib*, and considering that it is not customary to pay compensation for custody, the opinion expressed by the author of al-Masalik is correct.

Source URL:

<https://www.al-islam.org/marriage-according-five-schools-islamic-law-muhammad-jawad-mughniyya/custody-al-hidanah#comment-0>