

Part Two: A Study of the Legal Issues of Child Custody (Hidhanat)

Child Custody According to the Holy Qur'an

It was explained in part one that according to the teachings of the Qur'an the mother is obliged to breastfeed her baby up to twenty one months after its birth. It is clear, however, that besides feeding on milk, the baby needs certain caring to keep on nourishing; and this caring is to be performed, in normal circumstances, by someone who has the most emotional and physical relations with that baby.

Talking about taking care of the child, which is called *hidhanat* (custody) in juridical and legal texts, has since long ago been of interest to the Muslim scholars. In addition, because of its significance and the great role it plays in forming and adjusting socio-familial relationships, it has been examined in various chapters of legal books and the traditions of the infallible household of the Prophet (S.A.W.).

Although the root word *hadhana* and its derivatives are not used in the Holy Qur'an, but the root *kafala* concerning the issue of child custody and providing for its needs have been brought up in two instances; one about the Prophet Moses (A.S.) and the other for the Holy Mary (S.A.).

In the two *suras* of *Surat Ta Ha* and *Surat al-Qasas*, God mentions the story of Moses. When his mother put him afloat in an ark and Asiya, Pharaoh's wife, took him from the water, he rejected the breasts of the foster suckling-mothers. Afterward he was returned to his family as per her sister's advice:

﴿When your sister walked up [to Pharaoh's palace] saying, "Shall I show you someone who will take care of him (yakfuluhu)?" Then We restored you to your mother, that she might be comforted and not grieve.﴾¹

﴿And We had forbidden him to be suckled by any nurse since before. So she said, "Shall I show you a household that will take care of him (yakfulunahu) for you and will be his well-wishers?﴾²

The motivation behind sending back Moses (A.S.) to his family was to undertake his *kifala* (taking charge of his care), except that *kifala* in the first statement refers to one person and in the second to a group, i.e. the household of Moses (A.S.).

Thus, by definition, *kifala* includes tasks that are partly done by the foster suckling-mother and partly by other people, or at least part of those tasks could be undertaken by others, which is clearly implied from the statement ﴿and will be his well-wishers﴾.

In *Surat Al-i Imran*, the holy Qur'an brings up the issue of taking charge of Mary's care (*kifala*) by Zechariah. Having stated how Imran's wife dedicated to Him what was in her belly and the birth of Mary, Allah first emphasizes that Zechariah took charge of Mary's care:

﴿Thereupon her Lord accepted her with a gracious acceptance, and made her grow up in a worthy fashion, and He charged Zechariah with her care.﴾³

Then He mentions that charging him with her care has been determined by casting lots:

﴿These accounts are from the Unseen, which We reveal to you, and you were not with them when they were casting lots [to see] which of them would take charge of Mary's care (yakfulu), nor were you with them when they were contending.﴾⁴

Choosing a guardian (*kafil*) by casting lots denotes a disagreement existing between Zechariah and the dignitaries of Bani Isra'īl, which the Qur'an points out with surprise. A disagreement that can be an outcome of everybody's desire to take charge of Mary's care, as it can be due to everyone's unwillingness to do so, as well. In the former case, Mary's moral-spiritual merits and certain familial and social considerations lead to casting lots and in the latter case, the adverse economical conditions caused by draught prompted it.⁵

Three possibilities have been brought up in exegetical texts as to when the disagreement over Mary's guardianship occurred.

- a) Upon her birth and being handed over to the mosque by her mother in order to fulfill her vow.
- b) While she became an orphan as she lost her parents.
- c) While she reached maturity and Zechariah's inability to provide for her livelihood.⁶

It is clearly understood from what was said above that *kifala* (guardianship), at least in its Qur'anic application, is used in a more inclusive meaning than child custody. *Kifala* in this usage includes all aspects of a human being ranging from breastfeeding to provision for his/her living expenses and caretaking without any time limitation; but custody does not enjoy such comprehensiveness, as will be explained in the following chapters.

Preliminary Discussions

The term *hidhana* in Arabic is derived from the root *hadhana*. In Arabic *hadhana* means "the distance between the armpits to the loins", "the chest and the two arms and what includes in between", that can be summed up as "embrace".

Accordingly, *hidhana*, which can grammatically be either infinitive or noun⁷, means, "to clasp the baby to one's breast", "to nurture the baby", "to embrace the baby", which can be viewed as a synonym to "nursing" and "wet nursing".⁸

In Islamic jurisprudence, *hidhana* is used in its lexical meaning⁹ and it does not have a new meaning (legal reality) – as some believe. Thus, using the word *wilaya* in the meaning of "guardianship" for the definition of *hidhana*¹⁰ would not be correct.

Among the issues open to discussion about custody is whether it is a right or a decree. Some believe that religious laws (legal fabrications) are divisible into right and decree, the most important difference of which is in transferability of their use to others; and also the possibility of refusing to use it (*isqat* = relinquishment) in case it is a right and the impossibility to do so in case it is a decree.¹¹

If we accept that transferability and relinquishment are two basic features of right, then it is argued whether child custody is a right or a decree.

To those who believe custody is a kind of guardianship (*wilaya*), it is a decree, for *wilaya* is among the granted legal decrees which are removed or devised by the grantor or legislator and the one who is religiously accountable (*mukallaf*) has no option in fabricating or not fabricating them; consequently, neither of the parents can refuse to accept it.

However, those who do not regard *wilaya* as valid in the concept of custody, naturally view it as among the rights; as a result either of the parents would be permissible to refuse to take care of the child (accept its custody).¹²

To our opinion, even if we regard custody to be among the rights, no conclusion can be made from it for the permissibility to refuse to put it into action in all cases; for, right is divisible in one aspect into two types of natural–innate and entrusted.

The entrusted right is an authority given to a person by law and perhaps it can be viewed as synonym to "sovereignty"; natural right, however, is one genetically enjoyed by everybody without requiring any legal authority, like right to freedom.

Accordingly, undertaking a person's custody takes place in one of the following two ways: 1. Genetic (natural) and 2. Legislative (granted); for, in some cases, one's genetic relationship with another person in itself is sufficient to undertake their custody, but in some other cases, one has to be *permitted* to take over a task or someone's affairs.

For example, every human being undertakes their own affairs because of their innate authority over themselves without needing anything or anyone in this authority; in contrast, however, if they wish to interfere in others' lives and undertake to manage them, they have to have permission for it. [13](#) In cases where the custody of parents is concerned, mention is made of a natural-genetic right that is created as soon as a filial relationship is realized.

Naturally, such a right cannot be relinquished so much as the genetic relationship between the child and its parents cannot be relinquished, especially if we remember that custody is a reciprocal right. On one side is the child and on the other either the father or mother. On one hand if the child is not protected, it would fall prey to annihilation – so the parents are obliged to protect and support their child, and on the other hand, the realization of father-child or mother-child relationship itself necessitates the parents and not other people to undertake their child's care.

Therefore, it is incumbent on the parents to fulfill their duties in this respect and they are not allowed to shun this responsibility, for failure in this case would inflict serious harms on the child. [14](#)

However, as we will explain in the following chapters, besides the parents and the child's blood relatives who naturally undertake the child's custody; there are other people who can undertake this task, such as a person who by specific conditions can undertake the custody of abandoned babies.

Although picking up abandoned babies from public passageways (*iltiqat*) is a collective obligation, by leaving the baby to the finder of the baby or any other person through the organizations which are authorized to make decisions about such a baby, that person is privileged (permitted) to undertake the baby's custody.

This privilege or right is a legal right according to which God has given the person the responsibility of taking care of a baby and that person has the right to relinquish or transfer it to others. As he can discontinue his cooperation in this respect or due to losing the competence for taking care of the baby the right to custody is taken back from them.

Finally, it is concluded from all the traditions related from the Infallible Imams (A.S.) that from the viewpoint of Islamic law, taking care of the child is the father's main responsibility; although at a juncture this responsibility is transferred to someone else such as the mother. In all the traditions dealing with the mother's entitlement (precedence) to the custody of the child, it is stressed that the mother's priority is temporary and at a certain due time, it is nullified. [15](#) Nevertheless, the traditions stating the father's status mention his priority and entitlement (precedence) without any limitation or determining a specific due time and as an inclusive law (a man is more entitled than a woman to his child's custody because of his status as a father). [16](#)

Stages of Child Custody

The issue of child custody is examinable in two stages: the infancy and afterwards; or, in other words,

before and after two years of age.

It is evident that the issue of custody and who should undertake this responsibility is brought up when the parents have been separated; but in case of continued matrimony, this issue is out of discussion because the parents cooperate in taking care of their child.

1. Child Custody before the Age of Two

Some jurists believe that the custody of a child before the age of two is to be undertaken by the mother¹⁷; others believe that the custody of the child is upon both parents, even though they are separated.¹⁸

Despite certain arguments¹⁹, the most significant reason that the proponents of both views present is the traditions related from the Infallible Imams in Islamic sources.

Regarding their content, these traditions are divisible into three categories:

1. Partnership of both parents in child custody (the tradition related by Dawud b. Husayn).²⁰
2. Child custody as exclusive to the mother: Viewing the mother as more deserving (*ahaqq* = more rightful) towards her child, these traditions state this priority sometimes in respect to breastfeeding²¹ and at other times irrespective of it.²² As a result, some jurists argue that the lack of reference to the object of this priority (omission of the dependent – *muta'allaq*) denotes the generality of mother's priority in the custody of her child. Moreover, they claim the correlation between breastfeeding (*ridha*) and child custody (*hidhanat*) have implied that during the breastfeeding period the child custody rests with the mother.²³
3. Child custody as Exclusive to the mother (absoluteness of the tradition is related by Ibn 'Abbas and Fudhayl b. Yasar).²⁴

Survey and Summation of the Narrations

The first group of the traditions, including that of Dawud b. Husayn, is reliable in *sanad* (chain of transmission). This tradition in itself includes all parents, either divorced or still in marriage bond, and denotes that taking care of the child in its first two years of life, i.e., infancy, is upon both the parents who share this task together.

However, it must be noted that, as an explanation of the statement of the verse 233 of *Surat al-Baqara*: ﴿Mothers shall breastfeed their children for two full years﴾, the Imam (A.S.) has uttered the statement "So long as the baby is suckling, its custody is equally shared between the parents". In addition, we said previously that this verse suggests that after separation from their husbands, the mothers are obliged to breastfeed their babies for two full years if their husbands ask them to do so, and that the babies can be weaned before two years only if the parents make such decision by mutual consent and consultation.

Therefore, the phrase "equally shared between the parents" is derived from the statement ﴿with mutual consent and consultation﴾ and has nothing to do with the issue of *hidhanat* (custody)²⁵, thereby none of the objections raised against the *sanad* or evidentiary proof of this tradition by some jurists would be valid.²⁶

From among the second group of traditions, although varied in type, only the tradition related by Ayyub b. Nuh via Shaykh al-Saduq is valid in its chain of transmission. The content of which denotes the mother's priority in the custody (*hidhanat*) of her child up to the age of seven.

Ayyub b. Nuh's tradition has constrained the absoluteness of the third group traditions, i.e. the traditions related by Abi al-ʿAbbās and Fudhayl b. Yasar which denote the father's priority in the custody of his child. The above would sum up to the fact that during the first two years of the child's life (i.e., infancy) the mother is superior over the father in taking care of the child.²⁷

It is worth mentioning that in order to be able to undertake the custody of her child; the mother has to meet certain qualifications that will be talked about later on.²⁸

It is to be noted that a child can be turned over to its mother to be taken care of (custody) during its first two years of life (infancy) as long as the mother consents to breastfeed her child. However, if she rejects to do so, the father is permitted to hire a foster suckling-mother for the child and take it away from its mother;²⁹ because, as mentioned above, taking care of the child (its custody) is upon the father and the mother would take up this responsibility for a limited period due to a specific reason. Transfer of custody to the mother is sure to occur when the mother breastfeeds her child for free or for a wage equal to that demanded by others; otherwise, the principle of non-transfer of child custody to the mother is in effect.³⁰

2. Child Custody after the Age of two

Once the infancy period is over while the parents have separated, who should undertake the custody of the child?

Answer to this question can be examined in the form of three hypotheses:

2. 1. The parents being alive: In case the parents are divorced and are both alive, there are various views stated by the jurists on the custody of the child in terms of its gender. The most important is the priority of the mother in the custody of a son up to the age of two and a daughter up to the age of seven. To prove this as agreed by all jurists (consensus), reference has been made to the reconciliation of the traditions and preference of the traditions denoting seven years of age;³¹ of course, none of these reasons are sufficient to prove it and the differentiation between a son and a daughter concerning custody does not seem right.³²

As stated previously, the custody of the child, although after being weaned, is the main responsibility of the father; however, the mother is also given the right to undertake this responsibility up to the age of

seven if she wishes so irrespective of the child's gender.^{[33](#)}

The best evidence for proving this view is the tradition related by Ayyub b. Nuh, which explicitly states: "The woman is more deserved to [take care of] her child until it reaches seven, unless she wishes otherwise."^{[34](#)} It is obvious that this statement can constrain the absoluteness of the tradition related by Dawud, the tradition related by Abi al-Abbass and the one related by Fudhayl b. Yasar^{[35](#)} denoting the father's priority, and regard his right as authorized after the age of seven.^{[36](#)}

2. 2. Either of the parents being alive: In case the mother dies while undertaking the custody of her child (to the age of seven), the responsibility of the child custody will be transferred to the father.^{[37](#)} Since the child custody – as it was said before – is the responsibility of the father and it is transferred to the mother for seven years in case she desires so; therefore, the father has priority over others in his child's custody. The possibility of transferring this privilege to the child's maternal grandmother – as Ibn Barraaj has asserted – does not sound correct.^{[38](#)}

However, if the father dies, there is no doubt that the mother would undertake the custody of the child up to the age of seven. However, who should take care of the child after this age?

Some jurists have mentioned the restoration of custody to the mother and have invoked the verse ﴿**the blood relatives are more entitled to inherit from one another in the Book of Allah.**﴾^{[39](#)} and the verse ﴿**neither the mother shall be made to suffer harm on her child's account, nor the father on account of his child**﴾.^{[40](#)} The jurists' consensus (*ijma*), Dawud b. Husayn's tradition, Ibn Sanan's tradition, the practical principle of continuance (*istishab*), the mother's emotional condition, and the very traditions concerning *hidhanat* (custody).^{[41](#)}

In contrast, there are some other possibilities brought up such as transfer of the child custody to the father's *wasi* (executor of the father's will),^{[42](#)} to the paternal grandmother,^{[43](#)} and to the paternal grandfather, of which the latter possibility is more likely to be correct by all the reasons presented.^{[44](#)}

2. 3. None of the parents being alive: If a child loses one of its parents before it reaches maturity, who must undertake its custody?

To answer this question, first we have to look for a specific reason for which one or more persons are determined to undertake this responsibility and if there is not such a reason, seek to decide on someone by means of resorting to the existing generalities.

As it was stated before, this responsibility is transferred to the child's paternal grandfather, since seeing into and appropriation of the child's properties and making decision about its marriage, at least before reaching maturity, is only upon the grandfather to a similar level as its father in his absence. All the more so, then, the child's affairs and custody rest with him.^{[45](#)}

In case the child's grandfather is not alive, this responsibility will be transferred to the father's and

grandfather's executor. That is because the latter is the exclusive successor of the father and grandfather, who is authorized to intervene in the underage child and it is clear that custody and rearing of the child is among the duties of the father and the grandfather.[46](#)

Furthermore, although Ibn Abi ʿUmayr's tradition denotes the mother's priority over the executor, it is also implied from this same denotation that the executor has some responsibility toward the custody of the child.[47](#)

In contrast to this view, i.e., transferring the duty of child custody after the death of its parents to its paternal grandfather, other views have also been raised in Islamic jurisprudence, such as: transfer of custody to the child's near of kin according to the hierarchy of their inheritance (*awla bi mirathihi*)[48](#), transfer to the child's paternal kin (*ʿusba*),[49](#) transfer to the child's maternal aunt[50](#), which, given the previous explanations, do not sound correct.

Qualifications for Child Custody

Although the mother can take care of her child up to seven years after divorce from her husband, she has to meet certain qualifications for undertaking such a task, the lack of each one of which would lead to losing her competence to this end.

Of course, it is to be noted that if undertaking the child's custody is subject to the realization of these qualifications, there is no difference in this task between the mother and other people of equal rank or her successors.

Eight qualifications have been stated in old legal texts for confirmation of the mother's competence in the custody of her child:

1. Islam: Since before reaching maturity the child is legally attached to the religion of its father or mother, some jurists believe that the mother can take the custody of her child after separation from her Muslim husband if she is a Muslim herself.

The most important reason for this, notwithstanding the possibility of a non-Muslim mother's influencing her child's beliefs, is the impermissibility of the guardianship of a non-Muslim (unbeliever) over a Muslim child.[51](#)

To our opinion, however, what is meant by negation of way (*nafyi sabil*) in the verse ﴿and Allah will never provide the faithless any way [to prevail] over the faithful﴾[52](#) is not the negation of dominance of the non-Muslims over the Muslims, since a Muslim can have a non-Muslim employer. Rather, it means that the non-Muslim has no reason (argument) for disapproving Muslims. Furthermore, what is meant by child custody is only taking care of the child and has nothing to do with guardianship over the child so that a non-Muslim mother's taking care of a Muslim child may require the guardianship of non-Muslims over the Muslims.[53](#)

Irrespective of its weak chain of transmission (*sanad*) and as proportionate to other traditions,^{[54](#)} the tradition "Islam takes precedence over all and nothing takes precedence over it"^{[55](#)} is dedicated to inheritance and indicates that a Muslim inherits from a non-Muslim but not vice versa.^{[56](#)} So, it cannot be proved through this tradition that a non-Muslim mother cannot take the custody of her Muslim child.^{[57](#)}

2. Intellect: Among the basic requirements of the mother's custody of her child is her being sane. If the mother does not enjoy the soundness of intellect, she cannot undertake her child's custody, because she is not only unable to take care and safeguard her child, but she herself needs someone to take care and custody of her.^{[58](#)}

However, the jurists wonder if there is a difference between the periodical and chronic insanity in this respect.

Some of the jurists believe that there is no difference between these two types of insanity; for, taking care of the child (its custody) does not require guardianship over the child; thus, it can be reconciled with insanity and the decision in this regard is left with the mother's legal guardian.^{[59](#)} In contrast, some also believe that in both cases the child's custody cannot be left with the mother, unless the recurrence of the mother's insanity is extremely low and its duration is not too long.^{[60](#)}

To our opinion, however, taking care of her child is possible for a mother only in case she enjoys soundness of intellect, because how can an insane person who is unable to manage his or her own life, be able to take care of another person?

Therefore, if the mother is suffering from chronic insanity, she is certainly not qualified to take the custody of her child and transferring this issue to the mother's guardian is baseless, because child custody is not like the right of pre-emption. The right of delimitation, option of cancellation, and similar rights so that with the mother's loss of competence decision about them [her and her child] is transferred to her guardian; rather, child custody is a duty incumbent upon the mother, which will not be possible to fulfill if the mother is afflicted with insanity.

But if the mother's insanity is periodical so that she is able to do her duties, its occurrence will not endanger the child's physical and psychological health and the mother can in due time undertake her child's custody.

Of course, it is evident that if the criterion for the permission of child custody is the mother's capability, she can be judged as not forbidden from her child's custody due to periodical insanity only when its occurrence is not so frequent as to having an impact on the child's life and practically depreciate the mother's ability in taking care of her child and satisfying its needs.^{[61](#)}

3. Freedom: Among the qualifications mentioned in some of the early legal books, concerning the mother's custody of her child is that she is not a slave, which to our opinion is not a valid qualification at least for the mother.^{[62](#)}

Although talking about the rules of slavery in our time is useless due to the abolishment of slavery, this issue – by refinement of reason – can be useful in two cases. When the mother is imprisoned for committing a crime or is living in a forced labor camp; for, as the slaves have been deprived of wielding power in most of their daily affairs and unable to make independent decisions about their lives, it is also true for the person who lives in a prison or a forced labor camp.

Now the question is raised that whether the child is sent to prison along with her mother to be taken care of by her, although she is not able to make independent decisions concerning her own daily life affairs. Alternatively, it is separated from the mother to be left with the father or any other person who can legally take its custody because of the inappropriate atmosphere of such places and the destructive effects that such places may have on the personality growth of the child.

4. Freedom from Matrimonial Rights: According to this qualification, the mother may not marry while holding her child's custody.

To prove this issue, such reasons as consensus of the jurists, failure of mother in her maternal duties when remarried, and several traditions have been relied on, among which the traditions are of most importance.[63](#)

In five traditions, reference has been made to the mother's marriage and child custody and it is emphasized that the mother enjoys the right to have the custody of her child so long as she has not married. Among these traditions, of course, only Dawud Riqqi's is valid in *sanad*. However, the tradition related by Sulayman b. Dawud b. Minqari is weak for the uncertainty of its transmitter as Hafs b. Qiyath or someone else.[64](#) The tradition related by ʿAbd Allah b. ʿAmr b. al-ʿAs is also weak for its lack of *sanad* and thus both are invalid.[65](#)

In Dawud Riqqi's tradition, although the Imam does not directly talk about the prohibition of the mother's getting married, the statement "the slave is not privileged to separate his children from their mother until he is freed even though she is married"[66](#) clearly indicates that although the mother's marriage is an obstacle to her taking the custody of her child, but the father's being a slave is an obstacle to hold his child's custody as well. As his obstacle is greater than the mother's being married, the child remains in its mother's custody and upon the removal of the greater obstacle, i.e., the father's slavery, the child is returned to him.

Thus, there remains no doubt that if the mother gets married during her child's first seven years of age while the child's father is alive and there is also no obstacle for her to take care of her child, this marriage will cause the loss of her right to her child's custody, which will then be transferred to the father.[67](#)

Of course, it is clear that the mother's marriage is a barrier to her child's custody when she gets married to a man other than her ex-husband.[68](#) That is because if she remarries her ex-husband and the father of her child, the issue of custody is by itself resolved since all the evidences for custody are relevant in case the two have been separated. However, if the father dies, will the mother's marriage still result in

the loss of her right to her child's custody?

Although some jurists believe that in case the father dies, the mother's marriage will not result in losing her right.⁶⁹ To our opinion, as indicated by Dawud Riqi's tradition, the mother's marriage is an obstacle to her child's custody whether the father is dead or alive, because if the father dies the responsibility of child's custody goes to the paternal grandfather. Thus, with the mother's marriage the custody of her child is transferred to the father or his successor.

It is clear that in this problem the second husband's consent has no effect on the child custody, since the traditions that mention the mother's marriage as an obstacle are effectual irrespective of the second husband's consent or refusal.⁷⁰ In addition, the inhibition of marriage is for observing the right of the father and the child, and this right is not vindicated with the consent of the mother's second husband.

Renewability of the Mother's Right: If we accept that the mother's marriage will hinder her from taking the custody of her child, then the question is raised that if the mother separates from her second husband, can she take back the custody of her child?

Some jurists believe that if the mother separates from her second husband during the time that she enjoys the right to her child's custody – i.e., the first seven years of the child's life – she can take back her child's custody.⁷¹

If we accept such a claim, since in Islamic law a woman's separation from a man (divorce) is possible in two forms of revocable (*rij'i*) and irrevocable (*ba'in*)⁷², two possibilities are set forth. 1. The mother's right to custody is given back to her when she has separated from her second husband by irrevocable divorce, or in case she has separated by revocable divorce, her *idda* period has to be over.⁷³ 2. The criterion in the mother's renewal of her child's custody is her separation from her second husband, whether by revocable or irrevocable divorce. Since in revocable divorce there is no matrimonial obligation upon the mother, therefore she can freely take care of her child.⁷⁴

The most significant reasons presented by the proponents of the return (or restoration) theory – despite the tradition of *Abd Allah b. Amr b. al-As* which is not valid for its lack of *sanad*⁷⁵ – is that the mother's marriage is an obstacle to her child's custody. It is clear that the existence of an obstacle causes a ruling to relinquish rather than the lack of an obstacle creating a ruling,⁷⁶ therefore, the mother's priority remains intact with her separation from her second husband.

In addition, the mother's marriage makes her occupied with fulfilling her marital duties and her second husband's rights, which are far more powerful than the right to custody; now, if the mother separates from her husband, that obstacle is removed and she can undertake the custody of her child again.⁷⁷

To our opinion, however, the mother's separation from her second husband does not restore her right to undertake her child's custody, since the restoration of the mother's right after its loss requires a reason. If we have doubt in the restoration of this right, the practical principle signifies the non-restoration of this

right, just as in other instances the relinquished right will not be restored with the restoration of the circumstances to the earlier state.

5. Trustworthiness: Among the qualifications mentioned in legal texts for permitting the mother to take the custody of her child is her trustworthiness.[78](#)

Mother's being trustworthy is interpreted from two aspects. Lack of sinful signs (depravity) in her, which is sometimes mentioned as justice[79](#) or lack of perfidy and negligence in the issues related to the child's life,[80](#) which seems to be more pertinent, since a mother may not be abiding by the moral instruction of the religion but does not show the slightest negligence in taking care of her child.

Although, for proving this condition such reasons as incompatibility with guardianship (*wilayat*), uncertainty of perfidy, creation of an atmosphere of learning bad habits for the child, and the appearance of distress and constriction have been referred to,[81](#) to our opinion, the validity of the parents' having moral competence for undertaking the custody of their child does not require a specific reason, since the very legislation for custody is for protecting the life and psychophysical well-being of the children whose parents have separated by the ominous phenomenon of divorce.[82](#) Now, how is it possible to leave the child with a parent who may inflict serious physical or moral damages upon that child?

Is it logically permissible to transfer the children's custody to the parents (either father or mother) who misuse them as tools for earning money by sending them to street to engage in such acts as beggary, shoe shining, windshield cleaning, etc? Can it be claimed that the Holy Lawmaker would consent to such transference?

Besides, if we regard the child custody and leaving it to either of the parents as a trust, the generalities that validate a person to be entrusted would be evidentiary in the validity of this qualification in the issue of custody.[83](#)

6. Unchanging of the Mother's Residence: Some of the Sunni jurists believe that in order to be able to take care of her child a mother should not change her residence, whether temporarily or permanently (through traveling).[84](#)

To our opinion, although as Muhaqqiq Tusi and some other Shi'a jurists have asserted that the application of traditions on custody includes the two hypotheses of the mother's residence and change of residence, whose giving up is to be reasonable,[85](#) it should be noted that the child is not merchandise in the hands of the father or mother who have the right to possess it; rather, it is entrusted to them to take care of during the time it is not able to manage its own life and to provide means for its growth. Therefore, during the time the child is living under the supervision of its mother or father, its interests must be taken into account.

Therefore, if the change of residence does not have a negative impact on the child's life trend, psychophysical health, education, and moral conduct, it will undoubtedly live with its mother given the

(other) proofs hold true. But, if the change of residence is detrimental to it in any of the physical, psychological, emotional, religious, and educational aspects, this change will not be permissible. Nor will resorting to the absoluteness of traditions for its permissibility be possible, as certitude about the custody of either of the parents is true when the child's health is in all aspects secured.

7. Unchanging of the Father's Residence: The Sunni jurists have made the child's custody by the mother conditional on the unchanging of the father's permanent or temporary (by travel) residence, in a way that if the father decides to change his place of residence, he can take the child away from the mother.[86](#)

To our opinion, since there is no legal evidence for these issues in the traditions and Qur'anic verses,[87](#) what is in the child's best interests has to be taken into account. If being with the father or mother is to the child's interest, it would move along with them and if staying in its present residence were in his best interests, it would stay on.[88](#)

8. Unafflicted with Chronic and Contagious Diseases: We explained previously that the mother's insanity is a factor in disclaiming her competency in the custody of her child. Furthermore, some jurists have raised the question whether the mother's being afflicted with chronic and contagious diseases, as was the case for insanity, causes the loss of her competency or not.[89](#)

By raising the issue, that a child's living with its sick mother will cause harm to it and by referring to the Prophet's words warning to keep a distance from those infected with leprosy and not watering a diseased camel from the same place as the healthy animals drink, some claim that such medical considerations in a religious context prompt us to proclaim with certainty that a child must be separated from its sick mother.[90](#)

In contrast, some also believe that the mother's affliction with chronic and contagious diseases would not cause the loss of her right to the custody of her child. Proving this, they have made reference to the tradition related by Nadhr b. Qirwash al-Jammal,[91](#) as well as the traditions on custody and their non-reference to these diseases as restraining the mother's right to custody, the invalidity of mother's assistance and interference in the custody of her child and the practical principle of preference (*istishab*).[92](#)

To our opinion, the contagious diseases have to be distinguished from the chronic ones. In the contagious diseases, so long as the mother has not recovered from her illness, the child may not be left in her care; in the chronic diseases, however, its effect on the mother's ability to take care of the child is to be taken into account.

If the mother is afflicted with certain chronic diseases such as different kinds of cancers, which do not hinder the mother from taking care of her child, her right to her child's custody is retained even though she receives help from others to this end. But if this disease is so serious that it does not allow the mother to fulfill her duty and someone else is to help out, there is no doubt that the child cannot be left

with her since the narrations concerning custody are applicable where the mother is directly undertaking the duties of taking care of her child. In other words, the mother's right to custody is certainly valid when the mother is capable of fulfilling her duties so that the child's psychophysical health is not endangered.

Accordingly, it is not unlikely to claim that if the mother is addicted to narcotic drugs or alcoholic drinks, she is not qualified for her child's custody, although she is able to fulfill her duties, as its ethico-moral soundness, and in some cases its physical health, will be endangered. Thus, leaving the child with such a mother will cause the relinquishment of a purpose for which the law of custody has been devised. In the end, it is necessary to consider some points:

First: All the qualifications mentioned for custody, if we have reason for their validity, are not exclusive to the mother but common between her and the father, unless in regard to marriage, which, in case of validity, is only exclusive to the mother and is not applied to the father.[93](#)

Second: As, to our opinion, the mother's custody period includes the first seven years of the child's life, be it a boy or a girl, and after that the custody is transferred to the father up to the age of maturity, therefore, each of the parents is to observe these terms during their custody period.[94](#)

Third: The qualifications explained above are related to custody; and the custody of a child and the related discourses are in effect only when the parents have been separated. Therefore, when they are living together they both undertake their child's care and in case of the incompetence of either one, the other takes the custody of the child.[95](#)

Fourth: Given the fact that the child's infancy is part of the seven-year period that it spends with its mother, the qualifications for custody are true and necessary during the infancy, too; therefore, not asserting them for the infancy period is not because of their invalidity, rather, because of the clarity of their validity.[96](#)

Loss of the Required Qualifications for Child Custody

If either of the parents, while holding the custody of his or her child, loses any of the qualifications for this task, who will take over their duty?

1. Loss of Mother's Qualifications: Some of the jurists believe that if the mother lacks or loses one of the qualifications required for the custody of her child, then the father will substitute her and undertake the duty of the child's custody.[97](#)

Therefore, if the mother is qualified for taking care of her child but refuses to fulfill her duties for it, the father has to undertake care of his child even when the mother has the duty for that and if the father also refuses to do so, he can be forced to in order to protect the child.[98](#)

In contrast, some also claim that in this case the maternal grandmother substitutes and fulfills her

duties;⁹⁹ naturally, if the grandmother is a successor to the mother, in case of the mother's absence or her refusal to undertake her child's custody, this duty is transferred to her.

To our opinion – as we also explained before – the child's custody is the father's main intrinsic duty that for special reasons is transferred to the mother for the first seven years of its life; then, if the mother cannot or does not want to fulfill this duty, the father will substitute her.

2. Loss of Father's Qualifications: However, if the father lacks or loses one of the required qualifications, the possibility has been set forth in some legal texts that the task of taking care of the child up to maturity is transferred to the mother.¹⁰⁰

The proponents of this view believe that according to the traditions narrated by Fudhayl b. Yasar and Dawud Riqqi,¹⁰¹ if the father is a slave, so long as he is not set free, his child's custody will be left with the mother, even if she has been married to someone else. Accordingly, if other barriers to the father's custody of the child such as lack of moral competency, lack of intellectual soundness, and affliction with contagious diseases occur too, the mother, all the more so and in case of enjoying the required qualifications, has priority over other people in her child's custody. Besides the practical principle of continuance (*istishab*) also indicates the continuation of the mother's right.¹⁰²

To our opinion, however, during the time that the father is undertaking his child's custody, i.e., from seven until maturity, in case the father does not have the requirements for the child's custody or if he loses them, this duty will be transferred to the paternal grandfather. That is because with the termination of the mother's custody period, the duty of taking care of the child is transferred to the father or his successor; and as we explained before, the paternal grandfather is the successor.¹⁰³

Return of the Requirements

So far, we have stressed that custody of a child is subject to certain qualifications and if any of the parents loses one of them they will no longer be qualified to hold the custody of their child. However, it is natural to raise the question that if either of the parents regains the required qualifications for the child's custody, can the child be put under their care?

If the father regains the required qualifications, his child's custody will undoubtedly be given back to him. The statement, "he is more deserved of his child than the mother due to his status as a father" in Fudhayl b. Yasar's tradition indicates that loss of qualifications is an obstruction to the father's status and it is obvious that if the obstructions are removed, his fatherliness will restore its efficacy.

Similarly, if the mother is also able to regain the required qualifications while holding the custody of her child, for example, when signs of insanity are removed from her, her contagious disease is treated, etc., she will regain her right to the custody of her child, for the expediency for custody is retained in her. Here, only an obstacle has barred its efficacy, which if removed, the expediency will be effective, except

for the marriage of the mother, which we have previously talked about.

Parents' Relationship during the Child Custody

Among the most important issues brought up in child custody is the way the parents treat each other and the kind of relationship existing between them during this period, for as we explained before, child custody comes up when the parents have separated through divorce.

Naturally, when the parents are not living together under a single roof, the child has to live with one of them as according to the previous explanations the child, regardless of gender, lives with its mother during the first seven years of its life, and after that the father undertake its custody up to maturity.

It needs to be noted, however, that the parents' separation in itself creates tension between them, which may lead to hostile and vengeful behavior.

This unfriendly relationship between the parents would most often reach its peak by using the child as bait, that is, the child being with one parent is a means or pretext to exert indirect pressure on the other parent. For this reason, the great Shi'a jurists have since long ago attempted by stating a definition of these relations to minimize the probable damage being inflicted upon any of the parents as well as the child.

During the period in which the child is living with its father, whether due to the mother's lack of qualification for the child's custody or because her legal time for this purpose has run out, the father must make arrangements for the child's relationship with its mother in a way that neither the child nor the mother may be kept at bay. To this end, the father has to prepare the ground for certain affairs to fulfill: [104](#)

First, meeting with the child: He should prepare the ground for the meeting between the child and its mother. Moreover, not to prevent it, since preventing the child from meeting its mother would lead to breaking off the ties of relationship, which is strongly repulsive to Islam.

Second, nursing the child: If the child gets sick, the father must not prevent the mother from nursing and treating the child and hold her back from staying with her child, since the mother is more caring than others towards her child, and the sick child needs someone to take care of it and it is obvious that the mother is the most deserving person for this task.

Third, nursing the mother: When the mother gets sick, the father must not prevent the child – whether her son or daughter – to visit their mother frequently.

Fourth, child's mourning ceremony: In case the child passes away while the father is holding its custody, the mother can be present at her child's deathbed and attend to the related tasks. [105](#)

Fifth, mother's mourning ceremony: And if the mother dies, her child can be present at her deathbed, and if old enough, the child can undertake to administer the burial services such as funeral ablution, enshrouding, funeral procession, and burial, provided that the mother's husband gives them permission for this.

As the researches indicate, nothing is mentioned in any of the Shi'a legal texts about the child's relationship with its father while living with its mother. [106](#)

To our opinion, taking care of the child by any of the parents cannot lead to the relinquishment of the mutual rights of the child and parents; thus, all the things that are conventionally regarded as the requirements and functions of the father-child or the mother-child relationships are permissible and the child or any of the parents cannot be deprived of it.

[1.](#) Q. 20: 40.

[2.](#) Q. 28: 12.

[3.](#) Q. 3: 37.

[4.](#) Q. 3: 44.

[5.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Tibyan, 2/459-460; Tabrisi, Fadhl b. Hasan, Majma' al-Bayan, 283; Shawkani, Muhammad b. 'Ali b. Muhammad, Fath al-Qadir, 1/339.

[6.](#) Tabari, Muhammad b. Jarir, Jami' al-Bayan, 3/331; Faydh Kashani, Al-Safi, 1/336; Qummi Mashhadi, Kanz al-Daqa'iq, 2/87; Tabrisi, Fadhl b. Hasan, Majma' al-Bayan, 2/292.

[7.](#) Ibn Hajar 'Asqalani, Subul al-Salam, Mustata al-Albabi Halabi, 1379/1959, 3/227; Fayyumi, Ahmad b. Muhammad, Al-Misbah al-Munir, ed. Muhammad Muhi al-Din 'Abd al-Hamid, 1347/1927, 1/193.

[8.](#) See: Jawahiri, Isma'il b. Hammad, Al-Sihah, 5/2101; Lisan al-'Arab, 13/122-124; Zubaydi, Muhammad Murtaza, Taj al-'Arus, 9/180-181.

[9.](#) 'Allama Hilli, Tadhkirat al-Fuqaha, 2/295 and 311; idem, Tahrir al-Ahkam, 1/247; idem, Idhah al-Fawa'id, 3/273; Karaki, 'Ali b. Husayn, Jami' al-Maqasid, 7/129 and 246; Najafi, Muhammad Hasan, Jawahir, 27/293; Sayyid Sabiq, Fiqh al-Sunna, 3 vols. Dar al-Kutub al-'Arabiyya, Beirut, n.d., 2/388.

[10.](#) See: 'Allama Hilli, Tahrir al-Ahkam, 2/43; idem, Qawa'id al-Ahkam, 3/101; idem, Idhah al-Fawa'id, 3/263; Fadhl Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; 'Amili al-Faqhani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Ma'rifat Siyagh al-Niyyat wa al-Iqa'at wa al-Uqud, ed. Muhammad Barakat, Maktabat al-Imam al-'Asr, Shiraz, 1st edition, 1418/1997, p. 204; 'Allama Hilli, Idhah al-Fawa'id, 2/139; 'Amili, Sayyid Muhammad, Nihayat al-Maram, 1/460; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 193; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, 5/458; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, 8/421; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 25/83; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, 2/160; Fathullah, Dr. Ahmad, Mu'jam-i Alfadh al-Fiqh al-Ja'fari, 1st edition, Mtabi' al-Madukhal, 1415/1995, p. 162.

[11.](#) Tawhidi, Muhammad 'Ali, Misbah al-Fiqaha, 7 vols. 3rd edition, Qum, Matba'at al-Sayyid al-Shuhada, 1412/1992., 2/47; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 15/206-204.

[12.](#) Najafi, Muhammad Hasan, Jawahir, 31/284; Khwansari, Sayyid Ahmad, Jami' al-Madarik, 4/472-473.

[13.](#) It is by this same consideration that in relation to establishing the principle of guardianship (wilaya) it is stated that the principle is (taken to be based on) the non-guardianship and non-authority of a human ruling over another human being, because every human being is created free and independent and, in terms of creation and nature, is dominant over their own life, property, and mind. See: Muntaziri, Husayn 'Ali, Dirasat fi Wilayat al-Faqih wa Fiqh al-Dawlat al-Islamiyya, 2nd edition, Al-Markaz al-'Alimi li al-Dirasat al-Islamiyya, 1409/1988, 1/27.

[14.](#) Sayyid Sabiq, Fiqh al-Sunna, 2/338-339; also, for more information about the reasons of those who regard custody as an unrelinquishable right and criticism of them, see: Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, 5/464; Najafi, Muhammad Hasan, Jawahir, 31/284; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, 2/163; Ruhani, Sayyid

- Muhammad Sadiq, *Fiqh al-Sadiq*, 22/305; Fadhil Hindi, Muhammad b. Hasan, *Kashf al-Litham*, 2/107; Jaza'iri, Sayyid [\[Abd Allah, Al-Tuhfat al-Saniyya fi Sharh Nukhbat al-Muhsiniyya, manuscript, Astan Quds Razavi, p.296.](#)
- [15.](#) Kulayni, Muhammad b. Ya'qub, *Al-Kafi*, 6/103, No. 1 and 45, No. 3; Ibn Babuwayh Qummi, *Man la Yahdhuru al-Faqih*, 3/509, No. 4788 and 275, No. 1303 and 1305; Hurr [\[Amili, Muhammad Hasan, Wasa'il al-Shi'a](#), 15/191, No. 2-3, and 192, No. 7; Yusufi, Hasan b. Abi Talib, *Kashf al-Rumuz*, 2/201.
- [16.](#) Tusi, Muhammad b. Hasan, *Tahdhib al-Ahkam*, 8/105, No. 353; Ibn Babuwayh Qummi, *Man la Yahdhuru al-Faqih*, 3/275, No. 1304. For more information, see: Fadhil Hindi, Muhammad b. Hasan, *Kashf al-Litham*, 2/106-107; Makki, Muhammad b. Mansur, *Al-Sara'ir*, 2/652; Jaza'iri, Sayyid [\[Abd Allah, Al-Tuhfat al-Saniyya, p.295.](#)
- [17.](#) Shahid Awwal, Muhammad b. Makki [\[Amili, Al-Qawa'id wa al-Fawa'id fi al-Fiqh wa al-Usul wa al-'Arabiyya, ed. Sayyid \[Abd al-Hadi Hakim, 2 vols. Maktibat al-Mufid, n.d., 1/395; Miqdad Suyuri, Nadhd al-Qawa'id al-Fiqhiyya \[ala Madhhab al-Imamiyya, ed. \[Abdul Latif Kuhkamari, Ayatollah Mar'ashi Library, Qum, 1403/1982, 433; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 193.](#)
- [18.](#) Ibn Fahd Hilli, *Al-Muhadhdhab al-Bari'*, 3/426; also, to learn about its criticism, see: [\[Amili, Sayyid Muhammad, Nihayat al-Maram, 1/466; Tabataba'i, Sayyid \[Ali, Riyadh al-Masa'il, 2/162.](#)
- [19.](#) See: Najafi, Muhammad Hasan, *Jawahir*, 31/285; Kulayni, Muhammad b. Ya'qub, *Al-Kafi*, 5/492, No. 1; Tusi, Abu Ja'far Muhammad b. Hasan, Tusi, *Al-Amali*, ed. Bi'at Institute, 1st edition, Dar al-Thiqafa, Qum, 1414/1993., p. 342, No. 700.
- [20.](#) Kulayni, Muhammad b. Ya'qub, *Al-Kafi*, 6/45, No. 4.
- [21.](#) Kulayni, Muhammad b. Ya'qub, *Al-Kafi*, 6/103, No. 3 and 41, No. 6 and 44, No. 1; Ibn Babuwayh Qummi, *Man la Yahdhuru al-Faqih*, 3/509, No. 4788; Tamimi, Nu'man b. Muhammad, *Da'a'im al-Islam*, 2/256, No. 976.
- [22.](#) Ibn Babuwayh Qummi, *Man la Yahdhuru al-Faqih*, 3/275, No. 1303, 1305; Kulayni, Muhammad b. Ya'qub, *Al-Kafi*, 6/45, No. 3; Hurr [\[Amili, Muhammad Hasan, Wasa'il al-Shi'a](#), 15/192, No. 7.
- [23.](#) Shahid Thani, Zayn al-Din b. [\[Ali \[Amili, Masalik al-Afham, 8/421; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/302-303.](#)
- [24.](#) Shahid Thani, Zayn al-Din b. [\[Ali \[Amili, Masalik al-Afham, 8/105, No. 353; Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/275, No. 1304.](#)
- [25.](#) There are other alternatives in explaining this statement, such as: 1. the parents both share in the child custody, 2. the child is equally related to both the mother and the father; and none of them is superior [in this respect] to the other one, 3. the mother is obliged to breastfeed (ridha) and the father is obliged to pay the wage; this way rearing of the child is equally shared between the father and the mother; see: Tabataba'i, Sayyid [\[Ali, Riyadh al-Masa'il, 2/162; Najafi, Muhammad Hasan, Jawahir, 31/286.](#)
- [26.](#) Tabataba'i, Sayyid [\[Ali, Riyadh al-Masa'il, 2/162; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/304; \[Amili, Sayyid Muhammad, Nihayat al-Maram, 1/466; Bahrani, Yusuf, Al-Hada'iq al-Nadhira](#), 25/86.
- [27.](#) Shahid Thani, Zayn al-Din b. [\[Ali \[Amili, Masalik al-Afham, 8/421; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/304.](#)
- [28.](#) For more information, see: Muhaqqiq Hilli, *Shara'i al-Islam*, 2/567; Hilli, Ja'far b. Hasan, *Al-Mukhtasar al-Nafi'*, p. 194; Yusufi, Hasan b. Abi Talib, *Kashf al-Rumuz*, 2/200; Najafi, Muhammad Hasan, *Jawahir*, 31/273.
- [29.](#) Bahrani, Yusuf, *Al-Hada'iq al-Nadhira*, 25/87; Muhaqqiq Hilli, *Shara'i al-Islam*, 2/566 and 568; Ibn Barraj Trablusi, Qazi [\[Abd al-\[Aziz, Al-Muhadhdhab, 2/262; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/651; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi', p. 194; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, 2/200.](#)
- [30.](#) It is worth mentioning that in order to prove the annulment of the mother's right to custody, some jurists have referred to such reasons as: distress and constriction, correlation between custody (hidhanat) and suckling (ridha), the emergence of the term naz' (death agony) in the tradition related by Dawud b. Husayn in the child's separation from its mother, and the concept of ahaqq (more rightfull); as some have claimed – with reference to the practical principle, directing attention in judgment to the dominant case, and the non-correlation between custody and suckling – that the mother's right to custody of her child will not be annulled through her refusing to breastfeed it, which are all criticizable in their context. For more information, see: Jaza'iri, Sayyid [\[Abd Allah, Al-Tuhfat al-Saniyya, p.295; Shahid Thani, Zayn al-Din b. \[Ali \[Amili, Al-Rawdhat al-Bihiyya, 5/457; Najafi, Muhammad Hasan, Jawahir, 31/290-300, and 285; \[Amili, Sayyid Muhammad, Nihayat](#)

al-Maram, 1/466; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/436; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; ʿAllama Hilli, Idhah al-Fawa'id, 3/263; ʿAllama Hilli, Tahrir al-Ahkam, 1/247 and 2/43; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/652; Qurtubi, Al-Jami' li-Ahkam al-Qur'an, 3/169.

31. See: Ibn Barraġ Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, 2/262; Muhaqqiq Hilli, Shara'i al-Islam, 2/567; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi, p. 194; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, 2/200; ʿAllama Hilli, Tahrir al-Ahkam, 1/247 and 2/43; ʿAllama Hilli, Tabsirat al-Mutifallimin, p. 187; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lum'at al-Damishqiyya, p. 176; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/466; ʿAllama Hilli, Mukhtalaf al-Shi'a, 7/308; Najafi, Muhammad Hasan, Jawahir, 31/291; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/421-422.

32. See: Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 25-88; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; Khwansari, Sayyid Ahmad, Jami' al-Madarik, 4/474; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, 2/162.

33. Al-Wafi, 3/207, chapters on wiladat; Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p.296; ʿAllama Hilli, Tahrir al-Ahkam, 1/247 and 2/44; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, 5/131, problem 36; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 6/39; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/304.

34. Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/435, No. 4504.

35. Kulayni, Muhammad b. Ya'qub, Al-Kafi, 6/45, No. 4 and 1; Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/275, No. 1304.

36. Other views have also been brought up in Islamic jurisprudence in this respect, such as: mother's priority in custody of her child until the latter's marriage; priority of mother in custody of her son up to the age of two and the daughter up to the age of nine; mother's priority in the custody of her son until the age of seven and the daughter until the mother gets married; mother's priority in the custody of her son until maturity and the daughter until she [the daughter] gets married; mother's priority in the custody of her son until he can eat and dress by himself and the daughter until she gets married; mother's priority in the custody of her son until the age of two in case there is a clash and until the age of seven in case there is no clash; the preference of leaving the son's custody to the mother until the age of seven. For more information concerning the reasons for these views and their criticism, see: Al-Muqni, p. 360; ʿAllama Hilli, Mukhtalaf al-Shi'a, 7/306, 308, and 313; Ibn Fahd Hilli, Ibn Fahd Hilli, Al-Muhadhdhab al-Bari, 3/426-427 and 429; Ibn Barraġ Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, 2/352; Muhaqqiq Hilli, Shara'i al-Islam, 2/567; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi, p. 194; ʿAllama Hilli, Qawa'id al-Ahkam, 3/102; ʿAllama Hilli, Tahrir al-Ahkam, 2/44; Al-Marasim, p. 166; ʿAl-Muqni'a, p. 531; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/420; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; Najafi, Muhammad Hasan, Jawahir, 31/291; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, Riyadh al-Masa'il, 2/162; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 25/89; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, 5/131, issue 35-36; Makki, Muhammad b. Mansur, Al-Sara'ir, 3/653; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/467-468; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 6/39; Khwansari, Sayyid Ahmad, Jami' al-Madarik, 4/474.

37. Najafi, Muhammad Hasan, Jawahir al-Kalam fi Sharh Shara'i al-Islam, 31/293.

38. Ibn Barraġ Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, 2/353-354 and 318; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; Jawahir al-Uqud, 2/189.

39. Q. 8: 75; 33: 6.

40. Q. 2: 233.

41. For more information of how these evidences have been alluded to as well as their criticism, see: Makki, Muhammad b. Mansur, Al-Sara'ir, 2/652; Najafi, Muhammad Hasan, Jawahir, 31/293; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106-107; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/308-309; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, 2/162; ʿAllama Hilli, Qawa'id al-Ahkam, 3/102; idem, Irshad al-Adhhan, 2/40; Muhaqqiq Hilli, Shara'i al-Islam, 2/567; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi, p. 194; Ibn Barraġ Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, 2/262; ʿAllama Hilli, Tahrir al-Ahkam, 1/247 and 2/44; Kulayni, Muhammad b. Ya'qub, Al-Kafi, 6/45, No. 4 and 41, No. 7.

42. See: ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/510; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, 5/66.

43. ʿAl-Muqni'a, p. 531.

44. Although in regard to custody, none of the jurists have brought up the above possibility, it is asked in the book of

inheritance whether one can after his death hand over his child to a stranger to take care of while the child's grandfather is still alive. Giving a negative answer to this question, the Shi'a jurists – contrary to the Sunnis – have brought up some matters from which it can be concluded that the custody of the child after its father's death rests with its paternal grandfather in case the parents have already divorced and the child is over seven years of age. For more information, see: Tusi, Abu Ja'far Muhammad b. Hasan Al-Khilaf, 4/161–162, issue 40–41; idem, Al-Mabsut, 4/54–55 and 6/154–155; Allama Hilli, Tadhkirat al-Fuqaha, 2/586, 510, 460, and 80; Ali Bahr al-Ulum, Sayyid Muhammad, Bulghat al-Faqih, 4th edition, Maktabat al-Sadiq, 1403/1984, 4/72–73; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 20/398; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 6/144 and 268, and 7/195; Allama Hilli, Mukhtalaf al-Shi'a, 6/378; Makki, Muhammad b. Mansur, Al-Sara'ir, 3/204; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 19/94–95 and 22/16; Muhaqqiq Hilli, Shara'i al-Islam, 2/470 and 506; Ansari, Shaykh Murtadha, Al-Wasaya wa al-Mawarith, 1st edition, Baqiri Publication, Qum, 1415/1995, p. 61; Allama Hilli, Tahrir al-Ahkam, 1/219 and 2/541 and 7 and 7/418; Allama Hilli, Idhah al-Fawa'id, 2/52; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, 3/229; Allama Hilli, Tabsirat al-Mut'allimin, p. 173; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Rawdhat al-Bihiyya, 5/151; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus al-Shariyya fi Fiqh al-Imamiyya, 3 vols. 1st edition, al-Nashr al-Islamiyya Publication, Qum, 1412/1991 2/323; Hakim, Sayyid Muhsin, Mustamsik al-Urwat al-Wuthqa, 14 vols. 4th edition, Dar Ihya' al-Turath al-Arabi, Beirut, 1391/1971, 14/593; Najafi, Muhammad Hasan, Jawahir, 28/277.

45. To prove this view some arguments have been presented which are not free from dispute. For more information, see: Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; Najafi, Muhammad Hasan, Jawahir, 31/295; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 8/430–431; Muhaqqiq Hilli, Shara'i al-Islam, 2/567; Allama Hilli, Qawa'id al-Ahkam, 3/102; Allama Hilli, Idhah al-Fawa'id, 3/256; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Rawdhat al-Bihiyya, 5/459–460; Amili, Sayyid Muhammad, Nihayat al-Maram, 1/472.

46. Najafi, Muhammad Hasan, Jawahir, 31/296.

47. It is worth mentioning that the legal texts maintain that in case of the grandfather's death there are other possibilities such as transfer of the child's custody to the nearest of kin, the child's probable legatees in the order of their inheriting from the child, and to the Islamic ruler. For more information of the reasons for these views and their criticisms, see: Shahid Awwal, Muhammad b. Makki Amili, Al-Lum'at al-Damishqiyya, p. 176; Allama Hilli, Irshad al-Adhhan, 2/40; Qawa'id al-Ahkam fi Ma'rifat al-Halal wa al-Haram, 3/102; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106–107; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 8/431; Najafi, Muhammad Hasan, Jawahir, 31/296; Muhaqqiq Hilli, Shara'i al-Islam, 2/567; Amili, Sayyid Muhammad, Nihayat al-Maram, 1/472; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 25/97.

48. For more information about the reasons set forth by the proponents of this view, their criticisms, as well as the criterion for selecting one of the kin, see: Shafi'i, Abu Abd Allah Muhammad b. Idris, Al-Umm, 8 vols. 2nd edition, Dar al-Fikr, Beirut, 1403/1983, 5/92; Al-Tuhfat al-Saniyya, p. 295; Al-Hada'iq al-Nadhira, 25/96–97; Tusi, Abu Ja'far Muhammad b. Hasan Al-Khilaf, 5/134–137; Al-Sara'ir, 2/653–654; Qatif, Ibrahim b. Sulayman, Al-Siraj al-Wahhaj li Daf' al-Jaj Qati'a al-Lijaj, 1st edition, Mu'assisa-yi Nashr-i Islami, Qum, 1413/1990474; Al-Muqni'a, p. 531; Ibn Barraj Trablusi, Qazi Abd al-Aziz, Al-Muhadhdhab, 2/353; Al-Wafi, 2/119; Al-Wasila, p.288; Qurtubi al-Andulusi, Abu Walid Muhammad b. Ahmad (Ibn Rashid al-Hafid) Bidayat al-Mujtahid wa Nahayat al-Muqtasid, ed. Khalid Attar, 2 vols. Dar al-Fikr, Beirut, 1415/1995, 2/46; Qurtubi al-Andulusi, Bidayat al-Mujtahid, 2/43–44; Jawahir al-Uqud, 2/188; Najafi, Muhammad Hasan, Jawahir, 31/296–300; Shashi, Muhammad b. Ahmad, Hilyat al-Ulama fi Ma'rifat Madhahib al-Fuqaha, Risalat Institute, Beirut, 1400/1980, 7/437; Shara'i al-Islam, 2/567–568; Sharh al-Akhbar, 3/201–202, No. 1130; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Rawdhat al-Bihiyya, 5/461–462; Ishtahardi, Shaykh Ali Panah, Fatawi-yi Ibn Junayd, Mu'assisa-yi Nashr-i Islami, Qum, 1416/1996. p. 264; Fiqh al-Sadiq, 22/ 311; Allama Hilli, Qawa'id al-Ahkam, 3/102; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/107; Muzni, Isma'il b. Yahya, Mukhtasar al-Muzni, Dar al-Ma'rifa, Beirut, n.d. p. 235; Allama Hilli, Mukhtalaf al-Shi'a, 7/310, and 314–315; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 8/430–431 and 435; Mughni al-Muhtaj, 3/452; Amili, Sayyid Muhammad, Nihayat al-Maram, 1/472–471.

49. Tusi, Abu Ja'far Muhammad b. Hasan Al-Khilaf, 5/137–138; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/654.

50. Makki, Muhammad b. Mansur, Al-Sara'ir, 2/654; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/296.

51. Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 8/422; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-

Ahkam, p. 194; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/468; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/306;

52. Q. 4: 141.

53. Khu'i, Muhammad Taqi, Kitab al-Nikah (Mabani ʿUrwat al-Wuthqa), 2 vols. Dar al-ʿIlm School, 1407/1986, 2/311; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, 4/476.

54. Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 4/344, No. 5717–5718, Awali al-Li'ali, 3/496, No. 15; Kulayni, Muhammad b. Ya'qub, Al-Kafi, 7/143, No. 5.

55. Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 4/334, No. 5719.

56. It is to be noted that there are other possibilities brought up in the meaning of this tradition: 1. Islam will dominate all other religions, 2. Islam is the best of religions, 3. The truth of Islam is based on clear evidence and evident proofs, 4. The non-superiority of a non-Muslim over a Muslim, 5. Encouraging the Muslims to develop the scholarly global prevalence of Islam, 6. Islam will not be abrogated, 7. Devising legal ordinances that lead to the Muslims' superiority, 8. The license for the precedence of the Muslims over non-Muslims, and 9. Not legislating ordinances that lead to the non-Muslims' superiority over the Muslims. For more information, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 13/20; Yazdi, Sayyid Muhammad Kazim, Hashiyat al-Makasib, 2 vol. Ismaʿiliyan Institute, Qum, 1378/1956., 2/446; Tawhidi, Muhammad ʿAli, Misbah al-Fiqaha, 1/490 and 5/90; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 13/75 and 14/157 and 15/40; Khu'i, Kitab al-Tahara, 8/91; Khomeini, Ruhullah, Kitab al-Tahara, 3 vols. Ismaʿiliyan Institute, Qum, 1410/1989, 3/311; idem, Kitab al-Bayʿ, 5 vols. 4th edition, Ismaʿiliyan Institute, 1410/1989.2/545; Isfahani, Muhammad Husayn, Hashiyat al-Makasib, ed. ʿAbbas Muhammad Al-i Sabaʿ, 1st edition, Matbaʿa ʿIlmiyya, Qum, 1418/1997., 2/446; Ansari, Muhammad ʿAli, Al-Mawsuʿat al-Fiqhiyyat al Maysara, 3 vols. 1st edition, Islamic Thought Association, Qum, 1415/1995, 3283.

57. Najafi, Muhammad Hasan, Jawahir, 31/273.

58. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/423; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; Sayyid Sabiq, Fiqh al-Sunna, 2/342; ʿAllama Hilli, Qawaʿid al-Ahkam, 3/102.

59. Najafi, Muhammad Hasan, Jawahir, 31/287; for more information about the criticism of this issue, see: Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/307.

60. Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/423; for more information of its criticism, see: Najafi, Muhammad Hasan, Jawahir, 31/287.

61. Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194.

62. For more information about the reasons proposed for the validity of this condition, i.e., contradiction of guardianship with slavery, contradiction of custody with ownership and traditions, as well as their criticism, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/422; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/468; Ibn Hajar ʿAsqalani, Subul al-Salam, 3/229; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, 4/475–476; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 25/91; Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/275, No. 1304; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 8/107, No. 361; Kulayni, Muhammad b. Ya'qub, Al-Kafi, 5/492, No. 1.

63. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/424; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; Najafi, Muhammad Hasan, Jawahir, 31/290; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/305–306; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/469; Ibn Babuwayh Qummi, Al-Muqniʿ, Imam Hadi Publication, Qum, 1415/1995, p. 360; ʿAllama Hilli, Mukhtalaf al-Shiʿa, 7/306; Ibn Fahd Hilli, Al-Muhadhdhab al-Bari, 3/426.

64. Sulayman b. Dawud b. Minqari from Hafs b. Qiyath or other than him.

65. Kulayni, Muhammad b. Ya'qub, Al-Kafi, 6/45, No. 5; Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/435, No. 4502; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 8/105, No. 354; Abi Dawud, Sunan 4/508, No. 2276; Ibn Abi Jumhur Ahsa'i, Muhammad b. ʿAli, ʿAwali al-Li'ali, ed. Muftaba ʿIraqi, 4 vols. 1st edition, Sayyid al-Shuhada Publication, 1403/1983., 3/369–370, No. 346.

66. Ibid.

67. Muhaqqiq Hilli, Sharaʿi al-Islam, 2/567; ʿAllama Hilli, Qawaʿid al-Ahkam, 3/102; Al-Wasila ila Nail al-Fadhila, p. 288; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/651; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi, p. 194; ʿAllama Hilli,

Tabṣirat al-Muṭīʿallimin, p. 187; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. 176; Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, 5/132; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, 5/463.

68. It is to be pointed out that some of the Sunni jurists claim that if the mother gets married to her child's paternal uncle, her right to custody is not lost and she will keep on taking her child's custody: Minhaji Asyuti, Muhammad b. Ahmad, Jawahir al-Uqud, 2/189; Sayyid Sabiq, Fiqh al-Sunna, 2/344; Shawkani, Muhammad b. ʿAli, Nayl al-Awtar min Hadith Sayyid al-Akhyar, 9 vols. Dar al-Jil, Beirut, 1393/1973, 7/139.

69. Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; Najafi, Muhammad Hasan, Jawahir al-Kalam fi Sharh Shara'i al-Islam, 31/295; Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya fi Sharh Nukhbat al-Muhsiniyya, p.296.

70. Jawahir al-Uqudud, 2/189; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/424.

71. Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, 5/133; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. 176; Muhaqqiq Hilli, Shara'i al-Islam, 2/568; ʿAllama Hilli, Irshad al-Adhhan, 2/40; Jawahir al-Uqudud, 2/190; Ibn Hamza, Muhammad b. ʿAli, Al-Wasila ila Nayl al-Fadhila, ed. Muhammad al-Hassun, 1st edition, Ayatollah Marʿashi Library, Qum, 1408/1988, p. 288.

72. Revocable divorce is one after which a man has the right to go back to his wife up until the end of her ʿidda period and re-establish the marital bond. Since this type of divorce is characterized by a specific inconsistency, the woman enjoys all the rights she used to enjoy before divorce until the end of her ʿidda period; in the irrevocable divorce, however, the man does not have the right to return to his ex-wife, unless after her ʿidda period when he can marry her again observing all the marriage rules such as the woman's consent and payment of bridal gift. Naturally, during the ʿidda period the woman does not enjoy any of the matrimonial rights.

73. Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, 5/134; ʿAllama Hilli, Qawa'id al-Ahkam, 3/102; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/651.

74. Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 19/93; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106.

75. Shawkani, Muhammad b. ʿAli, Nayl al-Awtar, 7/138; Abi Dawud, Sunan 1/508, No. 2276; Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, 5/134; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/651; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/437.

76. The existence of an obstacle is effective in lack of emergence of a ruling rather than the lack of it to be effective in the existence of the ruling.

77. Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawa'id wa al-Fawa'id fi al-Fiqh wa al-Usul wa al-Arabiyya, 2/40; Nadh al-Qawa'id al-Fiqhiyya, p. 95; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, 5/463; ʿAllama Hilli, Mukhtalaf al-Shi'a, 7/310.

78. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/424; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194.

79. For a definition of justice in Islamic Jurisprudence terminology and various viewpoints about it see: Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, 2/324; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/107; ʿAllama Hilli, Idhah al-Fawa'id, 1/149; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, 12/311; Al-Wasila ila Nail al-Fadhila, p. 230; Makki, Muhammad b. Mansur, Al-Sara'ir, 1/280; Al-Urwat al-Wuthqa, 1/10; Ansari, Kitab al-Tahara, 2 vols. 1st edition, Mu'assisa-yi Al-Hadi, Qum, 1415/1994, p. 402; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 8/217; Al-Muqni'a, p. 725.

80. Al-Wasila ila Nail al-Fadhila, p. 288; Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p.296; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/469; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 25/93.

81. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham ila Tanqih Shara'i al-Islam, 8/424; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut fi fiqh al-Imamiyya, 6/40; ʿAmili, Sayyid Muhammad, Nihayat al-Maram fi Sharh-i Mukhtasar Shara'i al-Islam, 1/469; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/107.

82. Najafi, Muhammad Hasan, Jawahir, 31/289.

83. ʿAllama Hilli, Idhah al-Fawa'id, 3/265; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/107.

84. Al-Majmu' fi Sharh al-Muhadhdhab, 18/341; Sharbini, Muhammad, Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj, 4 vols. Dar Ihya' al-Turath al-Arabi, Beirut, 1377/1958, 3/452; Bada'i al-Sana'i fi Tartib al-Shara'i, 4/45; Ibn Qudama, Al-Mughni, 9/307.

85. Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 6/40; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham,

8/425; Tusi, Abu Ja'far Muhammad b. Hasan, b. Al-Khilaf, 5/132, problem No. 37; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/469; Najafi, Muhammad Hasan, Jawahir, 31/289.

86. Kashani, Abu Bakr b. Mas'ud, Bada'i al-Sana'i fi Tartib al-Shara'i, 4/45; Ibn Qudama, Al-Mughni, 9/307; Al-Majmu' fi Sharh al-Muhadhdhab, 18/342; Ghazali, Al-Wajiz fi Tafsir al-Qur'an al-'Azim, 2/71; Jawahir al-Uqudud, 2/190; also, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/425; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawa'id wa al-Fawa'id, 1/396; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/469; and for more information about other possibilities on this problem, see: Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 6/40; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/107.

87. Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 19/94.

88. Sayyid Sabiq, Fiqh al-Sunna, 2/352.

89. In early legal texts, given the knowledge of the time, mention has been made of such diseases as leprosy, scabies, anthrax, and plague (cholera); for more information, see: Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p.296; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/423 and 425; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/469.

90. Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/557, No. 4914 and 4/357; Ahmad, Musnad, 2/406; Bukhari, Abu ʿAbdullah Muhammad b. Isma'il, Sahih al-Bukhari, 8 vol. Dar al-Fikr li al-Tiba'at wa al-Nashr wa al-Towzi', 1401/1981, 7/31; Muslim, Sahih, 7/31; Abi Dawud, Sunan 2/231, No. 3911; Bayhaqi, Ahmad b. Husayn, Sunan, 7/135; also see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/425; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/469; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawa'id wa al-Fawa'id, 1/394; Damad, Muhammad Baqir, Al-Rawashih al-Samawiyya, Ayatollah Mar'ashi Library, Qum, 1405/1985, p. 165.

91. Kulayni, Muhammad b. Ya'qub, Al-Kafi, 6/40, No. 134; Mazandarani, Mowla Muhammad Salih, Sharh-i Usul al-Kafi, with additional notes by Mirza Abulhasan Sha'irani, 12 vols. n.d., 12/259; Muslim, Sahih (Nawawi, Sahih Muslim bi Sharh al-Nawawi (Sharh-i Muslim), 18 vols. Dar al-Kutub al-'Arabiyya, Beirut, 1407/1987.) 1/35; Ghaffari, ʿAli Akbar, Dirasat fi ʿIlm al-Diraya (Summary of Miqbas al-Hidaya), 1st edition, Imam Sadiq (A.S.) University, Tehran, 1369 sh. p.49; Nasr, Sayyid Hasan, Nihayat al-Diraya, ed. Majid al-Gharbawi, Mash'ar Publication, 1935/1975, pp. 168–169; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawa'id wa al-Fawa'id, 1/397.

92. ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/468; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 194; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 25/91; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, 2/162; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, 22/307; Najafi, Muhammad Hasan, Jawahir, 31/288; Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p.296.

93. Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, 2/162.

94. Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p. 296.

95. Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; Najafi, Muhammad Hasan, Jawahir, 31/284.

96. Idem, Jawahir, 31/289.

97. Idem, Jawahir, 31/295; ʿAllama Hilli, Tahrir al-Ahkam, 2/43–44; Ibn Barraji Trablusi, Qazi ʿAbd al-'Aziz, Al-Muhadhdhab, 2/262 and 352–353; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, 5/131; ʿJami' al-Khilaf wa al-Wifaq, p. 510; ʿAllama Hilli, Qawa'id al-Ahkam, 3/102.

98. Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawa'id wa al-Fawa'id, 1/396.

99. Ibn Barraji Trablusi, Qazi ʿAbd al-'Aziz, Al-Muhadhdhab, 2/353; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106.

100. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/429; Najafi, Muhammad Hasan, Jawahir, 31/295.

101. Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/275, No. 1304; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 8/107, No. 361.

102. Ibn Barraji Trablusi, Qazi ʿAbd al-'Aziz, Al-Muhadhdhab, 2/262 and 353; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/652; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, 1/470–471; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/428; Muhaqqiq Hilli, Shara'i al-Islam, 2/567; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi, p. 194; ʿAllama Hilli, Tahrir al-Ahkam, 2/44; ʿAllama Hilli, Qawa'id al-Ahkam, 3/102; ʿAllama Hilli, Tabsirat al-Muti'allimin, p. 187; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/106; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, 24/210.

103. See: ʿAllama Hilli, Tahrir al-Ahkam, 2/44.

[104.](#) For further information, see: ﷥Allama Hilli, Tahrir al-Ahkam, 2/44; Shahid Thani, Zayn al-Din b. ﷥Ali ﷥Amili, Masalik al-Afham, 8/426-427; Sayyid Sabiq, Fiqh al-Sunna, 2/351.

[105.](#) It is to be noted that some jurists while emphasizing the mother's presence at her child's preparation for burial, enshrouding, and burial service, have stressed according to some traditions that the mother is not to attend her child's funeral procession, which from the viewpoint of the Shi'i jurists is not true; see: Abi Dawud, Sunan 2/72, No. 3167; Qazvini, Muhammad b. Yazid, Sunan-i Ibn Majja, ed. Muhammad Fu'ad ﷥Abd al-Baqi, 2 vols. Dar al-Fikr, Beirut, n.d. 1/501, No. 1574-1578; Ahmad, Musnad, 6/408-409; Hurr ﷥Amili. Muhammad Hasan, Wasa'il al-Shi'a, 2/817-819.

[106.](#) It is worth mentioning that in some Sunni legal texts there are phrases that include both the father and mother: "If either of the parents gets sick or dies and the child is with the other one, it would not prevent the child to visit him or her or attend his or her funeral." Sayyid Sabiq, Fiqh al-Sunna, 2/351.

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