

# **The Best Interest of the Child: An Analysis of the Judicial Approaches in Assessing Child Maintenance Applications in Shariah Courts**

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## **ABSTRACT**

In recent years, several parties including custodial mothers have voiced their concern about child maintenance after divorce applications in the Shariah courts. The legal procedure to be followed is said to be difficult and consumed a lot of time and money. In addition, the amount granted in many cases are claimed to be relatively small, not sufficient to cover the needs of the involved children and do not reflect the non-custodial parent's ability to pay. This study investigates the approaches of the Shariah courts in assessing and determining child maintenance applications. By referring to the legal provision in the Islamic Family Law Act 1984, reported and unreported cases from 2002 to 2010 and information received from interviewees, we found that the legal provision for child maintenance is very general with no specific guidelines. As such, judges have to use their discretion in handling the applications which resulted to a range of differing, and sometimes conflicting approaches taken by the courts in verifying the criteria, particularly in ascertaining the needs of the children and the fathers' ability to pay the maintenance for the children. These approaches are not helpful in protecting the best interests of the involved children as the parties affected in the proceedings. This paper therefore, recommends that specific guidelines to be introduced in order to assist judges in assessing child maintenance applications in ways that will better protect the interests of children of divorcing parents.

**Keywords:** Malaysia, Shariah courts, Divorce, Child maintenance.

## 1. Introduction

Child maintenance, also known as child support, refers to an amount of money paid by parents to cover the needs of their children, including the cost of food, clothes, accommodation, medical care and education. According to the United Nations Convention on the Rights of the Child (UNCRC) 1989, children refers to minors under the age of 18 who are dependent beings by nature, and therefore considered entitled to receive adequate support or maintenance from their parents - both during the parent's marriage and after their divorce (<http://www.unicef.org.uk/UNICEFs-Work/UN-Convention/>).

Receiving proper maintenance is thus a special right of children. This is clear from Article 27 of the UNCRC, which states:

The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

In other words, the UNCRC requires that parents be responsible for providing their children with the best support possible within the parents' means, in order that they can enjoy an appropriate standard of living during childhood. This responsibility remains with the parents - regardless of their marital status - until their children reach adulthood or are able to provide for themselves.

Children's rights to proper and sufficient maintenance have also long been accepted in Islamic legal tradition. However, while the UNCRC requires both parents to maintain their children, most Muslim scholars take the view that the maintenance of children is solely the responsibility of the father. This is made clear in most legal texts dealing with this subject, and has been asserted by leading scholars of the various schools (al-Shirazi, 1976; Ibn Qudamah, 1989)

These scholars rely on Qur'anic verses that deal with this matter, and, in particular, Surah al-Baqarah: 233:

Mothers suckle their children for two whole years, if they wish to complete the term, and clothing and maintenance must be borne by the father in a fair manner. No one should be burdened with more than they can bear: no mother shall be made to suffer harm on account of her child, nor any father on account of his. The same duty is incumbent on the father's heir...

It is generally accepted that the statement, clothing and maintenance must be borne by the father in a fair manner is an injunction that the father be primarily liable for the maintenance of his children.

Muslim scholars often support this interpretation by reference to the *hadith* (traditions, records of the words and deeds of the Prophet Muhammad) which reports that the wife of Aby Sufyan (Hind bint Utbah) came to the Prophet and lodged a complaint against her husband. She claimed that her husband had failed to provide sufficient maintenance for her and her son, saying, Abu Sufyan is stingy. He does not give enough for me and my son, unless I take it secretly. The Prophet then said, Take what you and your son need on a reasonable basis (Sahih al-Bukhari, 1994).

Scholars usually argue that this hadith demonstrates that the wife's complaint was taken very seriously by the Prophet, as shown by the fact that he had allowed - indeed, ordered - the wife to take amounts from her husband's property to cover her costs and those of her child, even without her husband's knowledge or consent. They claim that, although the Prophet did not directly state that the father is the only party to provide maintenance for his children, his advice indicates that this was his view. Some scholars, including al-Shirazi (1976), argue that if the duty to maintain is not solely on the father/husband, the Prophet would not have commanded the wife to take the money and encouraged her to do so secretly.

## **2. The Malaysian context**

Several pieces of legislation have been enacted in Malaysia to regulate the right of children to receive proper maintenance. For Muslims, all matters concerning marriage and divorce, including custody and children's right to maintenance after divorce are governed by the Islamic Family Law Act or State Enactments. The non-Muslims on the other hand, are subjected to the Law Reform Act (Marriage and Divorce) (LRA) which was introduced in 1976. In this paper, focus is only given to the law that applies for Muslims and the practice of the Shariah court in determining maintenance for children after their parents' divorce.

In Malaysia, there are 14 different statutes on Islamic family law in total - one for each state and one for the Federal Territories. In this paper, our main reference is the Islamic Family Law Act (IFLA) enacted by the National Parliament, which governs Muslims in the Federal Territories.

All 14 statutes are, however, basically similar in nature, with only slight differences in structure and the wording of some provisions.

The Islamic Family Law Act (IFLA) was introduced in 1984 and had experienced some amendments in 2006. According to the IFLA, all divorce disputes between Muslims, including determination of child maintenance, must be dealt with in court. In a normal divorce proceeding in the Shariah courts where children are involved, the first issue to be decided once divorce is ordered is who will be given custodial rights. Although there are cases where child custody is given to the father, in most decided cases, it goes to the mother (Roslina, 2008). After the child custody decision is made, the custodial parent (typically the mother) will then apply to the court for an amount of maintenance from the non-custodial father in respect to the child in her custody. The court will assess the application and determine a sum for the child. Upon a decision, the court issues an order to this effect, known as a maintenance order.

The IFLA also allows parents to agree to a specific amount of maintenance through a *sulh* process, that is, an alternative dispute resolution mechanism managed by the Shariah courts. The *sulh* process is normally chaired by a court officer, who drafts the terms of any agreement between the parents, including the amount of child maintenance payable. This agreement will not be binding, however, unless endorsed by the court, and that will only occur if the amount is considered by the court to be reasonable. Upon approval, the court issues a formal consent order.

The main provision of IFLA concerning the right of children to maintenance in Section 72(1):

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

The IFLA thus makes the father the primary party responsible to maintain his children. It also grants power to the court to determine how much is reasonable for these purposes by considering two important aspects: the father's financial capability and his station in life. However, there are no guidelines for judges in assessing the two important aspects

as provided in the law. They have to use their discretion in evaluating them.

Decisions made by the Shariah courts have, for some time, been the target of complaint by a range of parties, including custodial mothers (Zaleha, Sahari & Azizah, 2007). Not only the procedure is difficult and consumes a lot of time and money, they also claimed that the amounts granted in most cases are relatively small and insufficient to cover the real needs of the children after divorce. In addition, decisions in child maintenance cases are also criticised for lacking consistency and not reflecting the non-custodial parent's true ability to pay.

This paper therefore investigates how Shariah courts decide child maintenance cases and what criteria they use in awarding maintenance. It will also suggest how Shariah court judges might better determine appropriate amounts of maintenance to protect the best interests of Muslim children after divorce. Our analysis is based on an examination of 90 reported and unreported cases decided by the Malaysian Shariah courts between 2002 and 2010. In this time, 65 cases were dealt through the *sulh* process and finalised with consent orders, while the other 25 proceeded to trials and resulted in maintenance orders issued against the father.

Although detailed grounds for judgment are not available in cases resolved by consent, they are nonetheless relevant for the purposes of this paper. As mentioned earlier, the 'agreed amount' shall not be binding unless it is approved by the Shariah courts and considered reasonable for the children. The 25 litigated cases, in which detailed judgments were presented, relied upon when we deal with the criteria considered by judges in assessing and determining the cases.

In addition, eight Shariah court judges with experience handling child maintenance applications were interviewed, and we will refer to their views throughout this paper. All interviews were recorded and transcribed but the identity of the judges will remain anonymous. In this paper, Shariah judges are referred to simply as Shariah Judge 1 or Shariah Judge 2 as example. All reported cases are cited with the first name of the parties involved, with the year of publication and the name of the journal in which it was reported, and unreported cases are cited with anonymised names and the year the decision was made. The anonymising of names of unreported cases and judges complies with the ethics approval for this research set by the University of Melbourne, Australia.

### **3. Findings and Discussion**

#### **3.1 Amounts Awarded**

The amounts awarded for the maintenance of children in the 90 cases reviewed have been categorized into 11 groups: RM1 to RM100; RM101 to RM200; RM201 to RM300; RM301 to RM400; RM401 to RM500; RM501 to RM600; RM601 to RM700; RM701 to RM800; RM801 to RM900; RM901 to RM1000; and RM1001 and above. The range of RM100 per category is a simple way to categorize differences in the amounts awarded per child by the court.

We have not taken into account the income of the fathers as the maintenance provider and the age of the child as this information was not included in most of the files consulted. It is therefore recommended for such information to be clearly mentioned in the order, namely the age of the child and the income of the father before the consent order or the 'maintenance order' is to be granted in the future. This information is helpful for any future application as the child/children grow up and/or after the changes of the father's salary that might happen in the future.

It is also important to note that, in most cases where several children are involved, the court decided a lump sum amount for all children and did not specifically mention exact amount awarded for each child. Therefore, for the purpose of this paper, we have divided the amount, assuming that whenever the amount is awarded for several children to be used for a month, it will be divided evenly among them in order to get the possible amount per every child. Similarly, where the court has granted an amount on a yearly basis, we have divided it by 12 to get a monthly sum.

A summary of our findings of the amounts awarded appears in Table 1.

**Table 1: Amount awarded**

Amount of maintenance awarded per month per child	Total number of children in cases in this category	Percentage
RM1 to RM100	62	29.8
RM101 to RM200	58	27.9
RM201 to RM300	36	17.3
RM301 to RM400	17	8.2
RM401 to RM500	18	8.7
RM501 to RM600	3	1.4
RM601 to RM700	6	2.9
RM701 to RM800	2	1.0
RM801 to RM900	0	0.0
RM901 to RM1000	3	1.4
RM1001 and above	3	1.4
<b>Total</b>	<b>208</b>	<b>100%</b>

The 90 cases reviewed involved different numbers of children in the families concerned, with most couples having from one to three children. In total, there were 208 children involved in these cases. The table shows that the amounts awarded vary between cases, with the average amount of maintenance awarded per child per month being RM250.

Table 1 also shows that 29.8 percent (62 of 208 children), were awarded RM100 or less to cover their needs for the duration of a month. The case of *Halis v Said* (anonymous unreported case, (2005) is indicative of this. In that case, the amount approved by the court for three children who stayed with the mother was only RM150 per month. This meant each child received only RM50 to cover their maintenance each month. Meanwhile, 27.9 percent (58 children) were awarded higher amounts, between RM101 and RM200 per month, while 17.3 percent (36 children), were awarded between RM201 and RM300 per month. In total, of the 208 children, 91.9 percent (191 children), were awarded RM500 or less per month. It also appears that the number of children granted between RM501 and above per month was only 8.1 percent (17 children).

Another significant finding shown in Table 1 is that the number of children granted RM1001 or more per month is very small - only three children, or 1.4 percent of the cases under review. It indicates that

awarding high amount of more than RM1000 a month for one child is quite rare in child maintenance cases in the Shariah courts.

### 3.2 The Inherent Obligation of the Father to Pay Maintenance

As mentioned earlier, Section 71 of the IFLA clearly states that the duty to provide maintenance is the father's, unless there is an agreement or court order stating otherwise. Several cases reviewed show, however, that this provision seems to be not conclusive in the eyes of the Syariah courts. There are cases where it has been treated as debatable whether or not the father needs to provide maintenance for his children. This can be seen in *Maimunah v Mohammad* [2005], (20 JH 2, 270), for example, where the divorced mother claimed maintenance of RM1,000 from the father, a businessman, for two children, one aged 15, the other four years. In his decision, the judge said:

Regarding the second fact in issue, how much is the amount of maintenance of the child to be given... I found that there are three issues that have to be dealt with. **The first issue is whether the Defendant (father) is required or not to give maintenance to the children...**[emphasis added]

It seems that the court did not embrace the view as provided in the IFLA that the duty to provide maintenance is the inherent and absolute obligation of the father. In other words, it is a God-given duty arising simply by virtue of being a father. Instead, the court imposed a new duty on the mother, requiring her to provide proof to the court that the father is, in fact, the party legally responsible to pay child maintenance. This approach could be seen as, not only jeopardising the rights of children, but will also prolong the proceedings.

In the *Maimunah* case, the judge gave considerable time to consider this issue. Only after evaluating a range of authorities did he say:

In this case, I found that there is no provision based on Hukum Syara' (Islamic law) which shows that the defendant (father) shall not provide the maintenance for his children... Therefore, I am of the opinion that the defendant, according to Hukum Syara' shall provide the maintenance of his children.

Our interviews with judges suggest that most judges hold one of two quite different views on this issue. Some, like the judge in *Maimunah v Mohammad*, believe it is crucial that they first decide whether or not the father should provide maintenance at all, arguing that this reflects the



approach of the Syafi'i School. This school, they argue, views the duty of the father to pay maintenance is not absolute but subject to several conditions including, the father must have financial capacity to pay, the child must not be working or have no wealth to cover his or her needs. If these conditions are not fulfilled, the father, they believe, is not liable to pay maintenance for his children (Interviews with Shariah Judge 8 on 28 April 2011; Shariah Judge 5 on 1 April 2011; and Shariah Judge 2 on 20 April 2011).

Other judges argue that, as the legislation has provided that the father is the first party liable to provide child maintenance, it should be treated as absolute liability and the court is therefore, bound by this (Interviews with Shariah Judge 1 on 18 March 2011; and Shariah Judge 3 on 25 March 2011). It should not be considered open to debate. They believed that the Syafi'i's conditions should only be considered if the father files another application claiming for reduction of the amount decided by the court, or asking for exemption due to the existence of certain problems on the father's side, for instance he has health problems and has no earning to pay the child/children, or the child has already worked and earned own salary to support his own expenses.

One of the judges interviewed explained:

Our duty is to be the third party to decide the reasonable amount for child maintenance. For me, the legislation is already clear on this. It is the duty of the father to maintain his children. There should be no argument on this matter...

(Interview with Syariah Judge 1 on 18 March 2011)

This point was reiterated by the court in *Norila v Mohd Zainuddin*, [2009], (28 JH 2, 247-258) in which the mother had withdrawn her claim of child maintenance during the original divorce proceedings. She renewed her application several years later, claiming she found herself in a very difficult position, supporting her child alone without assistance from the father. She told the court that she had to work extra hard to cover the costs of her child. The judge examined a wide array of authorities and concluded that the receipt of maintenance from the father is a basic right of the child. Nobody can deny or revoke this right not even the child's mother or father.

This decision reflects the notion that providing maintenance is the absolute liability of the father and receiving maintenance is a child's inherent right, simply based on his or her status as the child of his or her father. Due to that stand that it is the father's absolute duty, then, if the father believes he cannot, or need not, perform the duty- for whatever

reason- he must make such application and provide evidence to support his claim. For example, if he has a serious illness and is unable to work, or if he knows that the child is working and is earning income, he should be the party responsible for bringing evidence and establishing this to the satisfaction of the court.

### **3.3 Different Approaches in Assessing the Needs of the Child**

The cases reviewed, and information received from interviewees, suggest there was little consensus among judges as to what constitutes the needs of the child. Judges had differing views as to whether the amount for maintenance to be awarded by the court should cover only the *daruriyyat* (indispensable needs) of the child, or whether it should also include the *hajiyyat* (required needs) and/or *tahsiniyyat* (luxuries).

Different views on what constitutes real needs of the child to be determined by the court have resulted in two different approaches among judges. Those who adopt the view that the needs of the child refers to only indispensable needs, will endorse a narrow, careful approach to assessing the application and discard any claim they believe are not caught by that term. On the other hand, judges who believe that the needs of the child also includes their required needs and/or luxuries, will choose a far more compassionate and flexible approach. They entertain much wider claims by mothers relating to child maintenance.

The first detailed approach to assessing each component of maintenance was taken in *Rohana v Mohd Faizal* [2009], (3 ShLR, 92). Here, the divorced mother claimed RM500 for the first child, aged seven, RM450 for the second child, aged four, and RM400 for the third child, aged two. She presented a list of expenses needed on monthly basis organised according to the five items of maintenance set out in the legislation, as follows:

**Table 2: Budget claimed**

<u>First son:</u>	<u>Second son:</u>	<u>Third child:</u>
a) Food RM150	a) Daily expenses - formula milk and diapers RM100	a) Daily expenses -formula milk and diapers RM200
b) Clothing RM100	b) Clothing RM50	b) Clothing RM50
c) Shelter RM100	c) Shelter RM100	c) Shelter RM100
d) School expenses RM100	d) Medical RM50	d) Medical RM50
e) Medical RM50		
<u>Total RM500</u>	<u>Total RM450</u>	<u>Total RM400</u>

Although the custodial right was granted to the mother (plaintiff), two of the children were not living with her. The first stayed with the paternal grandparents and attended a public school close to their house. The second stayed with the maternal grandparents. The youngest child was the only one who lived with the plaintiff. During the proceedings, the mother admitted that she had a permanent job and earned RM2, 000 per month. She also admitted that her ex-husband gave her from RM100 to RM300 randomly per month to cover maintenance of the three children. However, the mother also claimed that the amount was not sufficient, and she had to contribute almost RM200 extra for each child.

The judge in this case evaluated every item of maintenance claimed by the mother for each child. With regards to their education, the mother told the court that the annual public school fees were covered by the father but she had to pay an additional RM100 every month to cover tuition fees for three extra classes: Islamic studies, English and Mathematics. In assessing the claim, the judge held that education is among the items of maintenance as provided in the legislation. However, the judge views that it refers only to compulsory education at a government public school. Any other form of education, for instance attending private school or tuition classes is excluded. The judge therefore rejected the mother's claim for tuition fees and held that if she

wanted to send the children to extra tuition classes, the mother would have to bear their cost.

The approach taken by the court was also apparent in the way it dealt with the items of food and diapers for the children. The mother told the court that the second child needed formula milk and diapers, which cost her around RM200 every month, and produced receipts. The mother added that the second child drank three packets a month of a specific type of formula milk named Essential, which costs around RM162.10 per month (RM57.70 per pack). The child also had to wear diapers at night, as he often wet himself while sleeping. The cost of the diapers was RM38.90 per bag. The mother also told the court that the youngest child drank six packs of formula milk named Bebelac which cost around RM180 per month (RM31 per packet). In addition, the mother explained that the third child used two bags of diapers every month, costing RM71.80.

The approach taken by the judge resulted in almost all these claims being rejected. He held that the indispensable needs of the child - merely enough to stay alive - were the benchmark of his judgment:

The court will assess on what are considered very important and indispensable needs (*daruriyyat*) of the children only, and not any other items that are considered required needs (*hajiyyat*) or luxuries (*tahsiniyat*) [2009], (3 ShLR, 109).

The judge decided formula milk for the second child aged four was not among the child's indispensable needs. Instead, he saw it as something to help the child grow healthier, but not a basic necessity for survival. He said the child could consume some other kind of food instead. The judge also decided that wearing diapers at night was not a basic necessity, and even advised the mother to train the child to go to the toilet before going to bed. With respect to the issue of consuming milk, the judge interpreted Chapter 2:233 of the Qur'an to breastfeeding as fixing the age at which a child should stop drinking milk. The two-year nursing period mentioned in the Qur'an was held to imply that children above two years old do not need milk. The judge said:

Based on the verse, the duration for nursing is two years only and [in this case] the mother claims for the cost of formula milk for her child who is above two years old. The verse shows that **drinking milk is not a necessity for a child above two years old...** [2009] (3 ShLR, 116)

... It is **not necessary for a child above two years old to drink milk. What more to have expensive formula milk which cost RM57.70 per packet.** Although the Plaintiff claimed that the children used to drink milk every day, however, to have such expensive brand is certainly not a valid choice, as there are other brands which are cheaper and reasonable. **It is not only extravagant, but also not reasonable.** With regard to diapers, the child should be trained to be independent to use toilet instead of wearing diapers. After all, **is it reasonable for the third child to have six packets of formula milk every month?** [2009], (3 ShLR, 117). [Emphasis added]

This approach led to a detailed assessment process that could be seen as not child-centric, and did not treat the best interests of the child as the priority. The judge's statement that the child should be potty-trained instead of wearing diapers, and that it is unreasonable for a child aged three to four to have six packets of formula milk every month, reflects a lack of awareness in dealing with children's diverse biological and psychological needs. It is not unusual for some children aged four to be unable to control their bladder at night and have difficulties with potty-training. Similarly, some small children are fussy and refuse to drink formula milk other than what they have usually been offered.

The mother in this case also told the court that because she was a full-time working mother she had to send the two-year-old child to a nursery and fetch him home after office hours. She therefore claimed RM100 as maintenance to cover nursery costs. Her claim was rejected on the basis that attending nursery was not an indispensable need, but rather a choice made by the mother. The judge had also stated that as a custodial mother, she must look after her child and stay at home to rear it. It seems the duty as a custodial mother is to rear the children solely as home-stay mother. The court said:

If the custody of the child is given to the Plaintiff (mother), and she has to send the child to the nursery during the day for her to go to work, therefore, it is not under the obligation of the Defendant (father) to pay for the nursery fee. As the custodial parent, it is the Plaintiff's duty to look after the child. If she needs to go to work and needs to send the child to any nursery, the cost for the nursery fee is under the obligation of the Plaintiff, and not of the Defendant.

This approach was also apparent from the judge's view that the welfare of the child would be adequately protected even if the amount awarded only covered indispensable needs. This has led to the decision where almost all her claims, including those for formula milk, diapers, accommodation, nursery fees, and even new clothes for the Muslim festival of *eid* were rejected.

There are, however, cases where child maintenance applications have been assessed in a more liberal manner, and the court has considered maintenance should cover required needs, as well as indispensable ones. For example in *Rohana v Mokhtar* [2009], (27 JH 2, 282) the judge adopted a much wider interpretation of the needs of the child in assessing the claim. During the proceedings, the mother presented the following detailed cost schedule of the amounts she paid for the maintenance of her two children, who were then at primary school.

**Table 3: Budget claimed**

<u>Daily Expenses</u>	<u>Monthly Expenses</u>	<u>Yearly Expenses</u>
<u>First child:</u> <ul style="list-style-type: none"> <li>• Pocket money to school- for public and religious schools RM1.50 X 22 days=RM33</li> <li>• School expenses RM50</li> <li>• Medication RM50</li> <li>• Religious school RM5</li> </ul> <u>Total: RM 138</u> <u>Second child:</u> <ul style="list-style-type: none"> <li>• Pocket money to school- for public and religious schools RM1.50 X 22 days=RM33</li> <li>• School expenses RM25</li> <li>• Religious school RM5</li> </ul> <u>Total RM63</u>	<u>Both children:</u> <ul style="list-style-type: none"> <li>• Food RM150</li> <li>• Payment to the grandfather for sending to school RM70</li> <li>• Payment to grandmother for looking after both children when the mother is at work RM180</li> <li>• Junk food RM50</li> <li>• Fee for Qur'an class RM30</li> </ul> <u>Total: RM480</u>	<u>First child:</u> <ul style="list-style-type: none"> <li>• School fee 2009= RM96</li> <li>• Food provided at School RM10</li> <li>• J-QAF fees RM20</li> <li>• Food at school Jul-Oct RM20</li> <li>• School fees 2006 RM152</li> <li>• School fees 2008 RM115</li> </ul> <u>Total: RM393</u> <u>Second child:</u> <ul style="list-style-type: none"> <li>• School fee 2007 RM145.50</li> <li>• School fees 2006 RM144.50</li> <li>• School fees 2008 RM196.90</li> </ul> <u>Total: RM536.90</u> <ul style="list-style-type: none"> <li>• School uniform for both <u>RM230.60</u></li> </ul>

The judge in this case interpreted the item education in the legislation as referring not only to government public schools, but also Islamic schools and extra Qur'an classes. In fact, all expenses of education were accepted by the court as part of the children's needs for the purposes of their maintenance.

The judge also extended the definition of the needs of the child to include arrangements for buying new clothes. The claim of RM50 for medical costs every month was not accepted, however, as the court

believed that both children did not have illnesses that required monthly medical attention. The court also decided to divide the amount of maintenance into two categories: food and clothes, and education. The judge awarded RM150 for each child (RM300 for both) to cover their food and clothing. This was to be paid by the father on a monthly basis. In addition, the court awarded RM200 for each child for school preparation and RM200 each for *eid*, to be paid by the father on an annual basis.

A similar compassionate approach was taken in *Saba v Ali*, (anonymous unreported case, 2007), where the custodial mother claimed RM600 for each child to cover five items of maintenance stipulated under the law. Two of the children were about to sit for the Lower Secondary Certificate (*Penilaian Menengah Rendah*) (PMR) and the Malaysian Education Certificate (*Sijil Pelajaran Malaysia*) (SPM) exams respectively that year. In deciding the application, the court interpreted the needs of the child to include not merely their indispensable needs, but also their required needs. Among others, the court accepted that all costs of schooling, including the costs of purchasing new uniforms, shoes and books, were included. The judge also awarded a higher amount for the two children who were going to sit for the exams. He granted them RM350 per month to cover their food and daily expenses, including transportation to attend tuition classes, while the other children were granted RM300 each. The court also granted an annual sum of RM300 each for the children attending secondary school and RM200 each for those at primary school, to cover the costs for new school uniforms and textbooks. Finally, the court ordered the father to pay RM300 annually for each child to cover new clothing for *eid*.

These cases show that there is no standard approach to evaluating the same criteria in different cases. Instead, judges have taken a variety of approaches to the needs of children. Some adopt a conservative interpretation by which the needs of the child refers solely to indispensable needs. They assess maintenance applications in great detail, and any claims not falling under a narrow reading of this definition are rejected. On the other hand, judges who accept a more flexible interpretation allow a much wider scope. The needs of the child are extended to cover not only 'indispensable needs' but also 'required needs', and this category is often interpreted more broadly.



### 3.4 Assessing The Father's Financial Ability

Although the IFLA clearly stipulates that in determining child maintenance, the court must assess the father's means and his station in life, cases reviewed show that, in fact, Shariah judges usually only consider one criterion – the income of the father – and neglect the question of his station in life.

There is no clear definition in the IFLA of income and how to evaluate a person's financial strength. The judges therefore exercise their discretion on this issue, as they do on other issues relating to maintenance. Almost all cases examined show that judges took the view that income means the father's monthly salary received from his employment, and the father's payslip issued by his employer was taken as conclusive proof of this. Judges also used to accept that the only way to verify the father's financial strength is only through his monthly salary. Other evidences of the father's financial position, for example, his cash money in the bank, his lifestyle and possession of land, his ability to possess credit cards, types of vehicles he drives and types of house he stays were not taken into consideration by the court.

In the cases reviewed, the courts used to follow several steps in interpreting the payslip. First, the judge will consider the father's gross salary as stated on the payslip. This normally consists of his basic salary and any allowances he receives, for example, housing and overtime allowances. The court then considers compulsory deductions made by the employer, such as the Employees Provident Fund (EPF), the Social Security Organisation (SOCSO), income tax and/or *zakat* (religious charitable payment obligatory for Muslims). Third, the court considers any debts, such as housing and car loans. Finally, the court considers the amount paid by the father to cover his own maintenance and that of his new wife and children, if he has remarried.

This approach was adopted in *Rohana v Mohd Faizal* [2009], (3 ShLR, 92), where the court considered all these matters before determining the maintenance for the three children of the divorced mother. The father's payslip stated that his basic salary was RM2046 per month. The judge took into account deductions of the EPF and SOCSO, totalling RM233.25, leaving the father with a net salary of RM1,813. 35.

The judge also considered a claimed debt payments presented verbally by the father. The father told the court that he had to pay on a monthly basis, a car loan of RM600, a motorcycle loan of RM149, two credit card repayments of RM144, and a household loan for a bed, TV

and fridge of RM125. The father also informed the court that he had remarried and had one child with his new wife. He further claimed he spent RM250 on expenses related to his new house, RM300 for rental and RM60 for electric and water bills. In total, the father claimed that he used around RM1, 552 of the salary he earned every month to cover these costs.

The judge accepted the total amount of the deductions and expressed his concern that the father had only a small amount left for the maintenance of the three children involved in the dispute:

The Defendant's net salary is only RM1896. If we deduct the expenses used to cover his own needs and other dependents of RM1552, the balance is RM344. If the amount of RM300 is given for the maintenance of the children claimed in this case, the Defendant is left with RM44. Based on the financial capability of the Defendant, the reasonable amount for the three children is RM100 per month per child or RM300 per month for all three children [2009], (3 ShLR, 122).

This practice shows that the court seems to be more liberal when dealing with the father's claim. The court does not evaluate other important matters to reflect one's financial strength such as the father's bank statement to evaluate his saving, or any shares that he might have bought under the father's name or any asset belonging to the father. The acceptance of the father's claims simply on the basis of his oral testimony creates concern among several parties. An oral statement with no documentation is not a conclusive way to assess one's financial ability, particularly when it directly affects the welfare of the children.

### **3.5 Out-dated Payslips**

In *Aiza v Adul* (Anonymous unreported case), (2007), the mother failed to produce her former husband's current payslips, instead producing ones from a year before the divorce. The inaccuracy of the salary received was acknowledged by the court by saying;

As the payslip is not the current payslip belonging to the Defendant [sic], he may have an increment in his salary, higher than the amount stated on the payslip, or it is also not impossible that he has lesser salary from what is stated here...

Although the payslip was out-dated, and might not be accurate, the court nonetheless, accepted and relied on the out-dated payslips to assess the amount of the father's gross salary and compulsory deductions, despite the possibility that he could have been receiving a higher salary. The court found that the father's basic salary was RM3,529. It then considered allowances and overtime pay, which raised his gross salary to RM8,163.60 per month. According to the payslip, the employer deducted RM495 for EPF, RM14.75 for SOCSO, RM394 for income tax and RM200 per month for *zakat*. After these deductions, the father's net salary was RM 7,059.85. From this, the court awarded RM1,400 per month for the maintenance of the four children. The practice of total reliance on the payslips has resulted in the situation where judges would rather refer to payslips they know to be out-dated than other sources of evidence.

### **3.6 Onus to Produce the Payslip**

In *Rohana v Mokhtar* [2009], (27 JH 2 p 289), the judge clearly stated that the mother was under obligation to prove the husband's earnings. This is actually the stand of most judges interviewed. As the mother acts as the plaintiff in child maintenance cases who claim the maintenance against the father, she must therefore bring the evidence to prove her claim. As cases reviewed showed that judges have conclusively taken a view that the father's financial ability is verified only through monthly salary based on his payslip, it is therefore, on the mother to find the payslip of the ex-husband and produce them in court.

This practice has obviously places a mother seeking maintenance for the children in the Syariah court in a very difficult situation. She must, first, make an application to the court for the maintenance of the children under her care. Second, in doing so, she must present details of expenses needed for five basic needs of the children according to the legislation. Third, she must present the payslip of the ex-husband to prove his financial ability to pay her claim.

This process is seen as not helpful for the children, and creates difficulties, such as cost, legal knowledge and time on the custodial mother. The cases selected for study show that many custodial mothers fail to win access to the personal information of the fathers. There are a number of legal limitations in Malaysia that prevent the personal details of any person (including an ex-husband) being disclosed to any third party. These have been recently strengthened by new privacy protections

imposed by the Personal Data Protection Act 2010 which protects all personal details of one person to be disclosed to other people. The custodial mothers, in many cases, have no choice but to produce what they have in hand - usually out-dated payslips from before the divorce.

### 3.7 Self-Employed Fathers with No Payslip

The court's common practice that the father's income should be based on his payslip is particularly problematic when dealing with self-employed fathers, or a father with several unregistered incomes. Many cases show that even where the father is a self-employed person with no payslip, the court nonetheless follows the common assumption that 'income' refers only to salary from employment and so can only be proven with a payslip issued by the employer. This happened in several cases, including the case of *Maryam v Hithir* [2006], (17 JH 2, 242), which dealt with an application by a divorced mother to change the amount decided in the earlier proceeding for maintenance of her two children under her custody, which was RM200 per month for both children. After several years, the wife made another claim against the father, who worked as an insurance agent and ran his own company. She applied to increase the amount from RM200 to RM1,000 per month for their two children. The mother however, failed to obtain any proof of the father's income, as he was a self-employed person with no monthly payslip. Although the requirement to produce the payslip of the ex-husband is almost impossible to be accomplished, the court however, seems to ignore the difficulty and put the liability of the failure is on the mother. The court rather said:

In assessing the amount of maintenance, the court shall accrue based on the financial capability of the father compared to the needs of the children. **As the Plaintiff failed to prove the financial capability of the Defendant,** therefore the court will rely on the oral defence of the father. (Emphasis added)

The judge however, did not ask the father to provide any documentation, instead accepting his oral statement that his income was only RM1,200 per month. The court had also accepted his claim that he had to pay RM460 monthly for a car loan, RM250 monthly for house rent, and RM273 monthly for his life insurance. After all deductions, he said he was left with just RM100 to RM200. Considering that, the judge said:

In order to make a decision, the court has to rely on the financial capability of the father, so he will not be stressed out in his effort to work in order to cover the child maintenance. The father should not be burdened by the children, as stated in Qura'nic verse 2:233 [2005], (17 JH 2, 242).

Several other cases under reviewed which dealt with self-employed fathers with no employers and no payslips, including businessmen, insurance agents, or un-employed fathers show that similar approach was taken by the courts. The mother as the plaintiff is still considered liable to produce the payslip of the father to support her claim. The father, as the party who is considered having the inherent liability in the eyes of the law to provide maintenance for his children seems to receive a special treatment and protected by such practice. He was not asked to produce any documentation showing his financial strength. As such, the mother who acts on behalf of the children to gain their right to maintenance from their own father was trapped in such difficult procedures.

#### **4. Conclusion and Recommendations**

The set of cases selected for study show that judges of the Shariah courts adopt a variety of approaches in assessing and awarding child maintenance. The legal provision is general to guide judges in handling the application. The absences of a specific guideline contribute to such problem. This has left judges with no choice, forcing them to resort to their discretion, and opening the door to the current range of different approaches. With no formal guidelines to direct its exercise, leads to problem when dealing with the needs of the child. Judges interpret the needs of the child to refer merely to their indispensable needs will allow very basic items and consequently award low amounts of maintenance. By contrast, judges who accept wider interpretation that the needs to include required needs and luxuries will entertain a wider range of claims, and therefore award a higher amount of maintenance.

As discussed earlier, almost all cases selected show that 'income of the father' is understood exclusively as monthly salary received from employment, proven by a payslip issued by his employer. The current practice that imposes the burden of proving the father's monthly income on the mother, requiring her to somehow obtain her former husband's payslip, has sometimes made the process of accurately assessing the father's ability to pay maintenance almost impossible. This, of course,

creates difficulties for the assessment process and places custodial mothers and their children, in difficult circumstances.

As the right to maintenance is an inherent right of all children, we believe there is an urgent need for reforms to improve practices in the Shariah courts in order to better protect Muslim children's right to maintenance after divorce. Such different understandings, interpretations and approaches that have led to inconsistencies in the decisions made could contribute little to the standing of the Shariah courts in the eyes of the public. Based on the findings, specific guidelines are proposed to be introduced in order to assist judges in assessing the applications. Clear definitions of 'income,' 'what constitutes and income', what kind of things under the meaning of 'the needs of the child', are required, as is clarity on the process of verifying one's financial strength that should be taken into account. These guidelines are aimed to achieve consistencies for children involved in the cases, and the decision that ensures children are as well-supported as is reasonably possible. Such reforms would be in line with the Malaysia's obligations as a signatory to the UNCRC to give primary consideration to the best interests of the child in all matter affecting them.

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