

**THE APPLICATION OF THE LAW ON CHILD
CUSTODY IN MALDIVES: TOWARDS SHARED
PARENTAL RESPONSIBILITIES**

BY

MAUSOOMA FAROOQ

**A dissertation submitted in fulfilment of the requirement for
the degree of Master of Comparative Laws**

**Ahmad Ibrahim Kulliyyah of Laws
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ABSTRACT

Upon divorce, child custody and support is often the most salient issue that parents have to deal with. The aftermath of divorce weakens the harmony of family which leads to impulsive negative impacts on the children, such as financial support, child's education and well-being. With so many issues that parents decide for litigation, custody of the minor is one of them and unfortunately it takes months to be concluded within the Family Courts. The purpose of this study is to analyse the practical dimensions of the law relating to the custody of the children in Maldives and evaluating the decisions of the Family Courts while interpreting the phenomenon of "best interest of the child" albeit applying existing laws. In addition, this paper seeks to discover the extent family judges in Maldives know of the concept and order joint custody arrangements. It is argued that the determination of children's physical custody and maintenance arrangement is among the most difficult decisions made in any marital dissolution process. Besides doctrinal and non-doctrinal study, this research adopts comparative research and will enable the audience to understand several key concepts which are unravelled to hearken the reader towards several notable solutions. Data for this research are based on semi-structured interviews that have been conducted face to face, and through email in Malaysia and Maldives. The interview data was then analysed to identify salient patterns and themes. This research found that despite the evolution of custodial principles such as the introduction of a gender-neutral approach and shared parenting at the universal level, the current provisions of the legislations show that Maldives maintains the traditional approach in awarding custody i.e. imposing the responsibility of childcare to one parent i.e. sole custody and only granting the right of access to the other. On one hand, the judges in granting custody order strongly encourages the non-custodial parent to be equally involved in the upbringing of the children. On the other hand, there is no such law and practice of giving joint legal custody arrangements being for the child's best interest. This study describes how the joint legal custody awards could benefit children by encouraging close relationship and continuing better contact with both the mother and father. It is the need of time that Maldivian Family Justice System reconstruct the ideas and practice of giving sole custody and balanced with the induction of joint legal custody concepts to achieve the 'best interest of the child.

خلاصة البحث

تُعدُّ حضانة الأطفال والنفقة عليهم من أكثر القضايا أهمية للوالدين في حال الطلاق، فالآثار الكارثية لما بعد الطلاق تعمل على إضعاف تناغم الأسرة، مما يؤدي إلى آثار سلبية على الأطفال من حيث تعليمهم وجودة حياتهم، وهذه القضية من أهم ما يتصارع عليه الوالدان في القضاء، وقد تستغرق شهوراً في محكمة الأسرة للحكم فيها، وعليه؛ يهدف البحث إلى تحليل الأبعاد العملية لقانون حضانة الأطفال في جزر المالديف، وتقييم قرارات محاكم الأسرة؛ لتفسير ظاهرة "المصلحة والأولوية للطفل" في تطبيق القوانين الحالية، وأيضاً إلى التأكد من معرفة قضاء محكمة الأسرة في جزر المالديف مفهوم الحضانة المشتركة ونظامها واتفاقياتها، فمن المعروف أن تحديد حضانة الطفل واتفاقية إعالته من بين أصعب القرارات المتخذة في حالات الطلاق، ويعتمد البحث المنهج المقارن بالإضافة إلى الدراسة الميدانية، مما يمكن من تحديد عدد من المفاهيم الجديدة والحلول ذات الصلة بموضوع البحث؛ إذ تستند بيانات البحث إلى مقابلات شبه منظمة أجريت شخصياً أو من خلال البريد الإلكتروني في ماليزيا وجزر المالديف، وتبيّن من تحليل البيانات أنه على الرغم من تطور مبادئ الحضانة من مثل إدخال نهج الحياد الجنساني، والمشاركة في تنشئة الأطفال على المستوى العالمي؛ تبيّن الأحكام الحالية للتشريعات والقوانين أن جزر المالديف ما زالت تحافظ على النهج التقليدي في منح الحضانة من مثل منح مسؤولية رعاية الطفل إلى أحد الوالدين؛ أي الحضانة الكاملة، ومنح حق الوصول إلى الطرف الآخر، ومن جهة يشجع القضاة في إلحاح على أن تكون المشاركة على قدم المساواة في تنشئة الأطفال في حال منح الحضانة الكاملة، ومن جهة أخرى؛ لا قانون أو ممارسة لإعطاء ترتيبات لحق حضانة قانونية مشتركة بما في ذلك مصلحة الطفل الفضلى، كما تبيّن النتائج أن منح الحضانة القانونية المشتركة يمكن أن يفيد الأطفال من خلال تشجيع العلاقة الوثيقة، ومن أجل تواصل أفضل ومستمر بين الأم والأب، ومن ثم؛ كانت مسألة وقت أن تعيد محاكم الأسرة في جزر المالديف هيكلية المفاهيم والممارسات المتمثلة في منح الحضانة الكاملة، واستحداث توازن في مفاهيم الحضانة المشتركة لتحقيق مصلحة الطفل الفضلى.

APPROVAL PAGE

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.....
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I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

.....
Roslina Bt Che Soh @ Yusoff
Internal Examiner

.....
Normi Bt Abd Malek
Internal Examiner

This dissertation was submitted to the Department of Legal Practice and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
Madam Suzanna Kamaruzzaman
Head, Department of Legal
Practice

This dissertation was submitted to the Ahmad Ibrahim Kulliyah of Laws and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
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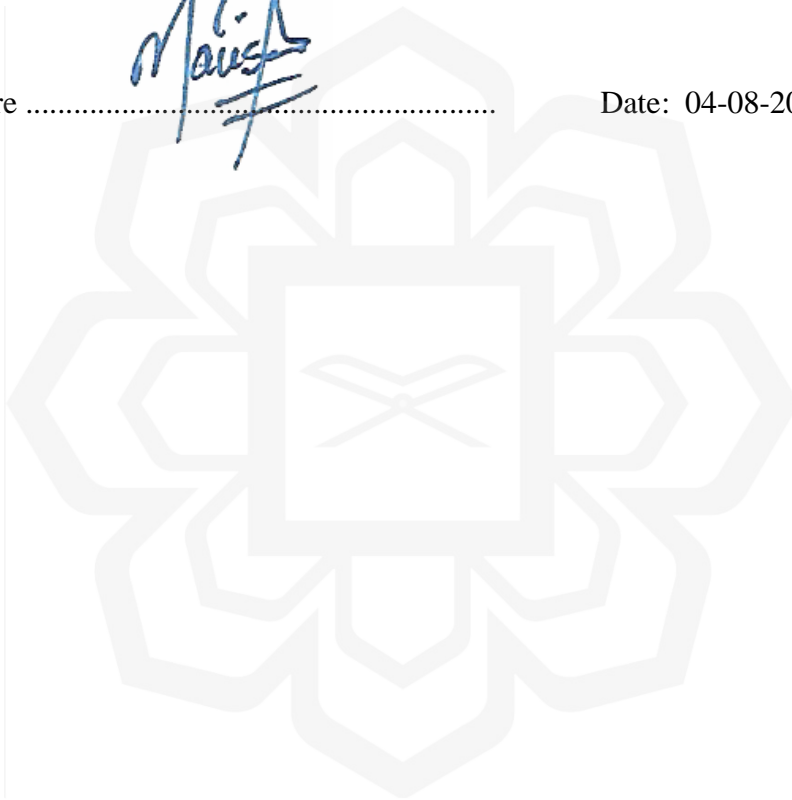
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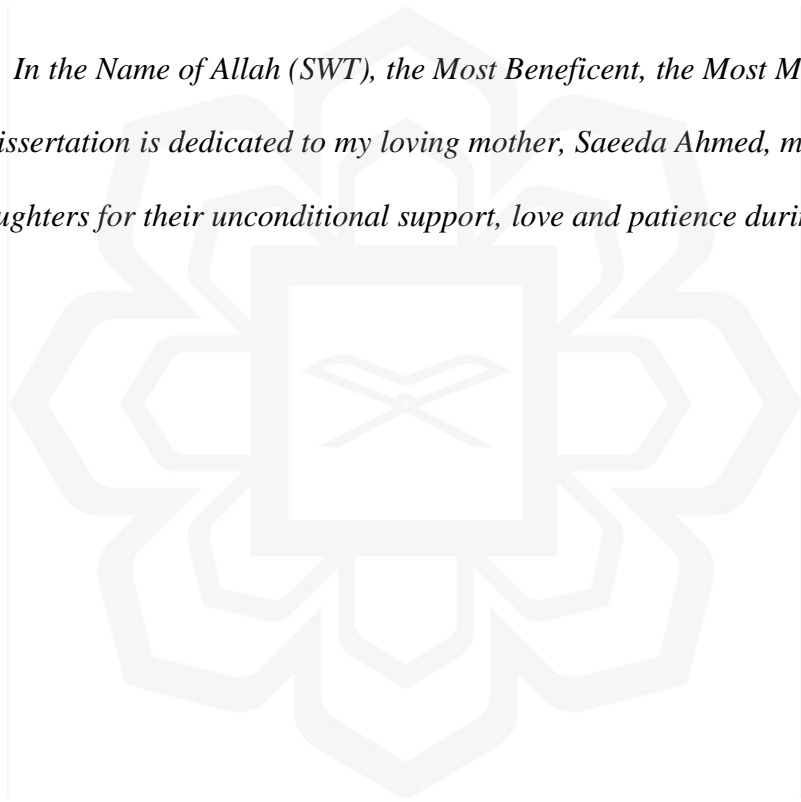
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In the Name of Allah (SWT), the Most Beneficent, the Most Merciful.

This dissertation is dedicated to my loving mother, Saeeda Ahmed, my husband and two daughters for their unconditional support, love and patience during this journey.

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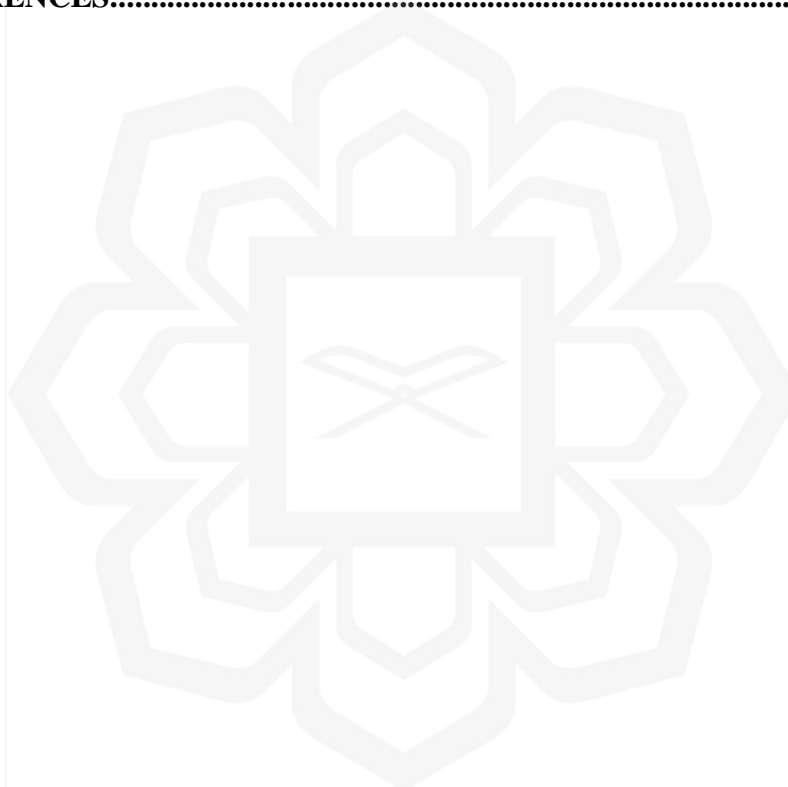
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Guardianship of Infant Act, 1961 (Act 351) (Malaysia)
Islamic Family Law (Federal Territory) Act (1984) (Act 303) (Malaysia)
Law Reform (Marriage and Divorce) Act (1976) (Act 164) (Amendment 2017) (Act A1546) (Malaysia)
Women's Charter (1980) (Act 26) (Singapore)
Convention on the Rights of the Child (CRC), entered into force September 2, 1990.



LIST OF ABBREVIATIONS

CRC	Convention on the Rights of the Child
GIA	Guardianship of Infant Act, 1961
IFLA	Islamic Family Law (Federal Territories) Act, 1984
LRA	Law Reform (Marriage & Divorce) Act, 1976
UN	United Nations



CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE RESEARCH

This research analyses the theoretical and practical dimensions of the law relating to the custody of children in Maldives, in particular with regard to the phenomenon of the interpretation of “*best interest of child*” in existing laws. Maldives is geographically located in the Indian Ocean, with a suffrage-demographics, representing a hundred percent Muslim population consisting of 1192 islands across the nation. Primarily, the Republic of Maldives practices Islamic *Shari’ah*, with the ShÉfiÑÊ, HanafÊ, MÉliki and Hanbali jurisdictions in promulgation at courts. However, to some extent, common law and conventional law have influenced the Maldivian legal system. Article 10 of the Constitution of the Maldives specifies that Islam is the religion of the State; there shall be no law in repugnant to the injunctions of Islam.¹ Moreover, all matters relating to marriage and family relations can be seen in the statement, “*without prejudice to the provisions of the Islamic Shari’ah, which govern all marital and family relations of the 100 percent Muslim population of the Maldives*”.²

Family issues constitute a significant matter of concern in the country. Particularly, child custody issues are one of the most prominent problems that the society faces in Maldives. Usually the hostility begins post-divorce, which leads to a struggle for the equality of rights for the child. Post completion of the divorce process of the couple often result in the children suffering more than anyone else in the family.

¹The Constitution of the Republic of Maldives, 2008, Art 10.

² CEDAW Committee and Others, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Maldives*, (Male: Maldives, 2017), 2–6.

Divorce brings bitterness and causes devastation to the families. There are numerous reasons for the pronouncement of divorce including but not limited to, social problems such as dwelling of a newly married couple with extended families, financial problems, and extra-marital affairs; all of these are the most observable reasons which are responsible for the breakdown of most marriages that end in divorce. Starting from 2012 until 2016, the statistics revealed 6720 divorce cases; ranking Maldives with the highest divorce cases in the world, including 1319 cases of custody encounters through court proceedings,³ consequently destroying family environment and psychologically affecting the upbringing of children. With post separation of the spouses, the aftermath of divorce weakens the harmony of family which leads to impulsive negative impacts on the children, such as lack of financial support, child's education and well-being. Yet, separating parents does not mean to abstain either one's responsibility towards their children.

Article 35 of the Maldivian Constitution guarantees the right of children. Apart from the constitution, Maldives ratifies Convention on the Rights of the Child (CRC) with the reservation. Moreover, the religion of Islam gives the special consideration to the rights of the children. Therefore, it is imperative to take care of them in the right way.

Although, Section 40 of the Maldivian Family Law Act, 2000, clearly states that custody of the minor should be given to the mother, as she is the natural guardian of the child, and this position akin to *Shari'ah as well*,⁴ in certain circumstances custody of the minor could also be given to the father. For example, in the case of when the mother

³ Department of Judicial Administration, *Statistics Books of the Judiciary of Maldives*, (Male: Maldives), (accessed 2 August 2018).

⁴ Abdul Haye Abro, "The Custody of Children (A Comparative Study of the Shari'ah, English and Pakistani Law)", *Pakistan Journal of Islamic Research*, vol. 14 (2014): 1–17.

remarries or if the minor comes of age (7 years) in which the child is allowed to choose a parent to live with.⁵ This position allows the family judge discretion in interpreting the phenomenon i.e. what is best interest of the child. Problems arise when the judge does not have the expertise to interpret the legal concept of the best interest of the child. For example, in the case of *Family Court Case No: 176/AC/2008*, which was a case reviewed by Family Court filed by the mother to get the custody of the child from the father, the mother raised concerns about having the child removed from her care, keeping the child from her, not allowing her any visits to the child, not sending the child to school since their divorce and the father's refusal to give the child back to the mother. This case ended with the Family Court passing judgment to give the custody of the child to the mother. However, the father appealed to the High Court. In this case (case no: 2008/HC-A/146), the High Court decided to give the full custody of the child to the mother as the mother was the rightful custodial parent according to Family Law Act 4/2000 section 40, section 71 of the Family Regulation. This was based on the Family Law Act 4/2000, section 40 (a), section 41 and 42, and Family Regulation section 71. The decision was also made in reference to the Family Law Act, section 40 (e) which states that if such a decision is to be made, the issues surrounding the case and the child's best interests must be taken into consideration. It further ensures that prior to giving the custody of the child to a parent, basic needs such as a proper shelter and opportunities for education to the child must be guaranteed to protect the rights of the child and if after the child is placed under the custody of the first custodial parent on the priority list whereby any evidences showing that the child is deprived of its rights surfaced or is found, the custody of the child would be given to the next person on the

⁵ The Family Law Act, (2000), s. 44 (b).

list; a decision made with child's best interests at heart. As the above was stated in Family Law Regulation section 72, the child was raised by and was living with the father and his family from birth till date. The case was the same even after the divorce, with no threats whatsoever to the child and the relevant documents proved that the child was receiving proper education, medical care with the father and his family. Therefore, with regard to the High Court case no: *2008/HC-A/146*, the High Court's bench decided that the risk of removing the child from a familiar environment and placing in a strange environment would have negative impact on the child's development. Thus, the bench of the court decided that it would not be child's best interest to give the custody of the child to the mother under these circumstances, hence Family Court's case no: *176/AC/2008* judgment to give the mother the custody of the child was nullified and the child was placed back in the custody of the father on the condition that the mother should be allowed to visit the child. Additionally, both parents are to contribute as much as possible in raising the child and that both parents refrain from any behaviour that would cause the child any harm whatsoever.

It is noted that there is a contradiction between the judgments of the Courts, when they interpreted the concept of "best interest" of the child.

1.2 STATEMENT OF THE PROBLEM

The Family Courts in Maldives have specific jurisdiction on child custody matters. While deciding the cases of custody, the Family Courts should have taken steps to continue the well-being of the minor, the expenditure incurred on the minor and the educational progress of the minor. However, it is observed that the litigants are not satisfied with the decisions of the family courts on custody issues, and on the other hand, the family courts being quasi-judicial forums have evidently failed to apply the

procedure set out by apex courts of the country and as per the principles of fair trial. It appears that Family Courts are highly dependent on the traditional approach of granting sole custody to the mother without taking circumstantial evidences into consideration, whereby the child custody issues involve the mother being child's best interest. The problem arises while interpretation of the phrase "best interest of child" by the Family Courts and the High Court and as evidenced in the cases, the High Court overruled the decisions of the Family Courts. The lengthy litigation process increased the miseries and agonies to the respondents and hence put their children in hardship and sufferings.

1.3 OBJECTIVES OF THE RESEARCH

This research is conducted based upon the following objectives:

1. To study the law related to child custody in Maldives;
2. To examine its strengths and weaknesses;
3. To compare best practices on child custody from other jurisdictions; and
4. To suggest and make recommendations on the child custody issues in Maldivian Family Law by incorporating and introducing shared parental responsibility.

1.4 RESEARCH QUESTIONS

In view of the above, the following are the research questions:

1. What are the laws that is applicable to child custody in Maldives?
2. What are the factors that contribute to the legal dispute on child custody in the Maldivian family law?
3. How do the Maldivian judges apply the concept of "the best interest of the child"?

4. What can be learnt from different jurisdictions on child custody issues?

1.5 HYPOTHESIS

The research hypotheses are as follows:

1. The Maldivian Courts apply the traditional approach of child custody.
2. The '*best interest of child*' has been wrongly construed by the Family Court.
3. Wrong interpretation and application of the custody law has jeopardised the interest of children after divorce.
4. Joint custody or shared parenting can be a way-forward to solve the problems among contended sides.

1.6 RESEARCH METHODOLOGY

This study is primarily based on doctrinal and non-doctrinal research and uses a qualitative, analytical and a comparative approach. Materials and data from books, statutes, articles, journals, conference papers, thesis, encyclopaedia, law reports, unreported cases and any other relevant internet information were referred to. For the purpose of this study, some important materials such as the case study and the section of the Maldivian Family Regulations are translated into English from Divehi Language by the researcher.

Comparative study of the countries such as Malaysia and Singapore and some other jurisdictions were conducted where substantial reforms have been made in the custody disputes. In addition, the International Convention on the Rights of Child (CRC) and other instruments were analysed to compare the current situation.

Moreover, with regards to the Islamic law, besides relying upon the Qur'an and Hadith, the research also referred to the classical works written by Islamic scholars from

various school and laws which are important since the laws of Maldives have its basis in *Shari'ah*.

Normally, it is observed by various writers that there is a major difference in text and in practice. Therefore, in order to study the actual situation, field work was conducted in the form of interviews. Due to the time limitations, interviews were focused on selected group of people and institutions, namely the Ministry of Gender, Family, and Social Services, the Judges from Family Court of the Maldives and Lawyers.

1.7 SCOPE AND LIMITATIONS OF THE STUDY

This study mainly focused on examining the law relating to custody disputes in Maldives. Maldives is applying 100 percent fully *Shari'ah*, which has been interpreted in Family Act. However, for this study, only the relevant law and statutory law on child custody is thoroughly investigated without undermining the importance of the classical Islamic law in Maldivian legal system.

1.8 LITERATURE REVIEW

Numerous literatures have been identified on the subject at hand from other jurisdictions. However, it has been evidenced that very few articles and reports are published on the Maldivian's child custody law. The available literatures provide research reports from international organisations, court decisions on the Family Law and Family Regulations. The researcher reviewed the literatures on the realm i.e., the phrase "best interest standard on child custody" and on joint custody or shared parenting as best solutions of custody issues in family settings. Moreover, the role of *Shari'ah* on

custody issues and how it explains the best interest of the child discussed, while reviewing the literatures from multiple authors.

Suzana, Roslina, and Najibah,⁶ examine the application of shared parenting in both Muslim family law based on *Shari'ah* and civil family law system of Malaysia. Based on their findings, they have made a brief comparative review on Australian law and policies. In addition, they found that by international and Islamic concept, shared parenting can be the best method to protect the welfare of the child. Moreover, the authors highlighted that in the Malaysian law, there are no provisions on shared parenting and specific guidelines on its application. Although, explained with regard to child welfare, shared parenting involves parental responsibilities and parental rights. Shared parenting can be a kind of arrangement made by parents. Likewise, it can be associated with joint physical custody, joint legal custody, time sharing and shared residence. When time is awarded among parents, an equal share for each parent, (50-50) may be considered as best, or a minimum of one third of the time. Though the authors have not mentioned about the custody issues in Maldives, this information will be very helpful for the study at hand.

Nielsen⁷ is of the view that if there are issues among parents then joint physical custody is the arrangement that best serves children's interests. On some occasions, there are not such big differences in the situation of parents with joint custody or sole custody. The quality of the parent– child relationship is a better predictor than conflict of children's outcomes. Then, the author of the article suggested that efforts to improve

⁶ Suzana Ali, Roslina Che Soh Yusoff, and Najibah Mohd Zin, "Application of Shared Parenting in Malaysia: Appraising the Australian Experience", *Pertanika Journal of Social Science and Humanities*, vol. 25, no. S (2017): 293–300.

⁷ Linda Nielsen, "Re-examining the Research on Parental Conflict, Co-parenting, and Custody Arrangements", *Psychology, Public Policy, and Law*, vol. 23, no. 2 (2017): 211.

parents' relationships with one another should be more invested in helping both parents to maintain and strengthen their relationships with their children.

Fabricius and Go⁸ found that shared parenting might have fewer negative consequences on children by their parents' divorces, and consequently might lead to better parent-child relationships. According to them, the approach outlined by Fabricius, Braver, Diaz, and Velez (2010) can be used for informed decisions and of wisdom, in imposing shared parenting time on families where only one parent wants it. This involves distinguishing the families in which both parents initially agreed to share parenting time and thus presumably volunteered for it, from families in which the parents disagreed and shared parenting was in some way imposed upon them. If imposed shared parenting is found to be associated with benefits, it would justify a rebuttable presumption for shared parenting. They found that the great majority of parents with shared parenting had to accept it after mediation, custody evaluation, trial, or judicial imposition. Nevertheless, those with shared parenting time had the most well-adjusted children years later.

Najibah⁹ discusses child custody from *Shari'ah* perspectives and the issues with regards to the Islamic family law, practice and procedure of Islamic family law systems in Malaysia. Further, she examines current issues which contradict the law and cases and provides recommendations on reviewing and amending the law in relation to custody disputes.

⁸ William V. Fabricius and Go Woon Suh, "Should Infants and Toddlers Have Frequent Overnight Parenting Time with Fathers? The Policy Debate and New Data", *Psychology, Public Policy, and Law*, vol. 23, no. 1 (2017): 68.

⁹ Najibah Mohad Zin, Nora Abdul Hak, Azizah Mohd, Normi Abdul Malek, Norlia Ibrahim, Roslina Che Soh Yousoff, and Noraini Md Badruddin Ibrahim Hashim, *Islamic Family Law in Malaysia*, (Malaysia: Thomson Reuters, 2016), 267–297.

Blomqvist and Heimer¹⁰ discussed that after separation of both parents, it is highly important to keep close contact between both parents for the well-being of children and it is in the best interests of the child. Further, they have found that the Swedish reform on court-ordered alternating residence can initiate at least in part, a will to promote equal parenting and can provide better conditions for fathers to be active parents post-separation, the reform Bill itself makes no mention of these values. Moreover, they highlight the specific interpretation of “the best interests of the child” that can be seen in the light of Sweden’s long-standing commitment to strengthening the role of fathers and promoting equal parenting roles between both parents.

McIntosh, Smyth, and Kelaher¹¹ found that Australian family law continues to support shared parenting and provides no age-related constraints to this pursuit. According to them, in Australia, there are no adverse consequences for shared parenting legislation, which remains without any special considerations for early childhood.

Artis and Krebs¹² reviewed the deficiencies of the best-interests standard and its obvious limitations with joint custody which gives the unique contribution to child development. Moreover, their study which explored the changes in the view of the judges on the issues of joint custody and described with references, found that joint legal custody awards encouraged the fathers to be more involved while other studies found that no such patterns. Furthermore, their study pointed out that the children’s well-being could be compromised if joint custody was given in hostile family arrangements. Although, the sole custody was the practice, some courts began to realise

¹⁰ Paula Blomqvist and Maria Heimer, "Equal Parenting when Families Break Apart: Alternating Residence and the Best Interests of the Child in Sweden", *Social Policy & Administration*, vol. 50, no. 7 (2016): 787–804.

¹¹ Jennifer E McIntosh, Bruce M Smyth, and Margaret Kelaher, "Responding to Concerns about a Study of Infant Overnight Care Postseparation, With Comments on Consensus: Reply to Warshak", *Psychology, Public Policy, and Law*, vol. 21, no. 1 (2015): 111–119.

¹² Julie E. Artis and Andrew V. Krebs, "Family Law and Social Change: Judicial views of Joint Custody, 1998–2011", *Law & Social Inquiry Volume*, vol. 40, no. 3 (2015): 723–745.