

INVOLVEMENT OF CHILDREN IN HADANAH PROCEEDING IN MALAYSIAN SYARIAH COURT: AN APPRAISAL

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Accepted date: 02-09-2018

Published date: 15-12-2018

To cite this document: Azzis, N. M. A, & Azhar, A. (2018). Involvement of Children in Hadanah Proceeding in Malaysian Syariah Court: An Appraisal. *International Journal of Law, Government and Communication*, 3(11), 47-57.

Abstract: *This writing examines the procedure in arriving at a decision in child custody cases. With the existence of the legal provisions; be it substantial law or procedural law; in all States, there are still unclear application of the concept of best interest of child or welfare of the child especially in their involvement in court proceedings in custodial issues. Although the term 'welfare' has been precisely constructed in the relevant Enactments, the harmonization between the concept of welfare and child participation in court proceedings is yet to be scrutinized by the Courts. Battle custody and guardianship cases in Syariah courts seems to focus the issue of qualified or unqualified custodian and guardian. As such, the concern of the court might divert from the child; as the subject matter; to the spouses since the issue brought up referring to the custodian. Thus, an empirical research was carried out along with library research in this qualitative writing. Data is analysed utilizing case study and content analysis method. This study indicated that Syariah Court procedures in arriving at a decision of child custody cases are sufficient. However, in order to safeguard the interest of parents and children, there are possible betterment of court due process in the context of implementation of certain procedures such as to how child interview and opinion should be conducted in practice particularly in order to fulfil the concept of best interest of child and welfare of the child.*

Keywords: *Child Custody, Syariah Courts, Best Interest of Child, Hadanah Procedure*

Introduction

The concept of best interest of child or welfare of the child being the utmost goal in winning the issue of child custody. Various elements should be fulfilled as to determine the best interest of child or the welfare of the child being observed under the supervision of the

parents or guardian. In order to identify the elements satisfied by either party i.e. the mother or the father or other potential custodian and guardian, the courts took numerous ways to gather such information before concluding custodial matters (Nor Fadzlina & Nurhidayah, 2010). This is because the effect of divorce and separation that involve children should not develop impact negatively and harmful to the child of the marriage. As such, the judicial interview in chambers by the judges or *in camera* procedure should be widely accepted by having the children's views and opinion and at the same time serve the concept of best interest of child or welfare of the child (Larry, 2003). The objective of this writing is to examine whether the judicial interviews or *in camera* procedure is generally acknowledged in Shariah Courts in assisting the judge in giving verdict for *hadanah* cases.

Best Interest of Child and Welfare of the Child

The principle of best interest of child and welfare of child as the fundamental consideration in custodial cases vary in its underpinning elements in each case (Normi, 2001; Roslina & Nora, 2011). Article 12 of United Nations Convention on Rights of a Child highlighted on best interest of child while the legal provision in Malaysia – be it civil law or Syariah law – expressed on welfare of the child. Judgment in most custodial cases applied the concept of welfare without neglecting the principle of best interest of child. The element listed in evaluating the concept of welfare are – care, comfort, attention, wellbeing and happiness of the child. While the elements to consider the concept of best interest of child being applied are – emotional ties and relationships between the child and his/her family members; capacity of the parents to provide a safe home and adequate food, clothing and medical care; mental and physical health needs of the child; mental and physical health needs of the parents and whether or not any presence of domestic violence in the home. With regard to the elements to be considered in custodial issue; the difference of approach between the concept of best interest of child and welfare of the child has no dissimilarity. Both approaches aim to be the underlying principle to ensure the proper upbringing and care of a child (Alizah et.al., 2017). However, these two fundamental considerations seem to be lacking comprehensive particulars in terms of definition and content (Roslina & Noraini, 2015). Slight dissimilarity applies in term of focal-issue whether the element listed is a child-centred focused or child and custodian-centred where the supporting elements from outside are not neglected.

Child Involvement in Court Proceedings

Child involvement in court proceedings generally discussed in juvenile cases which involved young offender in criminal offence or as witness (Anneta, 2001). In civil case, custodial issues demand the participation of child in courtroom with reference to various relevant legal provisions as one of the elements to respond to the concept of best interest of child and welfare of the child (Noor Aziah, 2012). Generally, child involvement in court proceedings can be divided into two modes that is - direct involvement and indirect involvement i.e. through representatives.

At International level, by virtue of Article 12 (1) UNCRC, it is clearly stated that “...*child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. ...opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative...*”.

This clause imposed (a) certain level of significance of having the opinion and views from child in relevant matters concerning child (b) condition to allow child views to be heard (c) age and maturity of the child a vital term to be considered and; (d) means of accepting their

views and opinion (Roslina, 2014). By virtue of Article 12 (1) UNCRC, ‘the right to listened to a child’ carry more weight compared to ‘listening the voice of the children’ in custody cases. As such, procedurally, the court ought to allow kids as the subject matter to speak on their right. In Australia, adopting the UNCRC, the Family Court established the Child Inclusive Conference (CIC) as to facilitate the Family Consultant in suggesting direction to the court at the very early stage. Based on the research, twelve items assists the Family Consultant to conclude including children’s ability to understand issues and implications and to give feedback; risk; importance of meeting parents first; time factor; hearing the child’s voice; focus on resolution; complexity of issues; best interest of the child; opportunity to follow up; therapeutic aspect; practice experience and intuition and the role and the limitations of the role of family consultant (Vicki Vicki, Alfred, Jennifer & Jasmin, 2017). The Family Consultant function effectively by way of balancing the needs of Article 12 of UNCRC and the concept of best interest of child. This could be seen through the focus highlighted by the Family Consultant that aware the wellbeing and potential risk participating child in CIC and conscious in resolving the complexity of the arising issues.

Under Islamic Law, according to Quranic verse from Surah Al Baqarah 2:233, Allah mentioned:

“Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers' provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the [father's] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is Seeing of what you do.” (Surah Al Baqarah 2:233)

Based on this verse, the attachment of an infant below 2 years old to her mother is a matter of his/her best interest. The baby needs the maternal bond, care and affection of her/his mother that includes that best source of nutrition for their physical development. As such, staying with his/her mother considered as a prime right of a child (at that age) to be nurtured and loved. At the same time, the father has specific duty towards the mother including those who feed the child through-out the breastfeeding period (Norita & Safinah, 2017).

According to one hadith narrated by Abu Hurairah r.a., the Prophet states that *“A woman came to the Prophet s.a.w and said, “My husband wants to take away my son, although he (the son) gives me comfort and brings me drinking water from the well of Abu Inabah.” Thereupon the husband appeared denying her claim over his son. The Prophet s.a.w then said: “Child! Here is your father and here is your mother; make a choice between the two whomsoever you want.” The son caught hold of the hand of his mother and she went away with her son”.* (Sunan Abu Dawud)

This hadith indicated that when the child attains certain age, they are capable to make up their own choice and decision. As such, the *mumayyiz* child was given rights to choose to stay whether to be with his mother or his father. It is assumed that the chosen party is the one close to the child, kind, loving and could be the best interest of the child. It is understood that, the child was to cast vote only if both parents possess proper criteria as a custodian (Ibn Qudamah). The rights of the child is stronger than the right of the custodian (Sayid Sabiq). The practice being applied in this hadith was firstly, the claim made by the mother and

secondly, the contention submitted by the father was heard by *Rasulullah s.a.w.* Then only, the child was asked for his opinion.

Referring to Islamic Family Law Enactment (Kedah) 2008 (IFLEK2008), factors that contribute in the verdict of *hadanah* cases is the child wishes. Pursuant to this provision, *in camera* procedure or judicial interview was held in Shariah Court. Judicial interview should be conducted to gather important information but must be held by skilled interviewers (Nor Fadzlina & Nurhidayah, 2010). The issue arose on the capability of the judges in conducting the judicial interview because the judges have no special skill or training in conducting interviews. In other countries, the wishes of the child obtained by way of counselling session, through welfare officer, family consultants and child representative (Roslina, 2015). Participation of child in mediation session (*sulh* session) in Syariah Court also should be considered because the voice of the child is for their own future needs (A. Ahmad, A. Yaakob, K. W. Mohd, N. A. Mohd Awal & M. A. A. Samuri, 2015).

Provision under UNCRC, Islamic Law and IFLEK 2008 request the underlying principle of child welfare and best interest of children being applied in court due process of custody cases. Such principles need specific attention as to the procedure especially on the wishes of the child and gaining their views and opinion. The child must be given proper opportunity to exercise the right to be heard in court due process. Be it direct appearance in courtroom or indirect appearance, the voice of the children should be recorded by the judge accordingly. This issue resembles the readiness of the court due process, preparation of the court system and court officer of such procedure - in allowing children to be present and accepting credible report from child representatives. The approach of courts to the children might varied with reference to the child condition. As each case differ to one another, if the court need to conduct judicial interview, the suitability to call upon a child to courtroom is the prime factor to be considered by the court.

Age of Discernment (Mumayyiz) as Determinant in Child Participation in Hadanah Cases

There are many distinguishing factors that guide decision-making in custody cases (Larry, 2003). Relying on the function of *in camera* procedure or judicial interview, the element of child age being the main determinant in their participation in *hadanah* cases besides maturity, mental health condition and physical health condition of a child.

Technically, under Islamic Law, *hadanah* essentially signifies right of custody in circumstance whereby the child is yet to reach the age of discernment i.e. non-*mumayyiz*. Once the child attains age of discernment or *mumayyiz*, the *hadanah* period lapsed. Thus, give opportunity for the child to decide as the hadith narrated by Abu Hurairah. *Hadanah* and non-*mumayyiz* child in actual context reflex a situation of nurturing and taking care of child which of age that need supervision and assistance from the guardian or custodian to manage themselves; and incapable of classifying right and wrong (Ahmad Ibrahim, 1997; Roslina, 2014). And the rights of custody for *mumayyiz* child terminology known as *kafalah* (Al-Mawardi). According to *mazhab Shafie* and *Hanbali*, *mumayyiz* child has the right to choose in order to live with when divorce occurs between parents because their capability as a growing child to think and make decision based on their needs, affection and warmth. This view was rebutted by *Hanafis* and *Malikis* that maintain the custody to the father on the basis of education for male child and marriage for the female child (Roslina, 2014).

Under Section 85(1) Islamic Family Law Enactment of Negeri Kedah 2008 (IFLEK 2008), “*the custody of a child terminates upon the child attaining the age of seven years, in case of a male, and the age of nine years, in the case of a female, but the court may, upon application of the hadinah allow her to retain the custody of the child until the attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female*”. By virtue of this provision, the age of the child to make their choice differ according to gender. The court may instruct male child aged 9 and female child aged 11 to come forward to exercise their right under the Act (Zanariah, 2012). The provision continues under subsection 2 that “*After termination of the right of the hadinah, the custody devolves upon the father, and if the child has reached the age of discernment (mumayyiz), he or she shall have the choice of living with either of the parents, unless the court otherwise orders.*”

As such, in discharging *hadanah* cases; in relation to child involvement in court proceeding; a non-*mumayyiz* child is unqualified to be inserted in the process due to incapacity. However, the views of the *mumayyiz* child could be obtained but not to be relied solely as the determinant in *Hadanah* Order.

Findings and Discussion

Child Involvement in Courtroom under Islamic Family Law Enactment

Legally speaking, *hadanah* cases in Syariah Courts ranging from the custodial right between the father and mother or other potential custodian disregards of the age of the child whether age of babies, an infant, a toddler, a minor or adult. *Hadanah* cases also do extend from the right of custody to visitation right that includes right to access, visit and overnight (Zanariah, 2014). The application of those rights from the litigants could be seen in various reported and unreported cases registered under the code 028 which refers to *hadanah* cases.

Pursuant to the legal provisions in IFLEK 2008 the court is obliged to contemplate the view of a *mumayyiz* child of certain age as prescribed as to obtain their wishes in custodial matters after considering the qualification of the applicants.

According to Section 82(1) IFLEK2008,

“*...the mother shall be of all persons the best entitled to the custody to the child of her infant during the connubial relationship as well as after its dissolution*”.

At all time, the mother being the preferred custodian for an infant which is a non-*mumayyiz*. But, when once the termination of the right of the *hadinah* occurs – especially when the child reaches the age of *mumayyiz* – the right transmits to the father by virtue of Section 85 (2) IFLEK 2008. Whereas Section 86 of IFLEK 2008 provides that custody for illegitimate child be it male or female upon mother and the maternal family.

Section 83 IFLEK 2008 stated on the criteria of the guardian or custodian,

“*A person to whom belongs the upbringing of the child, shall be entitled to exercise the right of hadanah if*

(a) *he is a Muslim;*

(b) *he is of sound mind;*

(c) *he is of an age that qualifies him to bestow on the child on the care, love, and affection that the child may need;*

(d) *he is of good conduct from the standpoint of Islamic morality; and*

(e) *he lives in a place where the child may not undergo any risk morally or physically.*”

Those conditions should be satisfied to be a qualified custodian. According to Section 85 IFLEK 2008, the welfare of the child with the consideration either the child's wishes or the parents has been stated as below:

“(1) The right of the hadinah to the custody of a child terminates upon the child attaining the age of seven years, in case of a male, and the age of nine years, in the case of a female, but the court may, upon application of the hadinah allow her to retain the custody of the child until the attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female.

(2) After termination of the right of the hadinah, the custody devolves upon the father, and if the child has reached the age of discernment (mumayyiz), he or she shall have the choice of living with either of the parents, unless the court otherwise orders.”

The element of welfare of the child is the paramount consideration in granting order for custody as provided under Section 87 IFLEK 2008;

“...the court may by order place the child in the custody of any other person or of any association the objects of which include child welfare.

(3) in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and, subject to that consideration, the court shall have regard to:-

(a) the wishes of the parents of the child; and

(b) the wishes of the child, where he or she is of an age to express an independent opinion.”

Under these provisions, the court have to listen to the wishes of the parents of the child and the wishes of the child of which at the age of discernment that could express his or her opinion after considering the condition and status of the child on legitimacy as accordance to Section 82 and 86 of IFLEK 2008.

In Camera Procedure or Judicial Interview in Hadanah Cases

Most of *hadanah* cases that undergo in camera procedure or judicial interview will be duly recorded in the court file as it stands as a strong supporting evidence obtained by the judge.ⁱ

In the case of *Rooseliwati binti Hussein lwn Syed Farouk Azlan bin Syed Abdul Aziz (14200-028-0126-2008)*, the litigants having 4 children throughout their marriage aged 19, 18, 15 and 11. The Plaintiff plead for full custody of her child aged 15 and 11. However, the court granted joint custody for both children. There was a record of *in camera* session held by the court as stated in the Judgment Order that the children stayed with the Plaintiff as their wishes. The court also ordered the Defendant to take care the child in the event if the Plaintiff has out-station task.

In the case of *Sheikh Abdul Shakir Bin Sheikh Abdul Kadir lwn Noor Haryatie Binti Harun (10200-028-0218-2008)*, the only daughter was given chance by the court to choose her *hadinah* and she opted to stay with her father. Her age was not stated clearly but was mentioned as '*anak telah mencapai umur dewasa*' or 'the child reached her age of majority'. In the earlier stage the court granted joint-custody of the child in *Hadanah* Order dated 5th July 2004. At that time, the child lived in Plaintiff's house and divorce. But when the mother moved to foreign country and got married to a Britain, the Plaintiff applied for full custody of his daughter in 2008 to safeguard her in terms of culture differences that she has to face in the foreign country.

In the case of *Linda Isah Visentin lwn Nik Mohd Zuhry bin Nik Mohd Yusoff and Ors (03000-028-0019-2011)*, the sons elected the father to be their custodian until they reach the age of adulthood. The Defendant filed an appeal contesting the order of the court that decided to call upon the child for judicial interview since the sons aged 8 and 6 years old on the basis of prejudice his right. The Syariah Appeal Court in *Nik Mohd Zuhry bin Nik Mohd Yusoff & 3 Orang Yang Lain lwn Linda Isah Visentin (03000-028- 0006-2009)* on such date approved the order of the Syariah High Court because the presiding judge to pronounce an *interim* Order pending over the settlement of the main *Hadanah* proceeding.

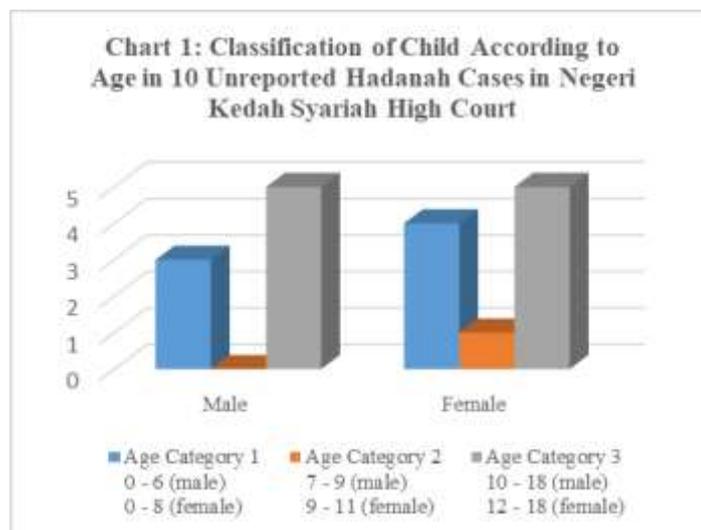
Result revealed that these 3 reported cases conclude area to be improved by Syariah Court. Firstly, procedurally, although all cases gone through proper *in camera* proceedings or judicial interview conducted so as to feed the court with relevant facts and figure in trial cases; the precise guidance in relation to age of the child to be called upon to attend court process is not clear. Case *Linda Isah* indicated that *interim* application did allow the appearance of non-*mumayyiz* child although they are incapable of making decision. Secondly, in the substance of the custody order. The type of custody order i.e. whether joint custody or sole custody has to be analysed in its application towards *mumayyiz* child. In the case of *Rooseliwati*, the court gave both father and mother time to be with the *mumayyiz* child. Complication might arise when unequal distribution of time take place and who possess the rights to decide for matters related to the child.

Non-Participation of Child in Sulh Settlement

Sulh session in Syariah Court formally conducted by a *Sulh* Officer with the presence of the litigants. Although children become the subject matter in *hadanah* cases, it seems that non-participation of child in *sulh* settlement emerge as an established practise in Syariah Courts.ⁱⁱ

Chart 1 displays the classification of child according to age from 10 selected unreported *hadanah* case. From 18 children involved in these 10 selected cases, 11 children categorized as having age of discernment while the remaining 7 children categorized as non *mumayyiz* child i.e. age 10 months to 4 years old for male and 8 months to 5 years old for female.

Out of these 10 cases in 2011 and 2012, only 5 cases involved child aged 10 to 17 for male and child age 11 to 15 for female. Results indicated that file number 02200-028-0241-2011, 02200-028-0250-2011, 02200-028-0267-2011, 02200-028-0011-2012 and 02200-028-0016-2012 touched on the rights of *mumayyiz* child in custodial and visitation matter.



Having children of age 15, 14 and 11 in the case 02200-028-0241-2011, the Plaintiff (mother) applied for custody on the basis that she nurtures her two-daughter aged 15 and 14 and her 11 years old son since birth. However, the case was struck out under Section 116 (i)(b)(ii) Islamic Mal Procedure Enactment (Negeri Kedah)1979 (at the material time) since the non-appearance of the Plaintiff. No Consent Judgment was recorded nor endorsed in this case.

In 02200-028-0250-2011 case, the father (Plaintiff) applied for custody for his 10-year-old son that at the material time was in the custody of her ex-wife (Defendant). The father claimed that the child did sent him a message asked Plaintiff to come and take him. The child refused to stay with his mother. The other two elder daughter remain to be with their mother. This matter resolved in *sulh* session. Custody of the 10-year-old *mumayyiz* child was granted to the Plaintiff as the father.

In the case 02200-028-0267-2011, Consent Judgment was recorded and endorsed as the litigants reach settlement through *sulh* session. Custodial right over the children was granted to the Plaintiff. The children – sons aged 14, 3 and daughter aged 11 was absence throughout the proceeding although two of them already attain the age of *mumayyiz*.

In the case 02200-028-0011-2012, the mother filed custody application with the assistance of Legal Aid Department for her sons aged 17 and 12. The appointed Legal Aid Officer managed to record Consent Agreement between the parties but the Defendant failed to attend court session to endorse such Agreement. With reference to Section 85 IFLEK 2008, the judge conducted judicial interview and the children opt to live with their mother.

Sulh session resolved issue in the case of 02200-028-0016-2012 when the Plaintiff (mother) applied for *hadanah* for her 13 years old daughter that has been staying with Defendant (father). The Plaintiff claimed that she has been denied her visitation right of her daughter. The Defendant in his Defence clearly explained his concern if the daughter lived with Plaintiff that married to a man with 2 grown up son i.e. aged 18 and above. The matter reconciled in *sulh* session whereby the Plaintiff agreed to have visitation right while Defendant have the custodial right over their daughter.

These findings resulted the absence of *in camera* proceedings in *sulh* session for *mumayyiz* child except for case 02200-028-0011-2012. Procedurally, the *sulh* officer that mediate such session recorded an Agreement without any judicial interview conducted although the child had reached the age of *mumayyiz*.

Syariah Court Procedure

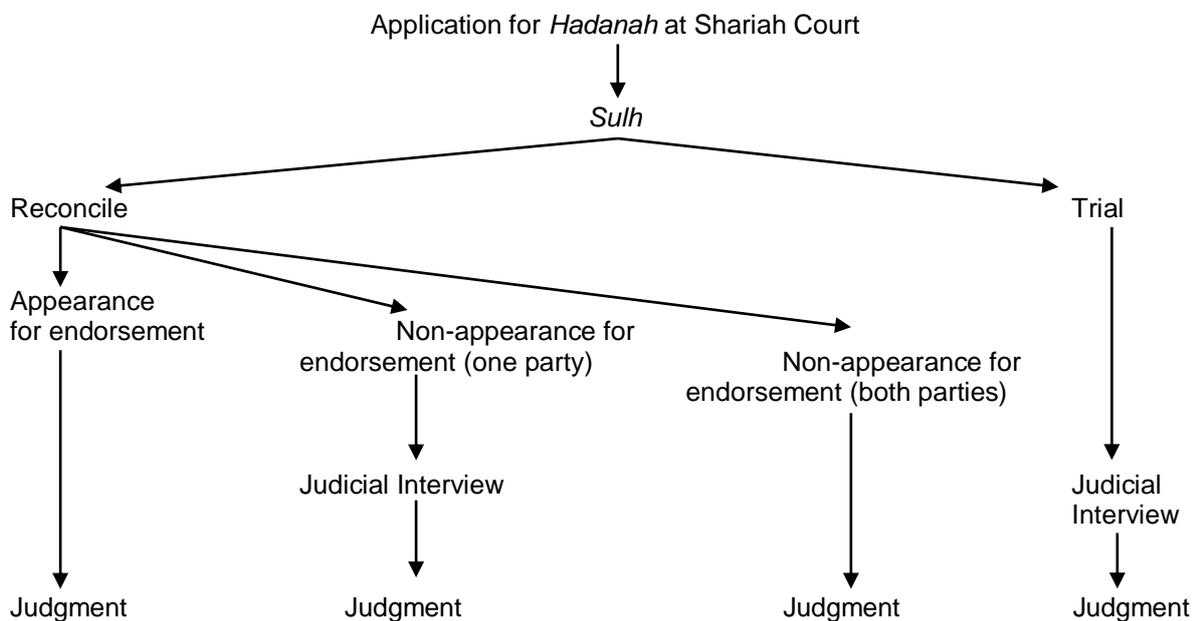
The flow of *hadanah* cases; as in Figure1 below; differ from one stage to another depends on how the court officer decides based on the documentary evidence filed by the litigants or *Syarie* Lawyer and other corroborated evidence.

If cases undergo for full trial or contested case, the judge call upon the *mumayyiz* child for judicial interview session to give information to the court on the potential custodian of the child. This is pursuant to the legal provision for the court to deliberate over the decision of *hadanah* for *mumayyiz* child from various perspectives i.e. the welfare of the child, the best interest of the child, reasons and wishes of the parents and reasons and wishes of the child. However, the precise process of interviewing such child left unguided and depends solely on the adjudicator. The role played by the judge in judicial interview without assistance from

any family consultant, welfare officer or any skilled professionals in child psychology create a huge gap in the method of retrieving relevant points from the child.

If cases could be concluded in *sulh* session, the approach of the *sulh* officer is to assist the litigants to a solution without gaining views from the child. Furthermore, in the practice of most *sulh* session, only *sulh* officer and the litigants are allowed to attend the session. But, third party, outsider and any other person may turn up if permitted by the *Sulh* Officer.

Figure 1: *Hadanah* Proceedings



Conclusion

As a conclusion, this research indicates that the child participation in legal proceeding, might be enhanced in terms of practises in Syariah Court.

The approach of the court to conduct judicial interview of a *mumayyiz* child whether by plea of either litigants or by the request of the presiding judge – confined within the jurisdiction and power of the court by virtue of the legal provisions provided. Submission of pleadings and cause paper has to be completed by both parties as a means to enlighten the court on the current debated issues. Nevertheless, the actual detail of judicial interview or *in camera* procedure executed by the Syarie Judge is silent and not expressed in standard operating procedure. If judges are not adequately proficient in interviewing children, they might make mistake in probing their views or feelings. Furthermore, usually, the judges trained in investigator techniques and not interview techniques compared to mediator and lawyer (Whitney, 2015). Child might be haunted with the feelings of guilt, pressured either before or after the interview. And the outcome of poor judicial interview techniques and the intimidating atmosphere in the courtroom – the child may be traumatized by the experience. (Nicholas, Rachel, Francine Cyr & Denise, 2013; Dan, 2011). The court also failed to receive any report on the child lifestyle either from welfare officer or any organization representative as an alternative of judicial meetings. Input from qualified psychologist, social worker, psychiatrists or mental-health expert might help judges in deducing more accurate and reliable information (Dan, 2015). A fact-finding on the such procedure may be conducted in

future so that the issue of skilled interviewer can be resolved in line with the betterment of the process that highlighted the best interest of the child.

With regard to out-of-court settlement, the presence of *mumayyiz* child in *sulh* session should be reviewed. Although the parties furnish credible information to the *sulh* officer in order to maintain their status quo or to uphold their rights, the views and opinion of a *mumayyiz* child is also a crucial demand to balance up the agreement reached by both parties. It is important to offer space for them not only to choose with whom they want to be with; but also, for them to raise up any issue that associates with their interest for today and in the future (Nicholas et. al., 2013). Furthermore, the *Sulh* officer have the discretion to allow a *mumayyiz* child to participate in *Sulh* session as no any legal impediment definitely specified restriction inclusion of *mumayyiz* child in *hadanah* JKSM Practice Direction or any legal provision.

Syariah Court as the best medium to reconcile family issues may refine their role in *hadanah* cases especially in involving child in courtroom. Divorce that took place between parents ought to avoid further damage to the interest of the child. It should be noted that although the right of the custodian lapsed, but the right of the child did not lapse in matters correlate with their education, spiritual and moral, physical and mental wellbeing and other needs including food, living area, safety and health. And such duty and responsibility shared together between the judicial institution and the parents.

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ⁱ Research was conducted using case study whereby *hadanah* cases was selected from reported case in Jurnal Hukum year 2008 – 2011 and 10 unreported cases in Syariah High Court of Negeri Kedah.

ⁱⁱ Ten unreported case in 2011 and 2012 with the code 028 from Syariah High Court of Negeri Kedah was selected – 5 cases each year.