

## **Determining jointly acquired property in syariah court: a legal analysis of children's needs.**

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### **Abstract**

Demands for division of jointly acquired property are often one of the main agendas for married couples, whether after divorce, after death, or those still in marriage, especially in polygamous marriages. Therefore, the parties involved will convince the court that they are entitled to the jointly acquired property or entitled to a more significant rate in the claim. So, to what extent do judges focus specifically on 'needs' in determining the division rate of jointly acquired property in decided cases? It needs to be seen. This article aims to discuss the extent of the role of the 'needs' of dependent children and its significance in determining the rate of division of jointly acquired property, which is rarely highlighted in most jointly developed property cases decided in Syariah Courts. This qualitative research method adopts a content analysis study design and uses a document analysis method approach in the data collection process to achieve the objectives. The information and data obtained were analysed descriptively. The study found that implicitly, the child's needs element can influence the court's decision in determining the rate of division of jointly acquired property even if it does not explicitly emphasise the significance of the child's needs in jointly developed property claims in the trial either by the trial judge or by the claimant.

Keywords: role, needs, children, jointly acquired property, Syariah Court

### **1. INTRODUCTION**

In general, jointly acquired property adopted as customary law within the Malay community (EN Taylor 1937; Hajjah Lijah bte Jamal v. Fatimah binti Mat Diah (1950) MLJ 63) and subsequently recognised by Islam through the principles contained in the rules of Islamic jurisprudence, namely 'urf or al-adat al-muhakkamah which means custom takes the place of

law (Ibrahim Lembut 2007). It also does not contradict the Islamic law from the point of view of maintaining justice and welfare of couples in marriage, especially women, and rejecting harm. Jointly acquired property is property acquired, collected and developed by a husband and wife during the period of a valid marriage according to Islamic law (Suwaid 2003; Abdul Monir 2006) whether it involves a direct contribution (Rogayah binti Ismail v. Abd Razak bin Sulong (2005) 20 JH (2) 342) or indirectly (Tengku Anun Zaharah v. Dato 'Dr Hussein (1983) 3 JH (1) 125) which is undertaken in the form of a single contribution or joint contribution (Mimi Kamariah Majid 1999).

Problems regarding jointly acquired property between husband and wife are essential and must be resolved fairly. Therefore, the jointly acquired property can not only be claimed during or after divorce (Suwaid 2010) or death (Misza'iri & Akmal Hidayah 2010) but also while the marriage is still going on, for example during the application for polygamy or after polygamy and also if there is a conversion (apostasy.) One of the parties in the marriage (Md Yazid et al. 2020). Along with that, among the essential elements taken into account in determining the rate of division of jointly acquired property claimed by the parties as provided in the Islamic Family Law Acts or Enactments of the states is the 'needs' of children in marriage (Section 122 (2) (c) of the Selangor Islamic Family Law Enactment 2003) other than the element of contribution to property acquired during the marriage period) and debts incurred by one of the parties for their benefit (husband and wife) shared.

Nevertheless, most of the jointly acquired property cases that have been tried in the Syariah Court are not explained in detail the 'needs' of the dependent children, for example, in the case of *Ida Khatijah binti Arshad v A. Rahman bin Isa* [2015] 40 JH 78; *Mohd Anuar bin Omar v. Norafidah binti Ibrahim* [2015] 41 JH (2) 200-219; *Masiran bin Saadali v Azizah binti Abd. Rahman* [2003] 16 JH 33; *Abd. Razak bin Kasim v Radziah binti Yahya* [2013] 37 JH 63; that is, even if the couple has children, but in the context of determining the rate of division of jointly acquired property, the attention and emphasis specifically on the needs of the children are not raised by the Court. Rarely do judges decide with special emphasis on the importance of the child's 'needs' in the division of jointly acquired property as in the case of *hadhanah*. Thus, the question arises as to the extent to which the elements of the child's needs are taken into account in the judgment of the case to determine the rate of division of jointly acquired property? What is the significance of the child's 'needs' element in determining the division rate of jointly acquired property? In fact, according to A. Ahmad et al. (2015), the 'needs' of children are much debated in the case of *hadhanah* rather than in the case of jointly acquired property.

In line with that, the objective of this article is to discuss the extent of the role of children's needs and its significance in determining the rate of division of jointly acquired property in the Syariah Court in Malaysia. Thus, this qualitative study adopts a content analysis study described and presented to achieve these objectives.

## 2. METHODOLOGY

The methodology adopted is doctrinal legal analysis. A few data for this paper are obtained from primary and secondary legal sources. The primary legal bases are the federal gazette,

statutes, cases, and Malaysia's high court. The secondary legal sources are obtained from legal dictionaries, law reviews, journals, review other social science journals and electronic references. The information and data obtained were analysed descriptively.

### **3. DISCUSSION AND FINDING**

#### **3.1 CHILDREN AND SYARAK IN GENERAL**

*Kamus Dewan* (2017) defines the word child as a young boy or girl, usually not yet 7 years old. The term 'slave' also means immature human slaves (usually under 17 years old). Therefore, based on the above definition, 'child' or 'boy' is a small individual, whether male or female, who is usually under 17 years old and should be given the best supervision from every angle. However, according to Islam and the law in Malaysia, the definition of a child is different.

According to Black's Law Dictionary, a child has not yet reached the age of 14, although the period now varies from one jurisdiction to another. Moreover, the term child also refers to a boy, girl, or minor (A. Garner 1999). Whereas Roger Bird (1983) defines a child concerning section 107, Children and Young Persons Act 1933 United Kingdom, which is as a person under the age of 14 and a child under the age of 10 is exempted from criminal responsibility committed by him. The Oxford Dictionary of Law states that a child has not reached adulthood. Further, according to this dictionary again, there is no most precise and specific term used for someone under 14, under 16 and sometimes under 18 (A. Martin 1996).

In 1991, the Child Protection Act 1991 (Act 468) was introduced to replace Act 232, which defined a child as a person under 18 and did not differentiate the definition between a child and a young person. However, based on the Children Act 2001, which came into force on 1 August 2002, a child is defined as under 18 (Mohammad Ramzi 2015). Similarly, a child provided under the Department of Social Welfare 2016 is defined as a person under 18 as enshrined in the Children Act 2001. However, the Children and Young Persons (Employment) Act 1966 (Amendment) 2018, which is an act to control the employment of children and young people, defines "children" are people who have not reached the age of 15 years, while "young people" are people who have not reached the age of 18 years.

According to Islamic law, the term child refers to someone who has not reached puberty (al-Suyuti t.th; Ibn Nujaim 1968). While according to Ibn Manzur (t.th), a child from the words "*al-thiflu and al-thiflah*" means a small child. While in terms of the plural word, "*al-thifl*" is "*athfaal*". Abu Abdillah (2008) said that a child is the word "*thifl*" which means from the time he was born from his mother's womb until he reached puberty. This is based on the terms of Allah SWT in surah al-Ghaffir, verse 67. There are two ways to determine whether the child has reached puberty or vice versa, namely puberty naturally and puberty with age. Usually, girls who have reached puberty are when menstruation comes, while boys are when semen comes out. Therefore, Mustafa al-Khin et al. (2011) stated that Imam Syafie thinks that the determination is through the first dream to come out of semen for men or see the coming out of menstrual blood for women.

While al-Jaziri (2003) states that Imam Malik argues, the signs of puberty are the growth of hair on the limbs, the tip of the nose expands when pressed, and the voice changes to hoarse and rough. Therefore, these children are considered *mukallaf* and are obliged to perform religious demands such as prayers, fasting and pilgrimage. Determination of puberty by age is taken into account when the physical signs do not occur in the child. The jurists have set a certain age for puberty. According to Faruq (1999), Imam Syafie, through the process of *istiqla'* has found the law and determined that the age of puberty for men is between 12 to 15 years. A person is considered puberty if he goes through one of two processes: either dreaming of ejaculating or reaching even a 15-year-old never dreamed directly. The menstrual age for a woman is between 9 to 15 years and the period of menstruation is between one day yesterday to 15 days. At the same time, 6 or 7 days is a menstrual habit for women (al-Shafie 1980 & al-Bakri 2011). Next, Imam Hanafi explained that the puberty limit for a child is usually 18 years for boys and 17 years for girls. At the same time, Imam Hanbali set 15 years for men and women. Finally, in the opinion of Imam Malik, the maturity of a child is known when he has reached the age of 18 (al-Jaziri 2003).

The Islamic Family Law Act/ Enactment and the Syariah Court Evidence Act/ Enactment of the states define '*baligh*' as 'having reached the age of majority according to Hukum Syarak'. As for the Act or the Civil Procedure Enactment of the Syariah Court, the states define 'a minor' to mean a person who has not reached the age of 18 years. According to the Islamic Family Law Enactment of the State of Selangor (2003) and Negeri Sembilan (2003) provides section 89 (4), for the care of self and property, a person shall be deemed to be a child unless he has attained the age of eighteen years.

### **3.2 BRIEF DISCUSSION OF THE NEEDS OF CHILDREN**

According to the Fourth Edition Kamus Dewan (2013), 'Necessity' is needed, helpful, or essential. Next, necessity carries the meaning of things human beings need to continue living. The Children's Rights Convention (CRC) 1989 has outlined the most basic universal children's rights that need to be protected, namely life (children's right to survival), development (right to education, play and expression), participation (rights related to upbringing, community activities) and protection (rights to shelter from dangerous situations such as abuse, exploitation, rape, discrimination) (Department of Social Welfare 2020). According to the Children Act 2001 (Act 611), children's needs can be seen from the aspects of protection, care, temporary care, health examination and medical treatment and rehabilitation. Therefore, according to Shahrizat (2009), the National Children's Policy has been formulated, a general policy on children's human rights to enjoy a prosperous life. In line with this, the National Child Protection Policy action plan has also been formulated and launched to foster awareness on child protection, focusing on strategies to protect from neglect, torture, abuse, discrimination and exploitation (Department of Social Welfare 2020). In addition, several statutes provide protection to children, such as the Child Care Act 1951 (Act 351 Revised 1988), Adoption Act (Adoption Act 1952), Child Sexual Offenses Act 2017 (Act 792), The Child Care Centers Act 1984 (Act 308) and the Children and Young Persons (Employment) (Amendment) Act 2018. Among the basic needs of children are food and drink, the comfort of residence, children's schooling, the stability of family relationships,

and the emotional stability necessary to the economic stability of the household (Johari Talib & Nazri Muslim 2007). Therefore, Nurazmallail et al. (2008) explained that the residence should be safe and protected from any adverse effects from a moral and physical point of view and provided by the caregiver (mother and father). According to Zanariah Noor (2010), children have the right to protection and safety from a physical or moral point of view. This statement reinforces the belief that a conducive environment free from social problems and crime is essential for children's housing needs.

In addition, Ku Suhaila (2016) argues that good mental health through counselling is also essential for children in family institutions, especially for children whose parents face a marital crisis. According to the Islamic perspective, there is no definition of 'children's needs' precisely and thoroughly stated in previous scholarly works (Zanariah Noor 2010). According to al-Jaziri (1998), the father has to spend or bear the living to meet the children's basic needs that are the person in charge of him. However, Abu Zahrah (1970) stated that if the father is unable to fulfil the responsibility to meet the needs of his child, then the burden is transferred to his family who is 'there' and if not, then the Baitulmal will take over the responsibility. As for girls, Ibn Qudamah (1983) states that the father needs to provide necessities for him until his daughter marries, according to the Shafi'i and Maliki schools.

The fulfilment of responsibilities for children's basic needs includes food, clothing, shelter, education, and others considered essential. According to Ibn 'Abidin (1966) and Ibn Nujaym (1997), from among the fuqaha' Hanafi, the obligation of maintenance on children consists of food, clothing and shelter. As the guardian of a child, he must provide them with educational needs, especially Islamic education (Ibn Qayyim 1983) because Islamic education is part of worship that proves the servant's obedience to his Creator and should be based on the developmental level of their age (Ibn Sina 2001). Imam al-Ghazali stated that children's education should be given careful attention starting from born (Muhammad Jamaluddin & al-Qasimi 2011). What's more, in the current era of globalisation, the need for education has become a significant need for children's future.

In line with this, the needs of children in terms of protection of personal and family life is essential to avoid being exposed to outside interference without any of his consent (Husni al-Jundi 1993). According to Muhammad Rakan (1985), the privilege of protecting personal life in Islam aims to guarantee the care and protection of the five *Maqasid al-Syari'ah*.

In the immediate context of food form requirements, Mohd Izhar Ariff et al. (2018) argues that the halal element of *tayyiban* should be emphasised to produce Muslims who have admirable personalities and noble personalities. The health needs of children also need to be addressed and related to the need for vaccines in children. In this regard, *Dar al-Ifta 'al-Misriyyah* (2016) states that the immunisation demanded in Islamic law is intended to prevent limb deformities in children because it is a type of preventive treatment.

Although Islamic family law does not provide a specific definition of the needs of children, section 86 (2) (b) of the Islamic Family Law (Federal Territories) Act 1984 states that the wishes of children are taken into account by the court based on age, maturity and the extent to

which the child understands the matter in dispute. This indirectly means the child's wants are also included in the category of the child's needs.

### **3.3 TO WHAT EXTENT DO CHILDREN'S 'NEEDS' AFFECT THE RATE OF DIVISION OF JOINTLY ACQUIRED PROPERTY?**

*Kamus Dewan* (2020) defines 'need' as necessary, necessity, importance or inevitably. Western scholars, using Maslow's (1934) hierarchical theory of 'needs' as the leading standard in the context of research related to the level of human needs including in psychology (Bland & DeRobertis 2020), management organisation (Dye et al. 2005), education (Adiele & Abraham 2013), socio-economics (Seeley 1992). However, according to Ridzuan et al. (2018), Maslow's theory has been criticised by some other scholars for having specific weak points, such as Corning (2000), Neher (2009), Wahba and Bridwell (1973) and others. Maslow's hierarchical theory of needs consists of five levels of human needs starting from the bottom, namely basic needs, security and self-assurance needs, the need for love, the need for self-respect, and the last is self-achievement. In other words, one has to meet the requirements on the ground floor first before one can meet the conditions on the upper floor.

Maslow's theory of hierarchy of needs is also said to be inconsistent with the Islamic perspective among others because it does not touch on spiritual and spiritual needs as displayed by Bouzenita & Boulanouar (2016), Ridzuan et al. (2018), Nor Nazimi et al. (2017) and others. Therefore, the 'need' in the context of Islamic perspective is included in the discussion of the conceptual framework of *Maqasid al-Shari'ah* which is to achieve the purpose of syarak for the benefit of human beings from the aspect of maintaining their religion, soul, intellect, lineage and property or called *Usul al-Khams* or *Daruriyyat al-Khamsah* (al-Ghazali 1993). According to al-Zuhayli (1995), *Maqasid al-Syari'ah* is divided into three components based on its importance to humanity, namely *daruriyyah* (something that is very necessary for human beings), *hajiyyah* (something that is needed to facilitate human beings and eliminate difficulties) and *tahsiniyyah* (perfection. that is, if nothing else it does not make life difficult). Based on these three components, the basic 'needs' for human life are included in the components of *daruriyyah* and *hajiyyah*, depending on the level of seriousness of the needs. In this regard, there has been no detailed study on Maslow's theory of needs in the context of Islamic family law, especially in determining the rate of division of jointly acquired property in Malaysia.

The needs of children are usually linked to *hadhanah* rights (A. Ahmad et al. 2015) and child alimony rights (Zaini & Abu Suffian 2012) which have provisions in the Islamic family acts and laws of the states and are explicitly discussed and in detail in the case-cases related to it as opposed to the needs of children in the division of jointly acquired property which are rarely expressly highlighted in the judgment of matrimonial property cases even though it is provided for in the act or enactment of Islamic family law.

Nurul (2021) stated that among the Muslim community in Malaysia, children's rights are related to the responsibility of parents or guardians to provide maintenance, *hadhanah*, guardianship of self, property, and legality of children enshrined in the Islamic Family Law Act and Enactment states. Similarly, in the context of jointly acquired property, the child's

rights are crucial elements the court considers before a decision regarding the rate of division of jointly acquired property is made. Yet in most cases, the efforts of disputing spouses to try to convince the court that they are more entitled to rights (Normi 2001) make the focus on the needs of the childless prominent.

Usually, the Court does not explicitly explain or discuss the needs of children in the decision of a jointly acquired property case. Still, the needs of dependent children receive special attention from the court. Their welfare needs are included in the factors that need to be taken into account by the court in determining the rate of division of jointly acquired property as provided in the Selangor Islamic Family Law Enactment 2003, Section 122 (2) (C), namely in exercising power given by Subsection (1), the court shall have regard to:

*“The needs of the minor children of the marriage, if any and subject to such considerations, the court shall make an equal division”.*

This can be seen from the number of cases of jointly acquired property claims reported in the Journal of Law from 1980 to 2016 (Volume 1 to Volume 42) that is the number of cases with dependent children is 67 cases (5 cases of which are couples who have adopted children). Furthermore, 48 cases recorded out of the total did not give specific emphasis or were not highlighted on the needs of the dependent children. There were only 19 cases in which the judges discussed the needs of children in determining the division of jointly acquired property. Still, the approach adopted to assess and consider the needs of children is less clear (Rosnani 2020).

According to Muhd, the jointly acquired property claim determines the rights between the husband and wife, but the judge will consider the child's needs to decide. Adil (2017) believes the needs of children in terms of food, drink, clothing, shelter, and care that a person usually manages with the title of mother. The division of jointly acquired property can be given to him indirect contribution of the wife.

Among the cases of jointly acquired property that significantly affect the needs of dependent children can be seen in the case of Masiran bin Saadali v Azizah binti Abd. Rahman [2003] 16 JH 33, the Court has divided the claimed property at an equal rate between the plaintiff and the defendant even though the defendant is a full-time housewife to assess the wife's indirect contribution in housekeeping work and children's rights from the wife a parenting point of view children.

Moreover, in the case of Abd. Razak bin Kasim v Radziah binti Yahya [2013] 37 JH 63, Kota Bharu Syariah High Court Judge ruled that 1/3 of the jointly acquired property was given to the Respondent (Radziah) based on the needs of minor children, namely 5 children as a result of the 20 years of the marriage. In this case, the appellant was dissatisfied that the respondent got 1/3 of the jointly acquired property and made an appeal requesting that the respondent should get only 1/4 part as the properties were from his efforts. The Syariah Court of Appeal dismissed the appellant's appeal and upheld the decision of the Kota Bharu Syariah High Court. This is because the Court considers the elements of the need for children to be taken care of in deciding the division rate of jointly acquired property between husband and wife.

In the case of Faridah binti Suleiman v Mohd. Noh bin Othman [2011] 32 JH 15, having examined the facts given by both parties, the judge held that the contribution given by the plaintiff was an indirect contribution to the acquisition of the property. What can be seen in this case is that the court decided by considering on the grounds of the plaintiff having a child to care for. So, her mother is responsible for taking care of the children as the plaintiff is the mother of two children who are still not old enough. Therefore, it is appropriate for the court to consider this decision given the existence of elements of the child's needs that need to be emphasised in this case.

In addition, the significance of children's needs in influencing the rate of division of jointly acquired property can be seen when the court does not set aside the needs of children in terms of protection and security in deciding on the division of jointly acquired property. This means that the needs of children from this aspect are indeed influential in the division of jointly acquired property because they are the group that needs to be protected, and their safety needs to be taken care of.

Significant needs for shelter protection and child safety can be seen in the case of Hanipah binti Mohd. Nor v Baharom bin Aman @ Abd. Rahman [2010] 30 JH 41, The Court took into account the needs of children from the aspect of protection and security when a house was claimed as jointly acquired property, and as a result of their marriage, they were endowed with 12 children. The wife has to look after and manage the many children and work as teachers and settlers of FELDA (Federal Land Development Authority). Therefore, considering the children's need for shelter to protect them from various negative things, the house has been declared jointly acquired property.

Similarly, in the case of Mohd Anuar bin Omar v. Norafidah binti Ibrahim [2015] 41 JH (2) 200-219, the appellant applied to the Syariah Court of Appeal for the respondent to be given a rate less than 1/3 for one of the properties because the respondent's contribution was not sufficient and also apply for a declaration setting aside the other two real estate assets as jointly acquired property as the respondent had no assistance in the acquisition of those properties. The Syariah Court of Appeal dismissed the appellant's appeal based on the respondent's contribution to the household and the needs of 5 children from 23 years of marriage. However, the emphasis on the needs of children does not seem to be highlighted but is still influential in determining the rate of division of jointly acquired property. According to the court, the wife should stay in the house to ensure the welfare of her children in terms of shelter protection, taking care of food and drink and so on.

In the case of Ida Khatijah binti Arshad v A. Rahman bin Isa [2015] 40 JH 78, a married couple with 6 children who are still studying. In determining the rate of division on the house claimed as the jointly acquired property, the court had considered the needs of the minor children. However, the appellant did not emphasise the question of the needs of the children. The court made an assessment not only by considering the element of indirect contribution in maintaining a household or caring for a family but also the needs of minor children in terms of protection and safety.



Based on the above description, the findings of the study indicate that the element of child needs can influence the court's decision in determining the rate of division of jointly acquired property even if it does not specifically significantly emphasise the child's needs in jointly acquired property claims either by the hearing judge or by the party making demands. Such an element allows the party holding custody of the children to receive a share or rate commensurate with their responsibilities in the jointly acquired property in managing the children, which is considered an indirect contribution. However, the share rate does not exceed the share rate for a person who contributes directly. For example, in the case of *Masiran bin Saadali v Azizah binti Abd. Rahman* [2003] 16 JH 33; *Abd. Razak bin Kasim v Radziah binti Yahya* [2013] 37 JH 63 and *Mohd Anuar bin Omar v Norafidah binti Ibrahim* [2015] 41 JH (2) 200-219.

In addition to examining the interests of both parties, namely the husband and wife, the court will also consider the needs of children in determining the rate of division of jointly acquired property to ensure that it is maintained and fair to all parties. The child's needs in the division of jointly acquired property are crucial to ensure the child's life as provided in the law. Implicitly, it is clear that the court made the issue of children's needs. One of the matters of focus before the division rate of the jointly acquired property was decided.

#### **4. CONCLUSION**

Ultimately, the needs of children are among the main aspects assessed and considered in court related to jointly acquired property claims as children are the ones who need to be defended to continue to survive in the midst of their parents' disputes, especially after divorce. With the needs of children enshrined in the statute, their rights are more guaranteed from a legal point of view. In the context of jointly acquired property claims, it can influence the court in determining the rate of division of jointly acquired property of the parties involved.

Based on the above study, it is found that the number of cases where the court does not pay special attention to the welfare of dependent children in judging the division of jointly acquired property is very significant compared to the instances given attention. The court only divided jointly acquired property between the parties without including the child's needs in the proceedings.

This is because no statement of claim from the parties was included in the proceedings related to the child's needs. As explained above, children will influence the rate of division of jointly acquired property in the event of a settlement agreement entered into by the plaintiff and defendant. Therefore, the court will assess the child welfare provision in jointly acquired property proceedings based on the statement of claim and settlement agreement made by the parties, even if the childbearing is the couple's adopted child.

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