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## **UNDERSTANDING WHY MOTHERS CAN LOSE CHILD CUSTODY IN MALAYSIA**

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### **ABSTRACT**

Custody decisions are tailored to the circumstances of each case based on related principles with the protection of child welfare as the courts' paramount consideration. This paper sought to understand custody issues from the quantitative viewpoint through a conceptual model and examined how child custody principles have influenced loss decisions for mothers. The methodology used was content analysis and the Chi-Square correlation, with usable data provided by 47 cases decided in Malaysia between 1987 and 2017 based on Act 303. A coding instrument and a conceptual framework were developed with items covering the presumption of maternal custody, custodian qualification and loss of rights, and the child's and the mother's wishes. The findings revealed that mothers were less likely

to lose custody cases, and when they did, their defeats were strongly influenced by factors related to children's preferences and the status quo arrangement. The results contribute to an understanding of how mothers can lose custody of their children, and clarify whether some of the independent variables are used more regularly and are more predictive of the loss decisions than the others.

**Keywords:** Child custody, Act 303, child preference, custodian qualification, loss of rights.

## INTRODUCTION

Over the past decades, divorce has become commonplace amongst Muslim married couples in Malaysia (The Star, 2013). Their decision to divorce will give rise to many issues including deciding who will maintain custody of the children. The process of determining custody of children is imperative for parents, children and society, for children's well-being is dependent to a large extent on the quality of parenting received during childhood (Kelly, 1994). Equally important is assessing the probability of the custody case outcomes in terms of which of the two parents will be accorded custody. Mothers, with a lower probability of losing custody cases, presumably may have greater bargaining power for settlements, and mothers with a higher likelihood for loss decisions may decide not to proceed with litigations. The predictability of the outcomes can encourage settlements, thereby resulting in the avoidance of expenses and additional time that would otherwise be better allocated for child upbringing instead.

Divorced couples may have disagreements about custody of their children. Research has shown that resolving parental disputes concerning custody through negotiations or mediation can promote the odds of cooperative parenting after divorce (Emery et al., 2005). In many cases, custody battles may not be the preferred option as they have the potential to bring about psychological and emotional effects on the mothers, fathers as well as the children, in addition to extra time and money spent for the proceedings, etc. Litigations may be the last recourse for settling custody disputes if parents are unable to reach a common ground through negotiations or mediation. Parents may be advised by legal counsels to proceed with litigations if the

chances of winning are good and the predictability of the outcomes is supported by relevant provisions and precedents. Predictability can also be achieved by identifying the values which may be attributed to the relevant factors in the cases. Courts would consider the factors provided under the law in determining whether a party has a reasonable chance of winning custody. These factors may be ascribed relative strength on the basis of the frequency of incidences and treated as predictors which can affect the potential outcomes of litigations. The identification of the likely predictors in this manner might provide another way of understanding how custody has been determined in past cases. The following statistical analysis will seek to identify which principles have most often been used or have been the most significant in terms of their relative frequency in influencing mothers' defeats in custody litigations.

### **CUSTODY ISSUES AND CHALLENGES FOR MOTHERS**

Engaging in custody litigations may have its associated financial and psychological challenges. Recourse to litigation may not be necessary if one party willingly surrenders custody right to another, or if the custody issue can be settled through negotiation or mediation. Custody arrangements can be negotiated by the parents themselves or through their lawyers. There is no empirical evidence in Malaysia on the extent private negotiations have been used to settle issues on custody, but a study in California indicated that at least 50 percent of parents made decisions through private agreements between themselves, and an additional 30 percent settled custody issues after negotiation (Kelly, 1994). When parents are unable to settle custody issues on their own, an alternative dispute resolution method such as mediation (*sulh*) can be used in an attempt to settle disputed cases. The law has mandated that mediation be attempted first before a custody hearing can be held before a judge<sup>1</sup>. Some studies have provided strong evidence of the effectiveness of mediation in bringing about improved

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<sup>1</sup> It is a legal requirement to attempt mediation after a case is filed if the Registrar is of the opinion that the case has reasonable prospects of being settled. Rule 3 *Syariah* Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004. Rule 4 provides that non-appearance in the mediation session is a contempt of court.

family relationships many years after the divorce. Non-residential parents who mediated are far more likely to maintain contact with their children (Emery et al., 2005). A study of custody cases in the Penang *Syariah* High Court indicated that 16 out of 32 cases (50%) were settled by means of mediation (Azzis & Azhar, 2018). Cases settled through mediation can save the parties involved both time and cost. A typical custodial arrangement resolved through mediation involves a parent being awarded custody and a non-custodial parent being awarded visitation rights.

If both parties are unable to reach an agreement, or if the mediation process fails because of non-cooperation from either or both of them, the mothers wishing to obtain custody may consider fighting a lawsuit. Court proceedings for custody cases can continue over a span of several months and even years. Having to emotionally cope with litigation process throughout a lengthy period can be stressful for mothers. Although mothers hold a preferred position under the law, which means a court will presume that they are the best persons to raise the children, fathers wishing to obtain custody can still challenge this presumption, for example by submitting evidence that the mothers have neglected or failed to care for the children. Mothers with issues in relation to the ability to provide care, for example might be left in limbo as the likelihood of winning custody would be diminished if the allegations raised against them are accepted. Emotional strain and outcome uncertainty can be a challenge to the party seeking custody. Many parents are reported to have experienced varying degrees of conflict surrounding child custody, and the conflicts are substantial in some cases. It has been estimated that 51 percent of divorces involved negligible conflicts over issues related to custody, while 24 percent had mild conflicts, 10 percent substantial conflicts, and 15 percent intense conflicts (Emery et al., 2005). Other high stressors including social isolation and financial constraints may compound the problem and result in single mothers having high risks of emotional distress. Research has shown that single mothers with higher levels of optimism, self-efficacy, and self-esteem have lower levels of depression and anxiety. Many programs and support systems are available to provide resources to single mothers, and participation in such programs may allow single mothers to form social networks that provide much needed emotional support (Taylor & Conger, 2017).

Research has confirmed that financial difficulty and poverty in female-headed households are common findings across international studies of poverty (Evans, 2011). Living on a single income with no court case to deal with might already be challenging to some mothers. If they decide to litigate a custody case, these mothers may find themselves at a disadvantage in terms of financial capability. Mothers who cannot afford a lawyer may seek assistance from the legal aid service provided by the government or relevant organizations, as financial constraint should not be a barrier to seeking justice. The services of the government's legal aids are meant to facilitate equal access to justice for all, in particular those who are financially deprived. If both parties in a custody case are eligible for legal aid, the prospect of settlement would be bigger as the parties will be referred to a mediation session under the department to seek an out-of-court settlement (Jbg.my, 2019). Receiving legal aid could certainly help alleviate the financial constraints; however, single mothers who do not qualify for legal assistance and cannot afford private lawyers may need to consider alternative dispute resolutions or represent themselves in litigations. The justice system does allow parents to represent themselves; however parents represented by counsels could be in a more advantageous position. Self-representation has its associated challenges and might be risky if the other parent has legal representation. This is because the claim of child custody has specific procedural and filing requirements that the applicant must comply with, and understand what needs to be included in the paper works and what factors a judge will consider in making the custody decision that would warrant the applicant to be fully prepared and equipped with the necessary knowledge. Representation may undoubtedly help raise the prospect of winning the case by the applicant, and the arrangement for representation may become necessary under certain circumstances, such as when parties are too busy to attend every hearing, or when there is a difficulty to trace the whereabouts of the defendants. Previous research has indicated that legal representation can improve litigation outcomes, with both large-scale studies of court records and smaller survey analyses finding evidence that legal representation matters in custody cases (Emily et al., 2016). Mothers with limited financial resources but lack the eligibility to use state-funded legal assistance may prefer to look into mediation which is usually a more cost-effective way to settle the issue without court proceedings.

## THE LEGAL BACKGROUND

Historically, child custody laws in western countries evolved from the concept of absolute paternal power to the tender-year doctrine and to the current standard of the children's best interest. Under the concept of absolute paternal power, custody would be given to the fathers as they provided financial support for the children. The tender-age doctrine established a presumption of maternal custody for children of younger age but gave the responsibility of providing financial support to the fathers. The best-interest standard determines custody arrangements which suit the children's needs, based on a variety of factors, with the focus on ensuring that the children's physical and emotional well-being are safeguarded. The standard was endorsed at the United Nation Convention on the Rights of the Child in 1989 through Article 3 providing "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Cypcs. uk, 2019). Despite the international endorsement, the standard was criticized as a vague concept, necessitating the use of wide discretion in the consideration of the factors determining best interest. The high level of discretion not only raises the possibility of errors, but also may promote litigations. Despite its shortcomings, the current best-interest standard was seen as a welcome departure from the inflexibility of previous principles (Andrea, 1986).

In Malaysia, child custody is governed by two separate laws, one applicable to the non-Muslims and another to the Muslims. For the non-Muslims, the law applicable is the Law Reform (Marriage and Divorce) Act of 1976 (Act 164), while the law governing the Muslims is the Islamic Family Law (Federal Territories) Act 1984 (Act 303) or the Islamic Family Law legislations of the respective states. While the Malaysian civil courts have jurisdiction over family matters relating to the non-Muslims, the *Syariah* courts have jurisdiction over family matters for the Muslims.

The two sets of laws give the power to courts to decide custody orders based on the principles set out in the respective provisions. Both the Islamic law and the civil law agree on many issues. The laws concur that in determining the custody of a child, the welfare of the child

is of utmost importance and must be given paramount consideration (Kahar & Mohd Zin, 2011). There is also a similarity in relation to the factors taken into consideration when determining the welfare of a child, i.e. the wishes of the parents and the preference of the child. Both laws provide for the presumption of the mother being a better custodial parent for a child of younger age, and in deciding whether that presumption applies or not, the court would consider the importance of preserving the status quo custodial arrangement to avoid disturbing the child's life. Both laws address the issue of eligibility of a custodian, with Act 303 providing for more specific criteria to determine the qualification of the person given the custodial responsibility.

Sections 81 to 87 of Act 303 prescribe the principles relating to custody. Generally, children below the age of *mumaiyyiz* will live with the mothers while children above the age have the right to choose their custodial parents. The best interest or welfare of the children is the first priority and of paramount importance in custody cases. Related principles for determining custody include the presumption of maternal custody, the requirement of custodian qualifications, the conditions relating to loss of custody rights, the need to maintain continuity of residence, and the children's as well as the parents' wishes. The underlying consideration of these principles is no other than the protection of the best welfare of the children. The presumption in favour of mothers would simplify the task of the courts; in cases involving young children, custody may be given to the mothers provided that certain other principles are satisfied such as those relating to custody qualification and loss of rights. When the presumption is rebuttable, courts may engage in a more detailed enquiry, ascertaining whether the ground of rebuttal as alleged has taken place. In practice, courts make custody decisions on an individual basis and determine which of the principles are relevant to the facts presented.

### **CONCEPTUAL MODEL AND DERIVATION OF HYPOTHESES**

The conceptual model that guided the analysis of custody outcomes reflects the statutory provisions on child custody. The model includes a number of factors influencing custody decisions, termed as

independent variables, and the custody decision, referred to as the dependent variable. The dependent variable in the following model is described as welfare-based, reflecting the legal provision that the paramount consideration in custody award is the welfare of the child (section 86(2) of Act 303). Independent variables comprising the presumption of maternal custody, the requirement of custodian qualifications, situations representing loss of custody rights, the need to maintain continuity of residence, and children's and parents' wishes are factors taken into consideration when determining the welfare of the children and subsequently custody awards.

The first independent variable included in the following hypothesis was derived from the provisions upholding the mothers as the preferred custodians when the children are of tender age. These provisions are incorporated under section 81(1), which states “the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution”, and section 86(3), which states “it shall be a rebuttable presumption that it is for the good of a child during his or her infancy to be with his or her mother”. The mothers' entitlement to custody of infant children under these provisions is for the first two-year period of the children's life until the attainment of the age of *mumaiyyiz* (Che Soh & Mohd Hashim, 2015). References made to the presumption may not necessarily result in its application, but the benefit of the presumption is less likely to be brought into play if the rule is not mentioned and contended before the court. Case reports often include references to these provisions, and in many cases involving children of younger age, custody is given to the mothers. This study assumes that, for children under the age of *mumaiyyiz* (discernment), references to the presumption made in case reports should plausibly increase the likelihood of the mothers winning custody, and the absence of references might be associated with the odds of loss decisions for the mothers. The study hypothesizes:

H<sub>1</sub>: There is a significant association between an absence of reference to the presumption of mother custody and a loss decision for a mother.

A person intending to take the responsibility of custody rights is expected to fulfil certain qualifications. Section 82 of Act 303 requires



the custodian to satisfy a number of conditions pertaining to religion, soundness of mind, the ability to give care, love and affection, good character and safe home. The inescapable conclusion to be drawn from the provision is that a person would be deprived of custody if she is disqualified. In the context of this study, it is assumed that proven disqualifications can increase the odds of mothers losing custody; thus, the study hypothesizes:

H<sub>2</sub>: A mother is more likely to lose custodial right when there is an allegation on qualification factors relating to the mother's unfitness and the allegation is accepted.

The entitlement of a mother to be the best caregiver is not absolute and may be lost under certain circumstances. A mother may lose a case against the father if arguments relating to loss of entitlements are raised and subsequently accepted. This is understandable as the paramount consideration in determining with whom a child should be placed is always the welfare of the child (section 86(2)). Growing up with a mother who is abusive or of bad character for example, would have a lifelong negative effect on a child, and for that reason, the welfare of the child should necessitate the shift of the custodial right in favor of the father. The circumstances under which custodial right may be lost are enumerated under section 83, which include marriage of the mother to a person not related to the child, immorality, change of residence, on grounds of abjuration of Islam, and neglect or cruelty to the child. Thus, the study hypothesizes:

H<sub>3</sub>: A mother is more likely to lose custodial right when there is an allegation that the mother has remarried/lost the right on other grounds and the allegation is accepted.

Other rules on custody include the necessity to maintain continuity of residence or status quo arrangement, and this may be a potential predictor of custodial awards. This may refer to a custodial arrangement prior to the official divorce where parents might no longer be living together or prior to the filing of custody order. A custody decision that supports this principle would maintain the custody arrangement that has taken place before the case is brought to the court. Section 86(3) requires the courts to have regard to the undesirability of

disturbing the life of a child if custodial right were to be changed from the existing custodian. The objective of the provision is to avoid unnecessary disruption to a child if he or she is already accustomed to any particular arrangement. It is hypothesized:

H<sub>4</sub>: A mother is more likely to lose custodial right when the existing custodian is not the mother and the custodial decision is made with a view to maintain continuity of residence.

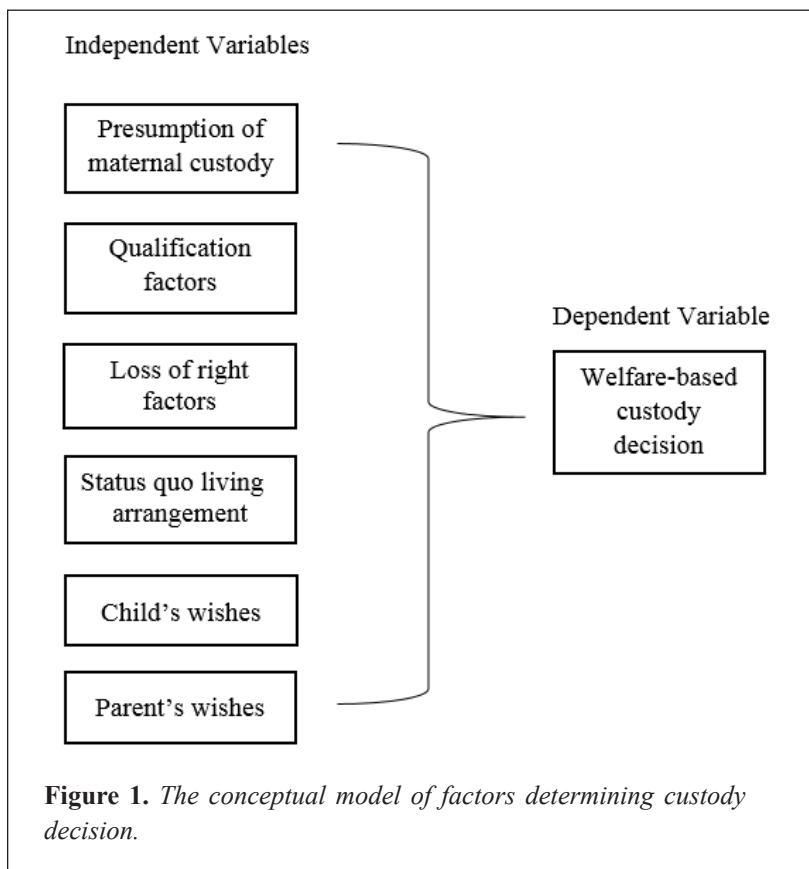
The child's preference is also relevant in determining custody. Section 86(2) requires the courts to consider the wishes of the child if the child is of the age where he or she can express an independent opinion. Thus, if a *mumaiyyiz* child were to prefer the father over the mother, a father may have better chances of being granted custody right. The study expects that the child's preference would influence the custody decision, and hence hypothesizes:

H<sub>5</sub>: A mother is more likely to lose custodial right when the child's opinion is asked and she/he does not prefer to live with the mother.

Parents' wishes may also be taken into consideration when determining the child's welfare under section 86(2) (a). Parents may want to enter into an agreement on child custody, in which the decision on who will receive custody is made by the parents themselves based on their mutual wishes, and the agreement may be endorsed by the court as court-ordered. Custodial agreements reflect parents' wishes, and variations are allowed if courts are satisfied that "the order was based on any misrepresentation or mistake of fact or there has been any material change in the circumstances (section 75) or it is reasonable on the basis of the welfare principle (section 76)". Based on this, it is hypothesized:

H<sub>6</sub>: A mother is more likely to lose custodial right when custody has been given to the father through an agreement and endorsed by the court.

Based on the foregoing related principles and predictors, the study developed the following conceptual framework:



## METHOD

This study analysed custody cases decided under the Islamic Family Law (Federal Territories) Act 1984 (Act 303) or equivalent legislations in order to establish the trend or pattern in relation to which factor is more likely to influence a loss decision for mothers. More specifically, the study was done with a view to determine which hypothesis can be supported based on past decisions and is likely to constitute a potential predictor for future decisions. Reported custody cases published in the Current Law Journal, Lexis Nexis and *Jurnal Hukum* databases were identified through appropriate search terms. The search generated 47 cases after the exclusion of duplications,

applications relating to procedures, revisions, committal or contempt proceedings, applications for visitation rights only without custody orders, and applications by parties other than mothers and fathers such as adoptive parents or grandparents. This study's model focused on typical cases of mother's -versus-father's custody, thereby omitting a few cases of shared and split custody, as well as custody of illegitimate children, which will be given only to mothers and maternal relatives (section 85).

The first part of the study involved the coding process, which basically analyzed how the cases were decided the way they were. The vast information in the judgment was assigned a code for classification purposes through a coding instrument, which was developed based on the conceptual model. The second part of the study involved the analysis of the coded data through Chi-Square. Chi-Square is a quantitative analysis which measures whether a relationship exists between two categorical variables. It was used in this study to identify which predictor variables can be associated with the dependent variable. The data were analyzed using IBM SPSS Statistics version 25 to calculate frequencies by using cross-tabulation and comparing observed data researchers' expectations by using the Pearson Chi-square ( $\chi^2$ ) test technique. Fisher's exact test was used in cases of small samples, i.e. tables consisting of cells with the expected number of frequencies being fewer than 5. When a significant result was obtained, the phi correlation coefficient was calculated to measure the strength of association between the variables based on the frequency of the incidences.

## **RESULTS AND DISCUSSION**

The results as shown below indicated that mothers were less likely to fail in their custody claims or defenses, and when they did fail, the factors significantly associated with their defeats were proven disqualification, proven loss of rights including mothers' marital status, status quo living arrangement as well as the children's preference. The statistical analysis showed that failure to invoke the maternal presumption and mothers giving away custody rights by means of agreements were not significantly associated with loss decisions.

Table 1

*Association Between Counsel Representations and Loss Decisions for Mothers*

Counsel representation	Custody decision		Total
	Mother won	Mother lost	
Mother represented by counsel	24	14	38
Mother not represented by counsel	2	1	3
Total	26	15	41

Table 1 indicates that mothers received legal representation in the majority of cases (93%) and were not represented in only a small number of cases (7%). Unrepresented mothers won custody cases when the other parties were also not represented. In practice, it was very uncommon for both spouses to be unrepresented (5%).

Table 2

*Association between the Absence Ofreference to the Presumption of Mother Custody and Loss Decisions for Mothers of Children of Non-Mumaiyyiz Age*

Rebuttable presumption	Custody decision		Total
	Mother won	Mother lost	
The presumption not referred	2	3	5
The presumption referred	16	5	21
Total	18	8	26

Hypothesis 1 which tested the potential association between the absence of reference to the presumption of maternal custody and custody decisions found a non-significant result, which implies that loss decisions for mothers were not enhanced by this factor. Table 2 shows that when the presumption was applied, mothers received custody of young children in 62 percent of the cases, and when the presumption was rebutted, in about 19 percent of the cases. The presumption was not referred in each and every case involving young children, with the absence of reference found in 19 percent of the cases. The odds of mothers not receiving custody of non-mumaiyyiz children stood at over 30 percent.

Table 3

*Association between Accepted Allegations on Qualification Factors and Loss Decisions for Mothers*

Qualification factors	Custody decision		Total
	Mother won	Mother lost	
Mother without accepted allegations	26	12	38
Mother with accepted allegations	0	4	4
Total	26	16	42

Note. Fisher's test is significant at  $p < 0.05$ , Phi Coefficient = 0.414,  $p < 0.05$

On the issue of custodian qualification, Table 3 shows a significant result for Hypothesis 2. The hypothesis, that a mother is more likely to lose custodial right when there is an accepted allegation relating to her qualification factors, was supported. As shown by the Phi Coefficient value, accepted allegations in relation to qualification factors were moderately associated with loss outcomes. These qualifications relate to the requirements of the Islamic religion, soundness of mind, the ability to give care, love and affection, etc. as provided under section 82 of Act 303. In cases where qualification factors are at issue, it is conceivable that allegations relating to the qualifications may be raised by the fathers to deny the fitness of the mothers in relation to child upbringing. The fathers might insist on custody because of the belief that they are better custodians and the mothers are legally unqualified. In return, objections may be raised by the mothers against the allegations to discredit the claim by the fathers, and the judgments would eventually decide the issues by accepting the allegations, rejecting, or leaving them unconfirmed for lack of evidence. This scenario of accepted allegations occurred in less than 10 percent of the cases and the majority of the cases comprised absence of, rejected, or unconfirmed allegations. Mothers with proven allegations were likely to lose custody in all cases, and the likelihood was reduced to 32 percent when they had no such accepted allegations. In practice, it is difficult for the fathers to make the allegations stick, which is likely to be attributable to the lack of evidence; however, regardless of the infrequency of cases, allegations regarding mothers' unfitness if accepted have a significant likelihood to predict loss decisions for the mothers. It may be noted that issues on qualification factors are more relevant in applications for permanent custody orders than in interim orders. Strong and complete proof are brought up during the full trial

and interim orders are usually based on brief submissions (*Amirul Azizan bin Abdul Rahim v. Faizah Fazlina bt Rosli*)<sup>2</sup>.

Table 4

*Association between Married Mothers and Loss Decisions for Mothers*

Marital status of mother	Custody decision		Total
	Mother won	Mother lost	
Not married	18	6	24
Married	0	8	8
Total	18	14	32

*Note.*  $\chi^2 = 13.714$ ,  $df = 1$ ,  $p < 0.001$ , *Phi Coefficient* =  $-0.655$ ,  $p < 0.001$

Table 5

*Association between Accepted Allegations on Other Factors of Loss of Custody Right and Loss Decisions for Mothers*

Other factors of loss of custody rights	Custody decision		Total
	Mother won	Mother lost	
Mother without accepted allegations	26	13	39
Mother with accepted allegations	0	3	3
Total	26	16	42

*Note.* Fisher's test is significant at  $p < 0.05$ , *Phi Coefficient* =  $0.354$ ,  $p < 0.05$

On the issue of the loss of rights factors (Hypothesis 3), Tables 4 and 5 indicate significant results. As shown by the Phi Coefficient values, there was a substantial association for the marriage factor and moderate association for other factors on loss of rights. The pattern of custody decisions showed a significant association between the variables confirming that marriage and proven allegations can increase the likelihood of mothers losing custody cases. Married mothers were likely to lose custody in all cases, and the likelihood was reduced to 25 percent if they were unmarried. Mothers with accepted allegations on other factors of loss of rights had 100 percent probability to lose custody cases, while mothers without such allegations against them had the odds of losing the case reduced to 33 percent.

<sup>2</sup> [2010] 1 ShLr 51).

Table 6

*Association between Children not Living with Mothers and Loss Decisions for Mothers*

Child has been living	Custody decision		Total
	Mother won	Mother lost	
With mother	22	1	23
Not with mother	4	14	18
Total	26	15	41

*Note.*  $\chi^2 = 23.467$ ,  $df = 1$ ,  $p < 0.001$ , *Phi Coefficient* = 0.757,  $p < 0.001$

Table 6 shows that there was a significant association between status quo arrangements and custody decisions. The Phi Coefficient value showed a very strong association between this factor and loss decisions. Custody decisions generally reflect custodial arrangements already in existence prior to the filing of custody orders. In the majority of the cases, mothers lost custody if the children had been living with the fathers/others. The status quo was only changed in 12 percent of the cases. Mothers lost in 78 percent of the cases when children did not live with them, and the likelihood of loss decisions was reduced to 4 percent when the children lived with them. The results of the analysis showed that the necessity to maintain status quo arrangements is a significant factor contributing to the defeat of mothers in custody decisions.

Table 7

*Association between Children not Preferring Mothers and Loss Decisions for Mothers*

Child's wishes	Custody decision		Total
	Mother won	Mother lost	
Child preferred mother	4	0	4
Child did not prefer mother	0	4	4
Total	4	4	8

*Note.* Fisher's test is significant at  $p < 0.05$ , *Phi Coefficient* = 1.000,  $p < 0.05$



Preference of children at the age of discernment could determine which parent might receive custody (Hypothesis 5). Table 7 shows that loss of child custody rights among mothers was significantly associated with the children’s decision to choose the fathers/others over their mothers. The Phi Coefficient value showed a very strong association between the variables. Mothers were found to have lost all the cases when the children preferred to live with the fathers/others.

Table 8

*Association between Custodial Agreements and Loss Decisions for Mothers*

Custodial agreement	Custody decision		Total
	Mother won	Mother lost	
Given to mother through agreement	1	0	1
Given to father through agreement	0	7	7
Total	1	7	8

Hypothesis 6 relates to parents’ wishes as the potential factor affecting mothers’ defeats. The hypothesis that a mother is more likely to lose custodial right when custody has been given to the father through an agreement was not supported (Table 8). The finding of this analysis implies that the presence of such an agreement does not affect her chances of winning her case should she decide to fight the custody battle against the father in future.

The preceding results explain why mothers lost custody cases, which factors were given great weight and how these factors that affected custody decisions can have important implications for mothers wishing to seek custody through litigations. Through the Chi Square analysis, this study found that loss decisions were significantly associated with factors of children’s preference, status quo arrangement, marital status of mothers, accepted allegation relating to custodian disqualification, as well as accepted allegation relating to other factors on loss of rights. The strongest correlations were found for children’s preference and status quo arrangement.

In terms of the descriptive analysis of the percentage value, mothers were found to have lost 100 percent of the cases when children

preferred to live with the fathers/others. In relation to status quo arrangement, the odds of loss decisions for mothers stood at 78 percent when children did not live with the mothers, and the likelihood was reduced to 4 percent when the children resided with them. Married mothers' probability to lose custody was 100 percent, compared to 25 percent if they were unmarried. On the factor of disqualification, mothers with proven allegations were likely to lose custody in 100 percent of the cases, and the likelihood was reduced to 32 percent when they had no such allegations. Mothers with accepted allegations on other factors of loss of rights were liable to lose 100 percent of the custody cases, while mothers without such allegations against them had the odds of losing the case at 33 percent. The likelihood of mothers losing custody for non-*mumaiyyiz* and *mumaiyyiz* children was 31 percent and 50 percent respectively.

On average, mothers had almost 37 percent probability of losing custody cases involving children of both age groups. In the case of non-*mumaiyyiz* children, mothers were refused custody in about one third of the cases. The finding showed that it was not uncommon for mothers to lose custody despite the presumption of maternal custody which gives preference to mothers for children of younger age. The court remained focused on what was best for the children's welfare, resulting in custody being taken away from the mothers if the court found that granting custody to them would impede this principle of welfare protection.

Children's preference was shown to be the most dominant factor in determining loss decisions for mothers. Courts recognized that children of older age have the capacity to reason and articulate appropriate reasons as well as emotional maturity for a preference. This factor may give rise to the question: will good mothers who do not have issues on qualification factors or loss of rights suffer loss decisions if the children do not select them as their preferred parents? The answer is probably in the affirmative, but the cases showed that the way children exercise their preference is to a certain extent predictable. Children's preference and continuity of residence are often found to be intertwined factors. Children living with mothers are likely to choose mothers as custodial parents, indicating that mothers who are primary caretakers would rarely be deprived of custody on the basis of the preference factor.

Continuity of residence was also correlated with the loss outcome for mothers. Courts were unlikely to change existing living arrangements as that could have the potential to disrupt the stability of the children's lives. If the mothers were the ones who took care of the upbringing of the children and were the primary caretakers prior to the custody hearing, the court was more likely to maintain the living environment that the children were already accustomed to.

Regardless of its strength, children's preference is not a conclusive determinant. In a typical case, a child's opinion will be adhered to by the court; however, in circumstances where honoring a child's wishes would not serve the child's best interest, it is more likely that the child's preference will not be followed (Che Soh, 2014). In practice, inquiring about a child's opinion is done through an interview where the judge or mediation officer may assess whether a child is mature enough to have a reasonable opinion. Input from a child's opinion about who he or she wants to live with would enable the court to decide if the child's preference can be used to determine which party will be the custodial parent. During the interview, a judge can ensure that a child has not been influenced or threatened when he or she prefers one parent over the other, or the choice is not induced by some promises made by one parent in exchange for the child's decision, or if the decision is caused by one parent being significantly lenient in terms of discipline. A case has been recorded in *Nail al Autar* which was brought before Ibn e Taiymiya. Custody of a boy avoiding the mother because she sent him to school every day, and choosing the father instead as he allowed him more time to play with friends was given to the mother despite the child's preference (Rafiq, 2014). Under serious circumstances, a judge may decide not to give full weightage to the child's opinion if his or her best interest would be jeopardized. In *Faridah bt Daud & Anor v. Mohd Firdaus Abdullah @ Jettle Francis*<sup>3</sup> the court did not make the decision based solely on the child's choice, but viewed that the consideration of the child's welfare was of far greater importance than simply approving the child's decision.

Often what influences mothers when making custody arrangement decisions is financial consideration. Surrendering the children to the former husbands may be considered as a quick fix solution though

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<sup>3</sup> (2005) 1 ShLR 153.

this may not be the best arrangement for the children or against the wishes of the mothers. The problem may stem from difficulty in securing child support from former husbands, although in law it is a settled position that the fathers' responsibility to provide maintenance continues despite the children not living with them. Obtaining a maintenance order for the children may not be an easy task, and even if the order is granted mothers still have to face challenges in getting the maintenance order enforced, which might be caused by intentional neglect or inability to pay by the fathers (Abdullah et al, 2015). Mothers facing arrears of maintenance may take advantage of the advanced payment mechanism provided by the family support division in *Syariah* courts. Conceding the children to the fathers might give rise to problems if in future the mothers decide to take back the children and the applications are contested by the fathers. The pattern of custody decisions generally reflects custodial arrangements already in existence prior to litigation.

Financial constraint has been highlighted to be the common challenge faced by mothers. For divorced mothers who are not working, it might not be easy to find suitable jobs if all these while during the marriage they have been housewives without the necessary employment training. Studies reported that single mothers had significantly higher rates of depression as well as higher rates of severe life events than those who were married (Abdul Kadir & Bifulco, 2010). Studies also showed that the economic problem is the most dominant problem faced by single mothers, followed by psychological and emotional problems, family problems and problems of stigma and community support (Abd Ghani & Hashim, 2013). In extreme cases involving single mothers with low self-esteem, lack of spiritual faith and no proper coping skills, the financial difficulty can potentially trigger other social problems. If mothers are forced to engage in illegal activities of prostitution, drug addiction, or crimes in order to raise their children, these scenarios can give rise to issues with regard to the loss of rights factor. Mothers can lose custody because of open immorality, child abuse or a history of drug addiction. Mothers should be exposed to the availability of various welfare provisions including charity/*zakat*, housing schemes, training and skills to enable them to find jobs or start a business. Financial aid can help ease their burden in relation to child upbringing following the divorce.

Mothers can also lose custody cases because of factors of qualification. The finding of a significant association between this factor of accepted allegation and custody outcome implies that mothers who are proven unqualified are likely to lose custody. Failure to provide care, love and affection for the children may render the mothers unqualified. Divorcing mothers could risk losing custody if evidence shows they have engaged in misconducts that affect the children or they have neglected the children. In cases where qualification may be at issue, mothers wishing to obtain custodial order should make efforts to ensure that the children are well cared for and avoid neglecting them while they are under their charge .

The ability to provide care, love and affection to children may give rise to an issue in the case of some single mothers considering that they have to juggle the double tasks of parenting and being the breadwinners. Studies suggest that Malaysian adolescents from urban single mother- families with low functioning and low parenting quality were at a higher risk for engaging in antisocial behaviours (Baharuddin et al., 2011). Studies also reported occurrences of depression and emotional distress among children of single parents. These children had high risks of being school drop-outs, being involved in drug abuse as well as being neglected (Hamid & Salleh, 2013). Single mothers should employ appropriate coping strategies through internal supports consisting of family members and friends in their neighborhoods, as well as the existing social support systems, i.e. government agencies, welfare institutions and community networks, individuals, experts and counselling services. The support systems would help alleviate the challenges related to the single parenting process (Hamid & Salleh, 2013).

On the issue of marriage as a ground for losing custody rights, a mother who remarries a person not related to the child runs the risk of negatively impacting her own case; the likelihood of a loss decision for a married mother should be read in the light of the welfare principle. Commentators agreed that a married mother would be denied custody if the marriage affects the welfare of the child (Mohd Zin et al., 2016). Decided cases also indicate that the marriage of a mother causes loss of custody rights if the marriage is not appropriate for the child's welfare (*Noornita bt Kamaruddin v. Faeiz bin Yeop*<sup>4</sup>

<sup>4</sup> [2004] CLJ (Sya) 198.

and *Azizah bt Ibrahim v. Sufian bin Che Mud*<sup>5</sup>. The idea of losing custody of her child might be frightening to a mother, and these cases may provide support that a mother should not be deprived of custody if consideration of her child's welfare shows that she is a better parent. A married mother seeking child custody who manages to convince the court why custodial order in her favor would better serve the child's welfare might still stand a chance to win the case.

## CONCLUSION

The preceding analysis sought to understand custody issues from a quantitative viewpoint through a conceptual model and formulation as well as the testing of hypotheses. Identifying the factors which have been most predictive of litigation decisions can enlighten litigating parties on the increased or decreased likelihood of loss decisions for mothers. The exercise may help make the outcomes of custody cases less unclear to those litigating parties.

Custody battles can be emotionally and financially challenging to mothers. Understanding the principles involved in determining custody can help in the decision-making on whether or not child custody should be obtained through litigations. This is because mothers are not always guaranteed the awards in custody battles against the fathers. Custody awards are tailored to the circumstances of each case, and the probability of mothers losing custody is influenced by many factors including the existing living arrangement of the children, children's preference, and accepted evidence on disqualifications and loss of rights. The quantitative analysis attempted in this paper was exploratory and intended to determine the broad trends in past cases in order to predict potential outcomes and trends in future. Knowledge of potential factors which can influence case outcomes can add some insight into the issue of child custody, and this might be helpful to mothers as they can use it to predict the results of their cases. Knowing the likely predictors which can increase or decrease the likelihood of a party winning or losing a case might help divorcing mothers understand how custody had been determined in past cases and what evidence they must present to courts if they wish to apply

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<sup>5</sup> [2012] 4 ShLr 1).

for custodial rights. The more knowledge mothers have about their options, the less uncertainty and stress they may encounter in the dispute concerning child custody. The increased certainty may also encourage settlements rather than litigations.

As these findings demonstrated, the model used in this study is largely acceptable, with the predictions proposed in the hypotheses generally supported. In typical cases, likely predictions of the potential litigation outcomes can be made with relative certainty if the facts of the cases indicate that any one of the identified factors is present, thereby allowing the parties to be better equipped to understand and predict the circumstances the courts are more likely to give custody to the mothers as opposed to the fathers or *vice versa*.

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