

## The Significance of Children's Needs in the Division of Harta Sepencarian (Matrimonial Property) in Malaysian Syariah Courts

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### Abstract

*In the context of claims for harta sepencarian (matrimonial property) division, the parties involved will seek to persuade the court of their entitlement to the harta sepencarian or to a larger share thereof. However, the specific needs of children under their care seldom receive the required attention during proceedings and judgments rendered by Syariah Courts when distributing harta sepencarian. This is because discussions about children's needs typically arise in custody-related cases rather than in harta sepencarian cases. Therefore, it's crucial to evaluate how judges consider children's needs when determining the division of harta sepencarian to ensure their welfare. This article aims to investigate the extent to which children's needs are taken into consideration when deciding the division rate of harta sepencarian, a dimension notably marginalized in the majority of Syariah Court cases involving the division of harta sepencarian in Malaysia. This qualitative study used the content analysis design to descriptively analyse documents in order to explore implicit elements of children's needs that may impact court decisions when distributing harta sepencarian. The findings identified several key elements of children's needs that could influence court decisions related to asset division in harta sepencarian, including considerations related to housing, sustenance, childcare, and education, although these aspects are not explicitly emphasized in court proceedings by either the presiding judge or the litigants.*

**Keywords:** *Harta Sepencarian, Children's, Needs, Syariah Courts.*

### INTRODUCTION

Harta Sepencarian (matrimonial property) can be claimed during or after a divorce (Tapah, 2010) or death of either spouse (Sitiris & Halim, 2010; Ahmad, Isa & Omar, 2014) as well as while the marriage is still valid, namely during an application for polygamy or after polygamy has occurred or if there is a change in religion (apostasy) by either party in the marriage (Ahmad et al., 2020). Three important elements are taken into consideration when determining the division rate of harta sepencarian as pursued by the interested parties as provided in the Islamic Family Law (Act or Enactment) of the respective states. These elements are children's needs (e.g., Section 122(2)(c) Selangor Islamic Family Law Enactment 2003), contribution towards acquiring the property during marriage and debt(s) incurred by one of the parties for their (husband and wife) shared benefit (Section 122(2)(a) & (b), Selangor Islamic Family Law Enactment 2003). Hence, the parties involved in the harta sepencarian claim will try to convince the court during the trial that they are entitled to the harta sepencarian or to a larger share in the claim.

Even though a court's decision might directly relate to children's needs when determining the division rate of the harta sepencarian, however, in most of these cases tried in the Syariah Courts, the judge only indirectly relates to the 'needs' of affected children.

According to Normi (2001), efforts by the conflicting couple to convince the court that they are more rightfully entitled tends to somewhat distract the focus on the child's needs. In addition, it is rare for a judge to make a

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decision that specifically emphasizes on the importance of the child's needs during the trial in the context of the division of harta sepencarian, as in the hadhanah case proceedings. A. Ahmad et al. (2015) suggested that this is because the child's needs are thoroughly discussed during the hadhanah case proceedings instead of the harta sepencarian court case.

The harta sepencarian element was assimilated into local customary law in the Malay community (Taylor, 1937; *Hajjah Lijah bte Jamal v. Fatimah binti Mat Diah* [1950] MLJ 63) and later recognized by syarak based the principles found in the annals of Islamic law, namely *urf* or *al-adat al-muhakkamah*, which means that customary practices take precedence to Islamic law (Lembut, 2007) and eventually legislated by including it in the Islamic Family Law of each respective state.

Hence, this article aimed to discuss the extent of the role of children's needs and their significance in determining the division rate of harta sepencarian in the Malaysian Syariah Courts.

## **LITERATURE REVIEW**

### **A Brief Discussion of Harta Sepencarian (Matrimonial Property)**

Harta sepencarian (matrimonial property) is defined as property acquired jointly by a husband and wife during the tenure of their marriage or accruing from a joint venture between a husband and wife during that tenure (Hooker, 1970). This includes the value of the property acquired before they got married (original property) but has since advanced or increased during the course of their marriage. Hence, all assets acquired before the date of marriage or during an invalid marriage or after the date of divorce (*Ningal @ Yang Chik v. Jamal* (1989) 5 JH (1) 186), as well as during the marriage but through inheritance, gift, grant or a gift given by a party who is still alive (*Che Abdullah Che Kob v. Wan Jarah Wan Daud* [2005] 20 JH (2) 200), is not considered as harta sepencarian but rather the individual's own property (Bakar & Hashim, 2008). Moreover, even property that is acquired during the course of marriage but there is a release agreement signed by one of the parties mentioning that they will not lay claim to the property as a harta sepencarian in the event of a divorce and this is recorded as a court order, then the property is not considered as a harta sepencarian (*Rahima Baba v. Abu Hanifah Bachik* [2005] 19 JH (1) 171).

Harta sepencarian from an Islamic law perspective, is defined as "property acquired jointly during marriage in accordance with the conditions determined by Syariah Law". In most states, Selangor, Johore, Perak, Pahang and Malacca, harta sepencarian is defined as "property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syarak" (Sec.2, Islamic Family Law (State of Johor) Enactment 2003, En.17/ 03; Sec.2, Islamic Family Law (State of Selangor) Enactment 2003, En. 2/03); Sec.2, Islamic Family Law (State of Perak) Enactment 2004, En. 6/04; Sec.2, Islamic Family Law (State of Pahang) Enactment 2005, En. 3/2005); Sec.2, Islamic Family Law (State of Malacca) Enactment 2002, En. 12/2002). However, in Negeri Sembilan, harta sepencarian is defined as "property acquired jointly whether directly or indirectly during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syarak" (Sec.2, Islamic Family Law (State of Negeri Sembilan) Enactment 2003, En. 11/03). Meanwhile, in Sabah and Sarawak, harta sepencarian is defined as "property acquired jointly whether directly or indirectly during the subsistence of marriage in accordance with the conditions stipulated by Islamic Law" (Sec. 2, Islamic Family Law (Sarawak) Enactment 2004, 8104; Sec. 2, Islamic Family Law (Sarawak) Ordinance 2001 (Chapter 43)).

Therefore, it can be concluded that harta sepencarian refers to all types of assets, including movable and immovable assets, jointly acquired by the husband and wife (Majid, 1999; *Zailan bin Abas and Others v. Zaiton binti Abdullah* (2006) 22 JH ( 2) 279), whether through direct contribution of efforts by both parties (*Rogayah binti Ismail v. Abd Razak bin Sulung* 2005) 20 JH (2) 342); *Mansjur bin Abdul Rahman v. Kamariah bte Noordin* (1989) 4 JH (2) 300) or in material or capital form (*Hazlina binti Hamidin v. Muhammad Zaidi bin Majid* (2005) 20 JH (2) 217), which can be valued in Ringgit, or it is the sole effort of the husband with an element of indirect contribution from the wife (*Norayah Bakar v. Mohd Adnan Mohd. Amin* (2006) 21 JH (1) 81) in the form of moral support (*Boto' bin Taha v. Jaafar bin Mohamed* (1985) 2 MLJ 98), advice, noble status (*Tengku Anun Zaharah v. Dato' Dr Hussien bin Mohamed Yusuf* (1980) 3 JH 125) or domestic assistance

(Rokiah v. Mohamed Idris (1989) 6 JH (2) 272) during the tenure of the marriage, including assets advanced or developed during marriage stemming from property owned before marriage (Hujah Lijah bte Jamal v. Fatimah binti Mat Diah (1950) MLJ 65) or assets secured through various types of work carried out by the husband and wife (Piah binti Said v. Che Lah bin Awang (1983) 2 JH 220) or property registered in the husband's name (Rahmah binti Mohd Lazim v. Rosnani binti Husain & 6 Others (2009) 29 JH (2) 161) according to criteria stipulated by Syariah law. However, it is undeniable that the party that has acquired the assets through one's own effort or contribution that is greater than the other party should receive a larger portion or share (Hamidah binti Abdullah v. Mohd Johannis bin Busu (2008) 2 JH (26) 182).

In the context of the division rate of harta sepencarian, the rate differs according to the respective states depending on the *ijtihad* and discretionary consideration as well as the judge's wisdom in understanding the basic contribution of the husband and wife in procuring all forms of property acquired throughout their married life based on the facts of the case presented. Hence, the child's needs are not given particular emphasis when explaining a decision regarding the division rate of harta sepencarian involving the parties in the case.

### **'Children' According to Islam and Conventional Law**

According to Islam, the term 'child' refers to an individual who has not reached puberty (*baligh*) (Ibn Nujaim, 1968; al-Suyuti, 1983). Whereas, according to Ibnu Manzur (1990), the term 'child', based on the word "*al-thiflu*" and "*al-thiflah*", refers to a child (the plural for "*al-thifl*" is "*athfaal*"). The term 'child' is based on the word "*thifl*", which refers to an individual from the time he is born until he reaches puberty (*baligh*). This is based on the word of Allah SWT in Surah al-Ghaffir, verse 67. Therefore, there are two ways to determine whether a child has reached puberty (*baligh*), which is either by nature or by age. Normally, girls reach puberty (*baligh*) when they first experience their menses, while boys reach puberty (*baligh*) when they first experience a 'wet dream'. Thus, according to Mustafa al-Khin et. al., (2011), Imam Syafie opined that boys reach puberty (*baligh*) when they first experience their 'wet dream', while for a girl it is when the first menstrual cycle begins.

Imam Malik opined that the signs of puberty (*baligh*) manifest in the growth of hair on various parts of the body, the tip of the nose expands when pressed and the voice becomes hoarse and rough (al-Jaziri, 2003). Hence, these children are considered *mukallaf* and are obliged to carry out certain religious practices, such as performing mandatory prayers, fasting and Hajj. Determining puberty (*baligh*) by way of age is taken into account when physical signs do not manifest in the child. The *fuqaha* have established a certain age for puberty (*baligh*). According to Faruq (1999), Imam Syafie, through the process of *istiqra'*, had managed to identify pertinent Islamic law and established that the age of puberty (*baligh*) for men is between 12 and 15 years and a person is considered to have reached puberty (*baligh*) if he goes through one of two processes, which is either experiencing a 'wet dream' or reaching the age of 15, even if he is yet to experience a 'wet dream'. A girl experiences her first menses between 9 to 15 years of age and the menstruation lasts between 24 hours to 15 days, whereas 6 or 7 days is a normal menstruation period for women (Mustafa al-Khin et al., 2011). In addition, Imam Hanafi explained that the maximum age limit for puberty (*baligh*) is usually 18 years for men and 17 years for women. Moreover, Imam Hanbali established the age of 15 for boys and girls. Finally, according to Imam Malik, a child's maturity is confirmed when he or she reaches the age of 18 years old (al-Jaziri 2003).

In Malaysia, based on the Islamic Family Law (Act or Enactment) and Syariah Court Evidence (Act or Enactment) in every state, 'puberty' (*baligh*) is defined as an individual attaining a legal age according to Syariah Law. As for the Syariah Courts Procedures (Acts or Enactments) in the respective states, a 'minor' is a person who has not attained the age of eighteen years', whereas 'person under disability' includes an infant, a person of unsound mind and a person prohibited from administering his property' (Section 3, Syariah Court Civil Procedure Enactment (State of Selangor) 2003). Meanwhile, Section 89(4) of both the Islamic Family Law (State of Selangor) Enactment 2003 and Islamic Family Law (State of Negeri Sembilan) Enactment 2003 provides for the custody of an individual and property, whereby a person shall be considered a minor unless he/she has completed the age of eighteen years. Next, the Syariah Court Evidence Act or Enactment defines 'aqil' as 'sound mind', while puberty (*baligh*) refers to 'legal age' according to Syariah Law.

A 'child' is defined as a boy or girl who is still young, usually not more than seven or eight years old (Kamus Dewan, 2020). Hence, based on the definition above, 'children', whether male or female, are individuals who are usually under seven or eight years of age and require proper supervision from every aspect.

According to Black's Law Dictionary, a 'child' refers to an individual who has not attained the age of 14 years, although the definition of age varies from one jurisdiction to another. Besides, the term 'child' can also refer to a boy or girl who has not reached adulthood (Garner, 1999). The Oxford Dictionary of Law states that a 'child' is a person who is yet to reach adulthood. According to the dictionary, there is no accurate or specific term because it is used for someone under 14 years old, under 16 years old or sometimes under 18 years old, depending on the context and the wording of the statute (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 the age of 18 years and did not differentiate the definition between children and young people. However, based on the Children Act 2001, which came into force on 1 August 2002, a 'child' is defined as someone who is under the age of 18 years (Zakaria, 2015). Likewise, the Department of Social Welfare (2016), defines a 'child' as someone who is under the age of 18 years, as stipulated in the Children Act 2001. However, the Children and Young People (Employment) Act 1966 (Amendment) 2018, which is an Act aimed at controlling the employment of children and young people, defines 'children' as those who have not attained the age of 15 years, while 'young people' as those who have not attained the age of 18 years.

### **A Concise Discussion on Children's Needs**

The Children's Rights Convention (CRC) 1989 had outlined a child's most basic universal rights that should be protected, namely life (right to a child's survival), development (right to education, play and voicing opinions), participation (rights related to upbringing and community activities) and protection (right to be shielded from dangerous conditions or harm, such as abuse, exploitation, molestation, discrimination) (Department of Social Welfare, 2020). This is consistent with the objectives of the Child Protection Act 1991, which emphasizes the conservation and protection of children and adolescents who need care and protection from maltreatment or abuse. According to the Children's Act 2001 (Act 611), children's 'needs' can be assessed based on certain aspects, such as protection, preservation, temporary care, health examinations and medical treatment as well as rehabilitation. According to Shahrizat (2009), the National Children's Policy is a general policy pertaining to children's basic rights that are required in order to enjoy a prosperous life. Hence, the National Child Protection Policy action plan was designed and launched to foster awareness about child protection by focusing on strategies that provide protection from neglect, torture, abuse, discrimination and exploitation (Department of Social Welfare, 2020). In addition, there are several statutes that provide protection to children, such as the Children and Young Persons Act 1947 (Act 232), Child Care Act 1951 (Act 351 Revised 1988), Child Sexual Offenses Act 2017 (Act 792), Children and Young People (Employment) (Amendment) Act 2018, Adoption Act (Adoption Act 1952), Domestic Violence Act 1994 (Act 521) and Childcare Centre Act 1984 (Act 308).

Some of the child's basic needs are food, place of residence, schooling, stable relationship among family members and also emotional stability that emerges from an economically stable household (Talib & Muslim, 2007). Marni et. al (2008) stated that a place of residence should be provided by the guardians (mother and father), as well as safety and protection from negative effects caused by moral and physical aspects. Noor (2010) stated that children are entitled to protection and security from negative physical or moral aspects. In addition, Ku Suhaila (2016) believed that good mental health assisted by a counselling approach is also an important children's need in family institutions, especially for children whose parents are undergoing a tumultuous marriage crisis.

According to the Islamic perspective, there is no definition of a 'child's need' that is specifically and absolutely mentioned in any of the literature by previous scholars (Noor, 2010). According to al-Jaziri (1998), fathers seek and allocate financial resources to bear the cost of living and cater for the basic needs of their children who are their responsibility. However, Abu Zahrah (1970) stated that if the father is unable to fulfil this responsibility, then the responsibility is transferred to his family members who are 'financially secure' and if there is no one in that position, then the Baitulmal will take over the responsibility. Meanwhile, according to the Shafi'i or Maliki

schools, if the child is a girl, Ibn Qudamah (1983) stated that the father needs to provide her basic needs until she gets married.

Fulfilling the responsibility of providing for the child's basic needs includes the provision of food, clothing, shelter, education etc. According to Ibn 'Abidin (1966) and Ibn Nujaym (1997), who both belong to the Hanafi school, the duty of providing sustenance to children includes the provision of food, clothing and shelter. As the child's guardian, it is the father's duty to fulfil the child's educational needs, especially Islamic education (Ibn Qayyim, 2010) because Islamic education is part of Islamic worship practices that proves a subject's obedience to the Creator and it is based on the child's age. Imam al-Ghazali stated that a child's education should be given priority starting from the time the child is born (Jamaluddin, 2011). Moreover, education is vital for a child's future in today's era of globalization.

In addition, children's needs, in terms of the protection of personal and family life, are also paramount when avoiding exposure to interference from third parties without the consent of the children (al-Jundi, 1993). According to al-Dughmi (1985), the privilege of the right to protect personal life provided in Islam aims to guarantee one's care and protection based on maqasid al-shari'ah.

In the context of the basic need for food, Kashim et al., (2018) opined that the halalan tayyiban element should be emphasized in order to mould Muslims who possess appreciable personalities and noble moral values. Children's healthcare also warrants attention, such as the vaccination of children. In this regard, Dar al-Ifta' al-Misriyyah (2016) stated that vaccination according to Syariah is aimed at preventing debilitating defects in children because it is a type of preventive treatment.

Although Islamic family law does not provide a specific definition regarding children's needs, Section 86(2)(b) of the Islamic Family Law Act (Federal Territories) 1984 states that the wishes of children are taken into account by the court based on age, maturity and to what extent the child understands the matter in dispute. This indirectly means that children's wishes are also included in the category of children's needs.

## **METHODOLOGY**

This qualitative study aimed to discuss children's needs and its significance in determining the rate of division of harta sepencarian in Malaysian Syariah Courts. Some of the data in this study were obtained from primary and secondary legal sources by employing the document analysis method, such as data related to the definition, concept and position of children's needs (dependent children) according to Sharia by referring to books on fiqh belonging to the four leading schools of thought (madhhabs) and references containing the views of contemporary scientists related to this subject matter. Primary legal sources involved literature on jurisprudence, government gazettes, statutes, and court cases, especially the Malaysian Syariah Courts. Secondary legal sources involved law dictionaries, law reviews, journals, reviews of other social science journals, and electronic references. The information and data were then descriptively analysed in order to describe the views of jurists, legal practitioners, including Syariah Court decisions regarding the issue of dependent children's needs.

In addition, a deductive analysis was also carried out where the researcher generally presented the issue of dependent children's needs in the division of harta sepencarian based on case studies, reports and case judgments carried out to determine the influence of children's needs on the division rate of harta sepencarian and the approach adopted by the courts to address this issue.

## **RESULTS AND DISCUSSIONS**

To What Extend Do Children's Needs Impact the Division Rate of Harta Sepencarian (Matrimonial Property) in Malaysian Syariah Courts?

Children's needs are usually related to hadhanah (A. Ahmad et. al, 2015) and child support rights (Nasohah & Yaziz, 2012), which are provided for in Islamic Family Law practiced in the respective states as well as specifically and thoroughly discussed in related cases compared to the children's needs factor in the division rate of harta sepencarian, which is rarely highlighted in the judgment involving these cases even though there are relevant provisions in Islamic Family Law.

Children's rights prevalent in the Muslim community in Malaysia is related to the responsibility of parents or guardians to provide sustenance, hadhanah, guardianship to the child, property and legitimacy of the child, as stipulated in the Islamic Family Law (Act and Enactment) of the respective states (Hashim, 2021). Likewise, in the context of jointly acquired property, the child's right to have its needs fulfilled is one of the important elements considered by the court before a decision regarding the division rate of harta sepencarian is made. However, in most cases, efforts of the conflicting spouses to convince the court that they are more entitled to the rights (Malek, 2001) decreases the focus on the children's needs. Hussain (2014) explained that children still dependent on their parents have an influence on the division rate of harta sepencarian, either in the form of securing all or part of the property of either the plaintiff or defendant in the proceedings.

Normally, the court does not specifically explain or discuss in detail the children's needs in the decision of a harta sepencarian case, but the needs of dependent children do get special attention from the court. Their welfare needs are included in the list of factors that are considered by the court when determining the division rate of harta sepencarian, as provided for in the Section 122 (2)(C), Islamic Family Law (State of Selangor) Enactment 2003 which states that when exercising authority provided by Subsection (1), the court shall take note of:

“The needs of the children (minors) from the marriage, if any, and subject to those considerations, the court shall make an equal distribution”.

The harta sepencarian claim aims to determine the rights of the husband and wife, but the judge will also take into account the child's needs when making a decision. According to Yahya (2017), taking into account the child's needs in relation to food, clothing, residence, childcare and education, which is usually managed by the child's mother, hence, the distribution of jointly acquired property can be made to her based on her indirect contributions.

Among the cases concerning harta sepencarian that directly and significantly affect the needs of dependent children is *Masiran bin Saadali v. Azizah bint Abd. Rahman* [2003] 16 JH 33. The court in this case had distributed the claimed property equally between the plaintiff and the defendant even though the defendant was a full-time housewife because the court took into consideration the indirect contribution of the wife in terms of caring for the household and the children's needs (childcare).

Besides that, in *Abd. Razak bin Kasim v. Radziah binti Yahya* [2013] 37 JH 63, the Kota Bharu Syariah High Court ruled that 1/3 of the harta sepencarian should go to the respondent (Radziah) based on the children's needs (minors), which comprised 5 children through the 20 years of marriage. In this case, the appellant was not satisfied that the respondent obtained 1/3 of the harta sepencarian and made an appeal requesting that the respondent should only get 1/4 of the total contested property since the property was obtained based on his efforts. The Syariah Court of Appeal rejected the appellant's appeal and upheld the decision of the Kota Bharu Syariah High Court. This is because the Court took into account the element of children's need, as the children still required childcare, when deciding the division rate of harta sepencarian by the husband and wife.

In *Faridah binti Suleiman v. Mohd. Noh bin Othman* [2011] 32 JH 15, after examining the facts presented by both parties, the court believed that the plaintiff's contribution was an indirect contribution towards the acquisition of the property. What is apparent in this case is that the court made a decision by considering the reasons given by the plaintiff that she had a child to care for. Hence, the overall responsibility of caring for the children was borne by the plaintiff since she is the mother of two underaged children. Therefore, it is appropriate for the court to consider this decision by looking at the element of children's needs that should be emphasized in this case.

The influence of children's needs on the division rate of harta sepencarian is also evident when the court does not exclude children's needs (protection and security) when deciding on the division of harta sepencarian. This means that children's needs (protection and security) affirmatively influence the division rate of harta sepencarian because children need to be protected and their safety reassured. The significance of the need for shelter and safety is evident in *Hanipah binti Mohd. Nor v Baharom bin Aman @ Abd. Rahman* [2010] 30 JH 41, whereby the Court took into account children's needs in terms of protection and safety when a house is

claimed as a harta sepencarian accruing from their marriage that was blessed with a total of 12 children. The wife had cared for and managed all the children in addition to working as a teacher and FELDA (Federal Land Development Board) settler. Therefore, taking into account the children's need for a place to live and to protect them from various negative elements, the house was declared as harta sepencarian.

Similarly, in *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 smaller than 1/3 for one of the properties because the extent of the respondent's contribution was inadequate. The appellant also applied for a declaration setting aside the other two property assets as being harta sepencarian because the respondent had not contributed in the acquisition of those properties. The Syariah Court of Appeal had rejected the appellant's appeal on the basis of the respondent's contribution in caring for the household and needs of their five children culminating from twenty three years of marriage. Hence, although the emphasis on children's needs was not highlighted but it still influenced the decision on the division rate of harta sepencarian. According to the court, the wife should stay at home to ensure the welfare of her children by providing protection (residential), food and so on.

In *Ida Khatijah binti Arshad v A. Rahman bin Isa* [2015] 40 JH 78, the case involved a married couple who had six school-going children. The court, when determining the division rate of a house claimed as harta sepencarian, had given consideration to the needs of the children (minors) even though the issue of children's needs was not emphasized by the appellant. The court made an assessment not only by considering the indirect contribution in the context of providing sustenance or caring for a family but also the children's needs in terms of education and seeking knowledge.

In the cases of *Rizal B. Md Said v Zuraidah Bt Mohd Othman* [No. Fail Kes: 14400-017-0363-2017] and *Ravin Trapshah B. Ismail v Esha Lim Hwee Nee* [No. Fail Kes: 14700-017-0280-2017], both parties had dependent children when making claims for harta sepencarian in the Syariah Court. However, in the judgments of these cases, the court only explained the resolutions made regarding the disputed properties between the parties. The 'need' of the dependent children were not detailed comprehensively in the considerations provided (Hussain 2022).

Based on the arguments above, this study found that the element of children's needs can influence the court's decision when determining the division rate of harta sepencarian even though this particular element was not specifically emphasized in harta sepencarian claims, either by the judge or by the party making the claim. The element allows the party who holds the children's custody to obtain a share or division rate in the harta sepencarian commensurate with their responsibility in the context of managing the children, which is considered as an indirect contribution even though the share or rate does not exceed that of the person who makes a direct contribution .

It is evident that in addition to examining the interests of both parties, namely the husband and wife, the court will also take into account the children's needs when determining the division rate of the harta sepencarian to ensure that it is proper and fair to all parties. Children's needs, in terms of providing shelter, food, care and education, are taken into account when distributing harta sepencarian in order to guarantee a life that should be enjoyed by a child as provided in the law. Implicitly, it is apparent that the court assumes that the issue of children's needs is one element that should be emphasized when determining the division rate of harta sepencarian.

## **FINDINGS**

Overall, Islam has outlined various requirements for dependent children that must be managed and nurtured by the children's parents or guardians because they are still underage and physically immature to survive on their own. Children's needs that parents should provide for are food, breastfeeding, education, medicine, clothing, shelter, play time, love and protection.

Meanwhile, according to the Children's Rights Convention (CRC) 1989, some of the most basic universal children's rights that must be protected are the right to survival, education, play and voicing opinions, social activities and protection (protection from dangerous situations such as abuse, exploitation, violation, discrimination)

In relation to harta sepencarian, relevant provisions have been legislated and enshrined in the Islamic Family Law Enactment of each respective state. These provisions clarify that the courts must take into account a number of issues before making a decision, such as the extent of the contribution made by each party to acquire the asset, debt owed by one of the parties for their mutual benefit and also children's (minors) needs from their marriage. Therefore, the elements of children's needs (underage or dependent children) that influence the determination of the division rate of harta sepencarian in the Syariah Court include the child's qualifications, status, protection (residence), education and financial resources.

In the context of the division rate of harta sepencarian and through judgments displayed in most cases concerning jointly acquired property claims, judges do not affirmatively provide clear and specific explanations on the significance of children's needs when deciding the case. However, implicitly, the element of the needs of children still dependent on their parents has an influence in determining the distribution rate of harta sepencarian by parties in a marriage. It is possible that no statement of claim related to children's needs from the parties is included in the proceedings.

This can be proven in cases concerning harta sepencarian that touch directly on the significance of the needs of dependent children, such as in *Masiran bin Saadali v Azizah bint Abd. Rahman* [2003] 16 JH 33; *Hanipah binti Mohd. Nor v Baharom bin Aman @ Abd. Rahman* [2010] 30 JH 41; *Faridah binti Suleiman lwn. Mohd. Noh bin Othman* [2011] 32 JH 15; *Abd. Razak bin Kasim v. Radziah binti Yahya* [2013] 37 JH 63. However, in certain cases concerning the division of harta sepencarian adjudicated in the Syariah Court, the 'need' of the dependent children are not explicitly and comprehensively articulated in the grounds of judgement. This is because, although the judgment primarily addresses the division of harta sepencarian property between the husband and wife, the judge has implicitly considered the 'needs' of the dependent children in rendering the decision on the division. For example in *Anuar bin Omar v. Norafidah binti Ibrahim* [2015] 41 JH (2) 200-219; *Ida Khatijah binti Arshad v. A. Rahman bin Isa* [2015] 40 JH 78; *Rizal B. Md Said v Zuraidah Bt Mohd Othman* [Case File No.: 14400-017-0363-2017]; *Ravin Trapshah B. Ismail v Esha Lim Hwee Nee* [Case File No.; 14700-017-0280-2017].

## **CONCLUSION**

Children's 'needs' should not be deemed trivial in cases of disputes or arguments between parents who are claiming their respective rights. Although children's needs are not specifically stated in harta sepencarian claims, they are one of the main aspects that are evaluated and considered by the courts since children are a group that needs to be defended in order to continue surviving in a contentious atmosphere involving their parents, especially after a divorce. Children's needs include aspects of nurturing and care, shelter, safety, health, food, love and so on.

Hence, by enshrining children's needs in the statute, their rights are better guaranteed from a legal perspective. In the context of claims for harta sepencarian, these rights are provided for in the Act or Enactment of Islamic Family Law of the respective states and can influence the court in determining the division rate of harta sepencarian among the parties involved.

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