

CUSTODY AND CHILD SUPPORT

Muslim and Canadian Family Laws



RESOURCE 4 OF 6



Canadian Council of Muslim Women (CCMW)
Le conseil canadien des femmes musulmanes (CCFM)



The Law
Foundation
of Ontario



This document is one in a series of six and should be read in conjunction with the others.

Titles in the series:

- 1) Domestic Contracts
- 2) Marriage
- 3) Divorce
- 4) Custody and Child Support
- 5) Family Property and Spousal Support
- 6) Inheritance

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Introduction



The Canadian Council of Muslim Women (CCMW) has published a series of documents to help Canadian Muslim women make informed choices pertaining to family law in Canada.

These documents provide comparative information about Canadian and Muslim family laws, particularly as they pertain to women's rights. We hope the documents will be of assistance to, among others, Muslim women, professionals working with Muslim women in the family court system, students who would like to know more about the topic and community-based services that assist women.

The material in this document is based on *Muslim and Canadian Family Laws: A Comparative Primer*, published by CCMW and updated in 2019. Any errors that appear in the documents are the sole responsibility of CCMW.

Those interested in finding out about the sources and validity of Muslim laws and legal opinions referred to in the documents should consult *Muslim and Canadian Family Laws: A Comparative Primer*, a meticulously referenced publication. Laws in a public legal system are in a constant state of flux as they are changed to adapt to the times. You are encouraged to verify that the information contained in the documents about Canadian laws is current.

Both the documents and the *Primer* are intended to provide information only and should not be considered a substitute for legal advice.

For legal advice, please consult a lawyer specializing in family law.

Muslim Law



Sharia and the Sources of Law

Muslims have developed an elaborate legal tradition over many centuries since the revelation of the Quran to Prophet Muhammad and the formation of the first Muslim communities in the seventh century CE. This legal tradition has divine revelation as its fundamental source. Divine revelation to humanity is represented in the Quran, the Arabic text reflecting the word of God revealed to Prophet Muhammad by Archangel Gabriel, and the Sunna, reflected in records that indicate what the Prophet said, did, or refrained from doing or saying. Besides the Quran and the Sunna of the Prophet, other sources of law in the Sunni tradition include the consensus of the community and analogical reasoning. In the Shi'i tradition, the pronouncements of the Imams – the leaders of the Muslim community from among the male descendants of the Prophet – are also considered authoritative.

Although, both in Western and Muslim discourses, it is common to use *sharia* interchangeably with Muslim law, *sharia* is a much broader term. Literally, the term means the path to the source of water. In the legal tradition, it refers to the ideal of living in an ordered community according to divine justice. By contrast, *fiqh* denotes the concrete jurist-made rulings that constitute the body of Muslim substantive laws. It is noteworthy that the Muslim legal system developed over 1,400 years, in different parts of the world, with diverse cultures, which also influenced the development of particular doctrines. Throughout this history, the Muslim legal tradition was always open to incorporating local customs as well as predominant administrative practices in neighboring and prior civilizations. In modern times, this has manifested in some borrowing from Western legal systems in the context of modern Muslim-majority nation-states.

The Laws and the Role of Interpretation

While the Quran and the Sunna of the Prophet contain some injunctions on how to act in a number of circumstances, virtually all of the substantive body of Muslim laws was developed by self-governing scholars over the course of many centuries. The body of practical rules developed by the scholars over the centuries came to be known as *fiqh*, which literally means knowledge. Whereas the Quran includes some verses (some clearer than others) that contain rules pertaining to family laws, and many spiritual provisions indicating the equality of all believers regardless of gender, virtually all of Muslim family laws were part of the jurist-made *fiqh*.

The important thing to remember about *fiqh* is that it is probabilistic (*zanni*). It is the best guess of the community of jurists at any given point in time, and does not claim for itself any sort of objective truth or identity with divine will.

Much can be written about the legal institutions and practices but for our purposes of understanding the applicability of Muslim family laws in Canada, it is sufficient to acknowledge the variations found within these laws, that is in *fiqh*.

Main Schools of Muslim Law

Today, there are four extant Sunni schools of law—Hanafi, Shafi'i, Maliki, and Hanbali—and one main Shi'i school, the Ja'fari. Schools of law are best understood as legal traditions. They are constituted of communities of jurists who are united by specific approaches to the law, and often have a certain number of core opinions on any particular question of law. This reliance on school of law or *madhhab* meant that Muslim law is deeply pluralistic. On any given legal question, there is a range of opinions advanced by the different schools, as well as a variation of positions offered by the majority and minority scholars within each school.

Legal Authority in Islam

It is a common saying that there is no church in Islam. This means that the Muslim community has long believed that there is no central authority that possesses the right to formulate legal and ethical doctrines for everyone else. Whereas Muslims commonly follow the opinions of the jurists, this is predicated on the assumption that those jurists are learned and wise, and not because of any inherent obligation to follow authority. Muslim women are under no obligation to follow the legal opinion of any particular school of law, let alone any specific jurists, in matters pertaining to family law. In fact, being free to choose among the variety of opinions offered by the schools of law, a concept referred to as *takhayyur*, has always been a central feature of *sharia* as a system of justice.

Reformists vs Traditionalists

The formulation of the vast body of laws known as *fiqh* was the product of many centuries of stable Muslim communities living under the *sharia*. However, in modern times, the social institutions of the *sharia* have been replaced in most of the Muslim-majority countries with modern legal institutions. This transformation led to much speculation over the fate of Muslim laws and their place in the modern world. Some Muslim reformists called for a return to a pure understanding of the Quran and the Sunna of the Prophet, without being necessarily bound by the classical *fiqh*, which was produced in a time and circumstances different from ours. Other reformists argued that we must look for the deeper “spirit” of the *sharia*: the spirit of equality, justice, and prosperity, without focusing too much on the substantive rules of *fiqh*. Yet another trend of thought argues that we should preserve the *fiqh* tradition but still find ways to make it evolve and adapt to modern conditions.

Canadian Muslim Communities

Canadian Muslim communities are relatively new and diverse. They are in the process of developing institutions and defining their position as a minority in a non-Muslim society. Fragmentation into many groups with different backgrounds and practices precludes the development of a generally recognized ethic to which everyone can refer. We thus have a fluid situation in which a very wide range of views about Islam and its laws is being articulated and debated.

Muslim Laws in Canada

Relying on Muslim laws may be more perilous in Canada than in most Muslim-majority countries. In Muslim-majority countries, there are defined laws laid down by governments, and it is therefore possible to have a good idea of what rules will be applied to a particular case. In Canada, however, one may be faced with unfamiliar standards and rules.

If you are thinking of having your affairs regulated in any way by Muslim laws, it would be wise to enquire beforehand about the kind of law involved. Will it be some version of the reformed law or the traditional law of one school or another?

You may be able to judge what kind of approach will be used by asking specific questions. For example, with regard to divorce: Do the persons with whom you are dealing consider the quick triple divorce valid? Do they believe that a woman has a right to support by her husband even after the three-month waiting period, and if so, for how long? With regard to inheritance, you might ask: Will my daughter have to share her part of the family inheritance with her uncles? You can use these documents to come up with such questions and also compare the answers you get with those found in Canadian law.

It is important to bear in mind that classical Muslims legal doctrines are not identical with the positive laws of modern Muslim-majority states, even when those states to claim to apply Muslim family laws. Actions taken according to either Muslim law or the law of a Muslim-majority state may have implications in the Canadian legal context on the terms and according to the categories established by Canadian family laws. It is important to not assume that an act such as a marriage or divorce taken within one system will be irrelevant in another, or that, conversely, they will be regarded in the same way. These documents are designed to help you understand some of those differences, but it is extremely important to consult with an expert in Canadian family law to fully understand your rights and duties under Canadian laws.

The information about Muslim laws in the following pages is not definitive. It should be viewed as a starting point only. For legal advice, please consult a lawyer specializing in family law.

Canadian Law



In Canada, the *Canadian Charter of Rights and Freedoms* specifically addresses equality rights of women. Canada is also a signatory of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) and of the *International Covenant on Civil and Political Rights* (ICCPR). Both these documents provide equality-rights protection for women which take precedence over the right to religious freedom.

Case Law

Case law, or court decisions, further addresses the issue of women's rights. Public court decisions are required to conform with the *Canadian Charter of Rights and Freedoms*. Court decisions are a matter of public record and can be appealed to a higher court.

Family Law

Family matters are governed by a number of federal and provincial laws. Some matters relating to marriage, such as rules about who can marry whom, are a federal responsibility; others, such as the technical administration of marriage, are provincial. Divorce is regulated federally under the *Divorce Act*, which underwent substantial revisions in 2019, to come into effect in 2020. Provincial laws cover custody, access, child support, property division, spousal support, restraining orders and child protection. Inheritance is also a matter for provincial regulation.

The names of the statutes vary from province to province, but the general issues covered are the same, and the overall approach is similar, although there are regional differences. These laws exist to assist families and to provide minimum common standards across the country.

Access to Justice and Legal Aid

Everyone involved in a family-law matter can use the services of a lawyer to support and assist them. In an attempt to ensure that people without the financial ability to pay for their own lawyer can still be properly represented, the provinces have developed legal aid plans. For example, in Ontario, the legal aid plan is called Legal Aid Ontario (LAO). Ontario's model provides successful applicants with a certificate for coverage, and the person selects their own lawyer.

The financial criteria in Ontario are very limited. Eligibility is determined by a review of the person's income and expenses. LAO sets different financial criteria for victims of domestic violence to make it easier for them to qualify for assistance. LAO primarily covers representation for court-based matters. There is very little legal aid available in private dispute-resolution cases.

Private Dispute Resolution

Many people prefer to resolve the issues arising from the end of their relationship outside the court system. However, in situations where there is an unequal balance of power, private resolutions may not reflect either the legal rights or the interests of the person with less power.

Family-law disputes are privately resolved through either mediation, arbitration or collaborative law.

Ontario's *Arbitration Act* requires that all family law arbitration be conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction. Arbitration conducted under any other system of law, including religious law, is not considered "family arbitration" and is not enforceable in Ontario courts.

Differences between Arbitration and Mediation

Arbitration is quite different from mediation in that the arbitrator, after listening to what each party has to say, will announce a decision (much as a judge does) in the case. The parties are bound to accept this decision – in fact, they have agreed to this before beginning the process. In mediation, the mediator assists the two people come to an agreement about the issues that are in dispute. Both mediated settlements and arbitral awards can be enforced by the court.

The changes in arbitration law do not interfere with the right of individuals to go to elders and religious institutions for advice and counselling, but these processes will only be sanctioned by the state and be legally binding if the family law of Canada is used.

Safety Related Matters

Although these documents deal primarily with issues of family law, it is important for women to know that criminal law provides some protection from abusive spouses. Both restraining/protection orders and exclusive-possession orders are important legal steps women can take through family court to protect themselves from abusive partners, especially during the early days of separation, when risk of violence often increases. Application for a restraining order and/or for exclusive possession of the home can be made as part of a larger family court proceeding dealing with custody, access, support and/ or division of property or it can be made separately.

The Canadian Legal System

The Canadian legal system is a public legal system with laws and systems in place that are intended to ensure women's equality rights. Under this system, laws are open to public review and scrutiny and court decisions are a matter of public record. Moreover, the decisions can be appealed to higher courts. In Canada, anyone involved in court proceedings has the right to have a lawyer represent them. For those who cannot afford legal representation, government-funded legal aid is available. A public law system supports a consistent approach and some measure of equality and accountability. Even so, the public system of law is not perfect.

Private rules, including religious laws, do not offer these same protections. They are not open to public review and scrutiny, and those who interpret them are not accountable to the public in any way. There is often no right of appeal from a bad decision made under a private regime. There is not necessarily a right to legal representation, and legal aid is seldom available.

For these reasons alone, a public system of family law is to be preferred over a private one.

Custody and Child Support



INTRODUCTION

MUSLIM LAW

Traditional Muslim law distinguishes between guardianship (*wilaya*) of the children, and custody or care of a dependent child (*hadana*). Whereas the father enjoys rights of guardianship over children since their birth, custody, or the right to live with and look after minor children who cannot care for themselves, belongs to the mother according to all classical jurists. The age and conditions of such custody vary, but the principle remains the same.

It is important to note that, in Canada, disputes over custody will be exclusively decided based on Canadian family law. Even in the case of arrangements between the parents, whether or not based on Muslim laws, courts can refuse to enforce such arrangements if they are deemed to not be in the best interests of the child.

CANADIAN LAW

The *Divorce Act*, and provincial/territorial laws (in Ontario, the *Children's Law Reform Act*) and court judgements provide a set of rules (formal and informal) for deciding on arrangements for the children once the parents separate. These rules provide significant direction but also leave room for discretion on the part of the court.

Parents can decide on child-related arrangements in a separation agreement, but the courts can disregard it if it is not in the best interests of the child.

People have many reasons for choosing to use either the *Divorce Act* or the legislation in their province or territory to resolve custody and access disputes. Unmarried people must use provincial/territorial legislation: because they

INTRODUCTION (continued)

MUSLIM LAW

CANADIAN LAW

are not married, the *Divorce Act* does not apply to them. However, some married people prefer to use the provincial/territorial legislation if they are not immediately seeking a divorce, if they cannot afford the cost of applying for a divorce or if the provincial/territorial legislation offers them better options. Anyone trying to decide which legislation is more appropriate should seek legal advice from a lawyer specializing in family law.

IMPORTANT NOTE:

The *Divorce Act* underwent significant revisions in 2019, most of which will come into effect in approximately June 2020. This brochure reflects the changes that were known as of July 2019.

GUIDING PRINCIPLES

MUSLIM LAW

Fathers have guardianship (*wilaya*) over their children, and also have a strict responsibility to provide for them. The mother is granted custody (*hadana*) of all her minor children. The father's responsibility to provide maintenance (*nafaqa*) to his children is absolute regardless of whether or not they are in his custody, and covers all necessary expenses for subsistence as well as education. Guardianship also entails legal representation of minor children. The guiding principle throughout these doctrines is the child's best interest. The underlying assumption is that a mother is most capable of caring for minor children, whereas a father is strictly responsible for their financial support.

CANADIAN LAW

The best interests of the child: Regardless of the legislation being used, determinations about how children spend time with each parent and how decisions are to be made about children are made using the "best interests of the child test." For example, in Ontario, according to the *Children's Law Reform Act*, the court must consider, among other things, the child's needs and circumstances; the child's views and preferences; the ability and willingness of those applying for custody to provide the child with guidance, education and the necessities of life, including support for any special needs; the ability of each person applying for custody to act as a parent and provide a stable family environment; and the relationship to the child of those applying for custody.

The factors in most provincial legislation, as well as in the federal *Divorce Act*, are similar. For detailed information about the best interests of the child test in any jurisdiction, it is important to review the appropriate legislation.

Courts may use a family assessment to assist in determining the best interests of the child.

GUIDING PRINCIPLES (continued)

MUSLIM LAW

CANADIAN LAW

Maximum parenting time: The revised *Divorce Act* states that children are to have as much time with each parent “as is consistent with the best interests of the child.” (Section 16(6))

Both parents have a right to information about the health, education and welfare of their child, regardless of who the child lives with and which parent has primary responsibility for decision-making. This means that each parent can ask questions and be given answers about counselling, school report cards and activities, health care and other such matters, whether or not the other parent consents.

CUSTODY RIGHTS

MUSLIM LAW

Most jurists, including Hanafis, agree that custody should belong to the mother until age 9 for girls, and 7 for boys, but some scholars, such as the Malikis, extend it to the age of puberty for boys, and marriage for girls. In general, classical jurists tend to believe that girls needed to stay in their mother's custody more than boys. According to most classical schools, a mother will lose custody to the father if she remarries. If both mother and father are incapable of caring for the children, they will go to the paternal grandmother, then paternal aunts, then maternal grandmother and aunts, in that order. Whereas mothers enjoy the right to custody of minor children, they cannot move the children to a foreign land or far away from their father's town, unless she is returning to her hometown.

The same applies to the father: he may not move the children away from their mother's town. Custody and guardianship rights in Muslim law are non-negotiable, since they exist to protect the children's rights, not the parents'. Thus, in a *khul'* settlement, the mother may not surrender her custody rights to the father, and vice-versa.

CANADIAN LAW (CUSTODY ORDERS)

The revised *Divorce Act*, when it comes into effect in approximately June 2020, replaces the terms custody and access with parenting time, contact time and decision-making responsibility. A "parenting order" is what has been called a custody order.

Other changes in the *Divorce Act* that relate to post-separation arrangements for the children include:

- A detailed list of factors to be used when applying the best interests of the child test (sections 16(1), (2) and (3))
- An extensive definition of family violence
- New provisions with respect to moving with children

The language in provincial legislation remains unchanged. In Ontario, for instance, the *Children's Law Reform Act*, continues to use the terms custody and access.

According to section 20(1) of the *Children's Law Reform Act*, both parents have equal rights to custody, and neither has an automatic right, regardless of whether they were married to one another, lived together in a common-law relationship, never lived together or were in a polygamous relationship.

CUSTODY RIGHTS (continued)

MUSLIM LAW

CANADIAN LAW (CUSTODY ORDERS)

Custody arrangements can be agreed on by both parties in a separation agreement. However, if the conditions are not in the best interests of the child, a court can disregard the negotiated agreement. Custody orders a court can make are, among others: joint custody, sole custody, shared custody, supervised access and supervised exchanges. Custody orders can only be change if there has been a significant change in circumstances of either party. Most custody orders made outside Ontario will be enforced by Ontario courts as long as they are in the best interests of the child.

In Ontario, if a parent does not follow the custody order, they may be found in contempt of court and can be fined up to \$5,000 or imprisoned for up to 90 days. The courts may also order the apprehension of the child and direct a police force to locate and return the child to the other parent; prohibit the removal of the child from Ontario; make an order for the return of the child to Ontario; order that the child's passport and/or the passport of the person not permitted to remove the child from Ontario be delivered to the court.

CHILD SUPPORT

MUSLIM LAW

Child support is the father's absolute responsibility regardless of where the children live. Support should cover all necessities including education, and should increase proportionally to the father's financial abilities. In case of the father's inability to provide for the children, the mother may coerce payments through a court order, or request a loan guaranteed by the father's assets.

CANADIAN LAW

Child support is defined as the money paid by the parent who does not have primary responsibility for the children to the parent who does. A parent will have child support responsibilities regardless of whether they were married, in a polygamous relationship, lived common-law or never lived with the other parent of the child/ren. The amount of support to be paid is based on the income of the person paying child support and the number of children. Child-support payments are not tax-deductible for the payer and do not constitute taxable income to the recipient.

A court can change the amount of child support if there is a significant change in the circumstances of either party (for example, the parent paying support loses their job or gets a significant pay raise), or extraordinary expenses (needs or activities of the child that involve costs above those covered by the child support order) or undue hardship, although undue hardship is almost never recognized by the court.

CHILD SUPPORT (continued)

MUSLIM LAW

CANADIAN LAW

Generally, child support is paid until the child reaches the age of 18. Support may end earlier if the child is no longer under parental control, has married or has had a child of their own. Support may continue past the age of 18 if the child remains enrolled full-time in school or is disabled and unable to become self-sufficient.

In Ontario, child-support orders are registered with the Family Responsibility Office (FRO), which collects the money from the payer and pays it to the recipient. The FRO has the authority to garnish pay cheques and bank accounts, seize GST and income tax returns or suspend a payer's driver's or professional licence when the payer is in arrears.

All the provinces have reciprocal enforcement agreements with one another that allow enforcement of child-support orders.

INTERNATIONAL CUSTODY

MUSLIM LAW

In spite of the mother's unquestionable right to custody of minors under classical Muslim laws, many modern Muslim-majority states have laws that favor the father as a result of a misguided expansion of the concept of guardianship. Furthermore, with minor exceptions such as Turkey, most Muslim-majority countries did not adopt international legal instruments that allow international cooperation to return children to the rightful custodian in the case of illegal abduction by the other parent.

Therefore, if a father takes his minor children to his Muslim-majority home country without the mother's knowledge, it will be difficult, although not entirely impossible, to use that country's legal system to regain custody over the children.

CANADIAN LAW

Canada is a signatory to *The Hague Convention on the Civil Aspects of International Child Abduction*. This treaty is the only multilateral agreement providing assistance in cross-border abduction.

The objectives of the convention are to (a) deter child abductions, (b) promote cooperation among countries and their respective authorities and (c) to ensure the prompt return of abducted children to their home countries.

If a child is removed illegally from Canada to another country signatory to *The Hague Convention*, the parent in Canada must contact the Central Authority here, which is either the federal Minister of Justice or the Attorney General of the province or territory.

The changes to Canada's *Divorce Act* have no impact on international laws related to abduction of children. Even though the terms custody and access will not exist in the *Divorce Act* in the future, *The Hague Convention* will continue to apply.

CHILD PROTECTION

MUSLIM LAW

CANADIAN LAW

While not directly related to the breakdown of a marriage, child-protection issues do arise from time to time in this context, especially when there has been violence in the family.

In Ontario, it is the *Child, Youth and Family Services Act* that ensures the safety of children in their families. The Act approves agencies to operate as children's aid societies and protect children under 18 years of age. Where the society has concerns, it can investigate, provide guidance, counselling and other services to families, supervise children and, in extreme cases, remove children from their parents and provide care for them in another setting.

We gratefully acknowledge the Law Foundation of Ontario for the financial support which made possible the updates to this document.

Some of the information on Muslim and Canadian family laws in the document is provided in a side-by-side format to allow for comparison. Sometimes there is no direct comparison available. These situations are noted as such.

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