

SETTLEMENT OF ARREARS OF ALIMONY PAYMENTS THROUGH NEGOTIATIONS FAMILY SUPPORT DIVISION AT THE SHARIAH COURT

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ABSTRACT

Fulfilling the obligation of alimony is obligatory for a father to his child and a husband to his wife. However, there are cases where the father, husband or ex-husband (iddah maintenance) who is called the debtor does not fulfill his obligation to provide alimony. Alimony will be in arrears when the court has issued an order and the arrears start from the first month according to section 134(2) of the Syariah Courts Civil Procedure Act. However, the debt that must be paid by the debtor must be according to his ability and the Family Support Division (BSK) must handle the negotiation to get an answer on what is the best way to resolve the arrears. The objective of this study is to assess the extent to which the implementation of the settlement by way of payment of alimony arrears is effective from the debtor to the creditor. The methodology used in this study is a qualitative study with data collection methods, namely the library method and the interview method. The data collection was collected and analyzed holistically based on the Malaysian Syariah Judicial Department (JKSM) and interviews with Family Support Division officers who handle cases related to alimony arrears through negotiation. The results of this study found that debtors can settle arrears of alimony based on negotiated discussions with payment methods through monthly installments, short installments and lump sum payments.

Keywords: *alimony, judgment debtor, legislation, shariah court*

INTRODUCTION

Nafkah in terms of language means to spend and spending money (Al-Shirbini et. al, 2001). In terms of terminology, it is to spend expenses as a mandatory obligation on a person such as food, clothing and shelter (Al-Marghinani, 2001). According to al-Sharqawi, nafkah is "food with a certain amount, which must be provided by the husband for his wife and the father of his children and his housekeeper. Also for his descendants, his servants and his livestock as much as is sufficient" (Al-Sharqawi Abdullah, 1309H/1891M). The definition from the fuqaha adds to the housekeeper because it is suitable for a certain place. However, it is more about the basic necessities, namely food, clothing and shelter.

In the case of a wife who is divorced by her husband, the right that the ex-wife can claim is iddah maintenance. According to the definition of Imam Syafie', "iddah maintenance is a provision until the woman waits to know the liberation of her womb for three menstrual periods" (Muhammad bin Idris as-Syafie', 2008). This shows that the divorced wife needs to be given iddah maintenance by her ex-husband for the continuation of life so that she can ensure that her womb is clean from the seed of her ex-husband. Meanwhile, from the term, "waiting from the iddah period by giving alimony as obedience to the command of Allah" (Mustafa al-Khin et. al, 1994). In the provision of iddah maintenance, the period is different from the way of separation from her ex-husband whether the woman is divorced in normal circumstances where the iddah period is for three menstrual periods or divorced while pregnant, which is for the duration of waiting for the birth of the child.

Regarding the father's obligation to provide for his children, it is based on the words of Allah in Surah Al-Baqarah verse 233:

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا

Meaning: "and the father's duty is to feed and clothe the mother in a proper manner. No one is burdened except according to his ability."

The above verse explains the obligation of a father to provide food and clothing based on his ability. If the father is absent (dead), then the obligation passes to the rightful heir (Al-Shirbini et. al, 2001). And in the hadith of the Messenger of Allah (PBUH), it is necessary to take the father's property without permission to obtain sustenance as in the following narration;

يَا رَسُولَ اللَّهِ إِنَّ أَبَا سَفْيَانَ رَجُلٌ شَدِيدٌ لَا يُعْطِينِي مِنَ النَّفَقَةِ مَا يَكْفِينِي وَيَكْفِي بَنِيَّ، إِلَّا مَا أَخَذْتُ مِنْ مَالِهِ بِغَيْرِ عِلْمِهِ، فَهَلْ عَلَيَّ فِي ذَلِكَ مِنْ جُنَاحٍ؟ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: خُذِي مِنْ مَالِهِ بِالْمَعْرُوفِ، مَا يَكْفِيكَ وَيَكْفِي بَنِيكَ

Meaning: "O Messenger of Allah, indeed Abu Sufyan is a stingy man. He does not give me enough to spend on me and my son unless I take it without his knowledge. The Messenger of Allah replied; "Take from his wealth what is sufficient for you and your son in a good way" (Al-Bukhari, t.t).

The above hadith explains the obligation of a father to support his child. This is because in urgent circumstances, the Messenger of Allah (PBUH) allowed Hind to take only the necessities even though Abu Sufyan did not know. Therefore, the obligation to support a child is under the responsibility of a father and the responsibility is only to meet the basic needs based on his ability until the child is able to support himself (Al-Shirbini et. al, 2001).

Meanwhile, according to Malaysian law, section 59(1) of the Islamic Family Law (Federal Territory) Act 1984 provides:

"Subject to Islamic Law, the Court may order a man to pay maintenance to his ex-wife."

The alimony ordered for the ex-wife here means iddah maintenance. Therefore, for any divorced couple, the court can order the ex-husband to pay iddah maintenance to his wife according to the agreement of the parties or the decision of the judge himself. Child alimony is provided for through section 72(1) in the same act;

"Unless an agreement or an order of the Court provides otherwise, it is the duty of a man to support his children, whether they are in his care or in the care of another, either by providing them with shelter, clothing, food, medicine, and education as is reasonable having regard to their means and standard of living or by paying their costs."

In the provision, it is explained that apart from basic needs such as food, clothing and shelter, the law also provides for other maintenance such as medical and education. This can be seen that these needs have become important in this day and age according to current trends. Alimony is done by paying costs or referred to as money according to the amount.

Therefore, alimony ordered by the court must be paid by the responsible party, namely the father or ex-husband. If alimony is not paid within a minimum period of one month, then it becomes arrears. Therefore, the objective of this study is to examine the solution in explaining alimony arrears by negotiation if it occurs and the effective way of payment, whether it is made in monthly installments, short installments or in one go based on the debtor's ability.

This is because it refers to the ability of the debtor. The solution to pay the debt is mandatory, so the purpose of this study is to ensure the extent to which the solution is most effective, whether in lump sum, short installments and monthly installments. This is also to ensure that the agreement also occurs on the part of the creditor because if the needs of the creditor require a lump sum payment, the possibility of payment in monthly installments or short installments does not occur.

RESEARCH PROBLEMS

Problems arise when the father or ex-husband disobeys the court order after being ordered to pay maintenance. This can be seen in the article in Sinar Harian that the issue of maintenance arrears is still a common issue in the community. The arrears occur when the husband fails to implement the maintenance order even though he knows that he is obligated to pay it (Sinar Harian, 2019). And this arrears can be taken action if there is a complaint from the ex-wife and the mother. In the state of Terengganu, a total of 1,616 have complained about this matter in the syariah court (Berita Harian, 2022). Apart from that, arrears of maintenance occur when a father fails to fulfill his responsibilities. This is because, after the court has ordered the payment of maintenance, the father has defaulted, causing enforcement to be taken based on a complaint from the mother (Mohd Hazwan Ismail & Jasni Sulong, 2020).

This was also discussed by the Minister in the Prime Minister's Department at the time, Datuk Seri Mujahid Rawa, who said that a husband who is lazy or has difficulty paying maintenance will be subject to bank restrictions. This bank restriction can be made in a syariah court with the help of a lawyer and also a government agency from the Family Support Division, the Malaysian Syariah Judicial Department (Berita Harian, 2018). With this method of restriction, it requires a legal process procedure where if the procedure is done correctly, the court can issue an execution order and a *hiwalah* notice (Harian Metro, 2021). The implementation of *hiwalah* is also permitted when the court allows for implementation when the application has been made after investigating the existence of maintenance arrears (Mohd Hazwan Ismail, 2023).

Apart from that, in the Utusan Malaysia newspaper dated 18 May 2023, a total of 32 women still have cases of child support claims in the state of Terengganu. The press release explained that there are still many fathers who ignore child support (Utusan Malaysia, 2023). Apart from the state of Terengganu, the whole of Malaysia recorded a total of 12,300 ex-husbands who refuse and stubbornly pay child support (Berita Harian, 2010). The problem of arrears occurs when the husband or father does not fulfill his responsibilities when ordered by the court. Therefore, this study will conduct a descriptive research to find out how to pay the arrears more effectively so that it can be resolved peacefully and harmoniously through negotiations.

LITERATURE REVIEW

Literature review is a review of studies that have been conducted by previous researchers. This study will examine the implementation of payment settlement in arrears of maintenance issues. The first study was conducted by Jazilah Mohd Saad @ Mat Saud, et. al. (2013) which explains the weaknesses in the enforcement mechanism. This refers to the implementation of maintenance orders that have already been issued by the court to comply with them. However, before enforcement is taken, there is mediation that needs to be carried out. However, the mediation was not successful and led to enforcement. Next, the study entitled 'Enforcement Child-Maintenance Payment Using Judgement Debtor Summons and Judicial Notice: A Penang Case Study'. In the study, maintenance is an obligation for a father to his child. In BSK, discussions are held to resolve maintenance

arrears at the initial stage, but after the discussions are unsuccessful, enforcement will be carried out by way of Judgment Debtor Summons and Judicial Notice. However, in this study, it was only carried out in Penang (Mohd Hazwan Ismail et. al, 2020).

The next study is from Mohd Hazwan Ismail, et. al, (2022) regarding the settlement of arrears of child support claims in the Covid-19 era. At that time, most government agencies could not be done face-to-face, causing action on complaints received by complainants to be done online. Therefore, in the study, the settlement of arrears of child support claims was only done online and the settlement was only agreed upon by the debtor without further discussion on the method of settlement. In the settlement, a third party or mediator played a role in resolving the conflict issue that occurred. BSK officers are neutral and do not take sides with anyone. The main goal of the BSK is to ensure that in the discussion process, an agreement is reached between the disputing parties. This study was conducted by Hanna Ambaras Khan (2020).

From the studies above, it is clear that there is an issue of arrears of maintenance but there is no discussion on how to resolve the arrears of maintenance in detail. Therefore, this study will fill the gap and explain in detail the settlement of maintenance payments that need to be explained to the dependents.

STUDY METHODOLOGY

The methodology in this study uses qualitative methods (Siti Uzairiah, 2017) by collecting data through the library and also field studies, namely through interviews. The study through the library (Mohd Shafie Abu Bakar, 1991) is a theoretical collection using fiqh books, seminar papers, journals, books and studies that have been conducted by previous studies.

While the method through interviews is the use of unstructured interview methods (Ahmad Sunawari Long, 2009) with officers Shariah, the Malaysian Syariah Judicial Department. These interviews are data that support and fill in the gaps to strengthen the information related to this study. Therefore, the combination of these methods will be able to produce a theoretical study by applying it with reality when finding out the causes that occur regarding the neglect of providing alimony.

DISCUSSION AND FINDINGS

In resolving maintenance arrears, there are several legal provisions that can be taken action. Among them are judgment debtor summons, judgment notice, *hiwalah* and seizure according to the Shariah Courts Civil Procedure Act. However, maintenance arrears can be resolved through negotiation first. The resolution of maintenance arrears is handled by a government agency from the Malaysian Shariah Judicial Department, namely the Family Support Division (BSK). Among the units that handle arrears of alimony cases are the Legal Advisory Service Unit (UKNP) and the Enforcement and Implementation of Orders Unit (UPPP). Before enforcement is taken, BSK will register and resolve the case through UKNP first.

Legal Advisory Service Unit (UKNP)

One of the units in BSK is the Legal Advisory Service Unit (UKNP) which carries out the negotiation or mediation process for the disputing parties. Before starting the UKNP process, the creditor, either the ex-wife or the mother, will appear at the BSK office to complain about the failure of the ex-husband or the father to pay maintenance. The creditor must submit a written maintenance order that has been decided by any sharia court in the country. BSK officers will review the complaint in detail to see if there is a case of maintenance arrears. If there are no arrears, then the complaint is not accepted (Halimatus Saadiah Kariya, 2015). This happened in the case of *Aini v. Ziman (2022)* where there was an allegation from the creditor saying that there was arrears of maintenance. After investigating through discussions with the debtor, the debtor paid by hand to the child and not through the creditor. So the case was rejected and not accepted because there were no arrears.

After checking and confirming that there are arrears and no maintenance payments have been made by the ex-husband or father, the creditor must bring relevant documents that show his failure such as a copy of the previous maintenance order for the registration process and also a copy of the identity card, a copy of the divorce certificate or a copy of the marriage certificate (if still together with the spouse), a copy of the birth certificate (not necessary if the arrears of 'iddah maintenance are due) and a bank statement (if the maintenance order needs to be deposited in the bank).

These documents will be taken and recorded for the registration process. The creditor will be given a customer information form and will need to fill in all the details found in the form such as name, identity card number, home address, employer's address, heir's address, property and amount of arrears. These details will be entered into the E-Nafkah system and after that a notice of attendance will be generated, issued and submitted to the disputing parties within 21 days for the first consultation (Malaysian Syariah Judicial Department (JKSM), 2016).

This notice of appearance issued will summon both parties to the dispute for a legal advisory process aimed at investigating the reasons and details of the failure to pay maintenance after being ordered by the court. The debtor must submit any documents such as bank receipts or witnesses if payment has been made. This is because, the burden of proof at that point has shifted to the person being complained about to deny the arrears even though the complaining party has claimed that no payment has been made.

From the results of discussions through mediation, there are two statuses of case resolution, namely successful case resolution and unsuccessful case resolution. A successful case is a case that reaches an agreement between the two parties after mediation is conducted together with BSK officers. There are also cases that are successfully resolved between the two parties who were in dispute before the mediation process. However, there are also cases that are unsuccessful, including due to both parties or one of the parties not being present, no agreement between the two parties or other reasons (Mr. Nik Suhaimi bin Nik Saberi, 2018). The following are the overall statistics of successful and unsuccessful case resolutions in Malaysia:

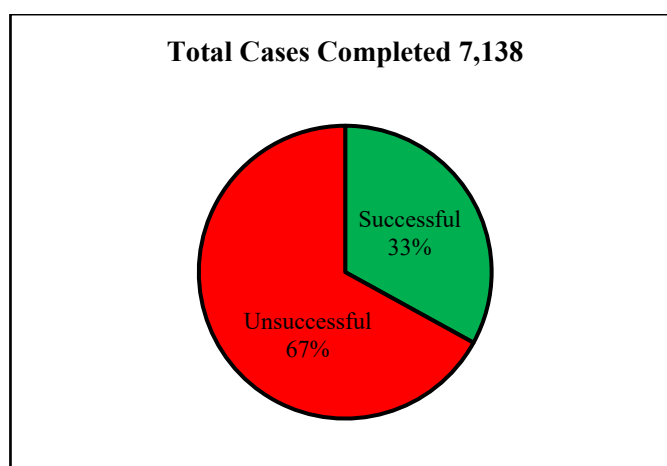
Table 1: UKNP Case Resolutions from 2016 to 2020

Status	Case Resolution
Successful	2,356
Unsuccessful	4,782
Total	7,138

Source: E-Nafkah, Jabatan Kehakiman Syariah Malaysia.

The table above shows the total number of case settlements, namely successful and unsuccessful case settlements. Successful cases were only 2,356 cases compared to unsuccessful cases which were almost double, namely 4,782 cases. This makes the total number of cases managed 7,138 cases. Therefore, if we look at the percentage of successful and unsuccessful case settlements, it is as shown in the diagram below:

Figure: Percentage of Case Resolutions



Source: Mohd. Hazwan bin Ismail

Out of a total of 7,138 cases, the percentage of cases that were successfully resolved was 33% while the percentage of unsuccessful cases was 67%. For unsuccessful cases, the case was stopped at that point. Meanwhile, for successful cases, there were settlement options that were made by the debtor based on the results of discussions with BSK officers.

The first case to be resolved from the discussion was *Zainab v. Jefry (2016)*. In the case, the debtor owed RM360,000 which involved outstanding maintenance debts, namely child maintenance and 'iddah maintenance. As a result of discussions with the BSK officers, both parties reached an agreement that the debtor would settle the outstanding maintenance debt by an alternative method, namely handing over three houses to the creditor. The creditor agreed to the offer and the case was successfully resolved by mutual agreement (Mr. Nik Suhaimi bin Nik Saberi, 2018).

Next is the case of *Maznah v. Kamaruz (2016)* which has been registered at the Penang State Court. The debtor was ordered to pay 'iddah maintenance of RM260 throughout the 'iddah period and child maintenance of RM160 per month for two children. The debtor failed to pay the maintenance and caused the total arrears to be RM960, which is calculated from October 2015 to March 2016. As a result of the discussion, the debtor acknowledged the outstanding debt of RM960 and agreed to pay in one lump sum. Case settlement through lump sum payment is when the debtor pays the maintenance arrears in one payment only either by cash, money transfer or cheque.

Next, for mediations that are resolved by short payment methods, namely two or three installment payments, it is as in the case of *Mazlipah v. Azmi (2017)*. This case involves arrears totaling RM12,500 from November 2016 to June 2017. The BSK has issued a notice of attendance for the mediation session. During the mediation session, the debtor appeared and admitted before the BSK officer that there was arrears of maintenance that he had not paid and agreed to pay in two short installments. The first time the debtor paid RM10,000 on the last day of the negotiation session. And the remaining arrears were paid early in the first week of July 2017.

Meanwhile, settling the case by paying monthly installments little by little until it is completed is a decision that often occurs between the two parties in mediation sessions. For example, in the case of *Zunaidah v. Razalee (2016)* registered at the Penang State Court in 2013, the debtor was ordered by the court to pay maintenance for four children amounting to RM1,300 per month as well as 'iddah maintenance of RM1,800. However, the debtor failed to comply and the total debt collected was RM2,300. As a result of mediation, both parties reached an agreement that the method of payment to be made by the debtor would be in installments of RM100 per month starting from June 2016 until completion.

The results of the study found that there are three solutions carried out by debtors in resolving arrears of maintenance, namely lump sum payment, short installment payment and monthly installment payment. Although there is one case by exchanging property for debt arrears, it can be considered a lump sum payment solution because the debt has already been covered by its value. Therefore, with the mediation method carried out, it needs to be seen in terms of the ability of a debtor to resolve arrears of debt.

When both parties reach an agreement, it can bring satisfaction to the parties because it facilitates a conflict that occurs. This is very much in line with the verse of the Quran in surah al-Nisa' ayat 128:

.....فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصَلِّحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ..... ١٢٨

Meaning: If a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves; and making peace is better.

The above verse clearly shows that by means of discussion, it can give a better decision because it can keep away from endless disputes. Apart from that, the main objective in resolving debts involving maintenance is by means of a more effective solution based on ability or capability as the core to succeed. This does not need to look at the very rigid wording that has been ordered from the court. Determined by the method of fiqh, namely:

العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني

Meaning: A contract is taken into account based on the intended purpose and objective, not just the wording and arrangement of letters (Muhammad Aali Borno, 1424H).

Fiqh rules explain that even though the order has indicated a certain amount that must be followed, if there is arrears of alimony that has not been paid by the debtor, then the method of settlement by conciliation is better when the parties know the extent of their ability to settle it. The objective in this claim for arrears of alimony is to settle the debt even if it is by monthly installments which can delay the settlement of the arrears. Therefore, the objective of this study was achieved when the study found that most debtors in the mediation session agreed to settle, in the majority, monthly installment payments. In addition, short installments were also agreed upon and for the last one, for debtors who were able, a lump sum payment was made to settle the existing arrears.

A lump sum settlement is agreed upon by both parties when the creditor has received the money immediately while the debtor has sufficient finances. It is not an offense even if the creditor also agrees to be paid monthly. Most of the time for both parties who have divorced, they no longer want to meet and deal with each other because that brings them to their own after the divorce. Therefore, a lump sum payment is better but it also needs to look at the financial capabilities of the debtor.

Settlement in short installments by paying two or three times is also agreed upon in the discussion process between both parties. Although it is not the majority in the settlement of debt cases, at least the creditor also understands to compromise by not choosing to settle all at once. This discussion occurs because the debtor has limited finances that settle all at once. It also requires an appropriate period so that the money he earns can pay the debt. This is because, the money earned by working also needs to support his own commitments, and after that he can settle debts such as alimony.

While monthly installments are the most common solution for resolving debts based on the mediation process. This happens because there is a high debt arrears, and this will make it difficult for the debtor to settle in one go and in short installments. Monthly installments are a very good choice for a solution in mediation because it is consistent for resolving debts. The debtor who works, the money obtained from his salary needs to pay other commitments for the continuation of life and he does not need to pay a lot for alimony debts. This can also be harmful to the debtor because the court also needs to assess the debtor's ability. From the creditor's side, the result of the discussion by agreeing to pay monthly installments is the best because if the creditor does not agree, and needs money immediately in one go, then it will be difficult for the debtor to find it. And it is possible that it ends with a bad decision and the debt payment is not successfully resolved. Therefore, with discussion, both parties can find out the extent of the ability of the creditor and the debtor. For the creditor, daily expenses need to be limited so that the debtor can make consistent payments. And for the debtor, they need to consistently obtain money to pay without interruption after the grace period is given.

CONCLUSION

The maintenance ordered is mandatory to be implemented. Failure to implement it can be complained to the court and the court can take action against the debtor. However, before action is taken by the court, there is a mediation session first to resolve the problem by mutual agreement based on the ability and capability of the debtor. In the mediation session, it should be emphasized the issue of ability to trace the cause why the maintenance is not implemented. As a result of the mediation session conducted by the BSK in the mediation unit, there are three ways of solution, namely lump sum payment, short installment payment and payment in monthly installments.

The suggestion from this study is, if the creditor complains to the court, the best solution is for the debt to be deducted from the debtor's salary based on an appropriate percentage and this will be consistent in the implementation of debt payments. Meanwhile, for employees who have an EPF, then withdrawing the EPF to settle debts is a good action like withdrawing to buy a house. However, it is subject to the withdrawal percentage and the existing legal process.

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