

Child Custody in Divorce Cases: An Islamic Family Law Perspective

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Article Info

Article history:

Received: 15-02-2024

Revised: 17-05-2024

Accepted: 21-05-2024

Keywords:

Custody child,
Divorce,
family law,
Hadhanah,
courts.

ABSTRACT

Determination right foster child in context divorce in law Islamic family is based on several principle main , such as protection to child , justice between parents , and fulfillment need physical , emotional , and spiritual aspects of the child . The approach qualitative with method studies literature used For identify principles base hadhanah which emphasizes welfare child in a way physical , emotional , and spiritual. The Religious Court has role important in determine right foster with consider proximity emotional child , ability economy , and parental commitment . In addition , the challenges faced covers difference interpretation inter-school , influence of social norms culture , as well as difficulty in implementation verdict . Approach holistic that integrates aspect legal , social and psychological become key in ensure justice and welfare child in every case divorce.

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1. INTRODUCTION

In the system law Islamic family, divorce between husband and wife not only finish bond marriage, but also gives rise to complex issues related with right foster child. Custody child be one of issue important thing to do decided with wise , with consider existing principles in Islamic law . Islam provides clear guidelines about right foster child, which aims for protect interest best children and make sure sustainability right as well as parental obligations to child, even though wedding they has end.¹

Determination right foster child in context divorce in law Islamic family is based on several principle main, such as protection to child, justice between parents, and fulfillment need physical, emotional, and spiritual of the child. Of course just , thing This No off from role Religious Courts which have authority For decide who is entitled to obtain right foster child , with refers to the applicable sharia guidelines . However , the implementation of law Islamic family in matter right foster child No always walk without challenges . Differences interpretation law between Islamic sects, as well as the influence of social and cultural norms local, often becomes factor affecting decisions taken.²

This article will discuss three aspect main related right foster child in case divorce : first , the principles the basis on which guidelines in determination right foster child according to law Islamic family ; second , the role Religious Court in take decision about right foster children ; and third , challenges as well as the

¹ Dwi Dasa Suryantoro, "Child Custody Rights After Divorce According to the Compilation of Islamic Law: Legal and Conceptual Analysis" 4, No. 1 (ND).

² Fitriani Noor, M. Fahmi Al-Amruzi, and Ahmadi Hasan, "Problems of Child Custody Rights After Divorce Decisions in Religious Courts (Case Study Number 342/Pdt.G/2020/Pa.Mtp Jo Appeal Decision Number 32/Pdt.G/ 2020/Pta.Bjm Jo Cassation Decision Number 392 K/Ag/2021)," *Al Qalam: Journal of Religious and Social Sciences* 17, No. 6 (November 4, 2023): 4085–4104, <https://doi.org/10.35931/Aq.V17i6.2808>.

controversy that arose in implementation law Islamic family related with right foster child . Discussion This aiming For give better understanding deep about How law Islamic family regulates and influences taking decision in matter this , and challenges faced in its implementation .

2. METHOD

Study This use approach qualitative with method studies literature For analyze determination right foster child in divorce according to law Islamic family . Data obtained from books , journals scientific , articles , and decisions Relevant Religious Courts . Research This will identify principles base related right foster child , role Religious Courts , as well as challenges that arise consequence difference interpretation law between sects and the influence of social norms culture . Method of analysis Contents used For highlight themes main like justice , protection children , and parental rights . Case study will used For describe implementation law in practice ³.

3. RESULTS AND DISCUSSION

In general language, hadhanah originate from the word *al- hidhnu* which mean side or embrace to side. While in a way term , hadhanah is maintenance child for those who are entitled For maintain it . Maintenance here It means give guarantee related affairs food , clothing, sleep, hygiene, etc. Hadhanah This be one of form distribution love Darling a Muslim to his descendants.⁴ When a child Still small, hadhanah more suitable to be given to mother. This is because they own a bigger heart soft , full love love , and patience in educate . However , if the child Already reach age certain , then the gift should delegated to man . Because , he more capable to care for and educate the child than race air ⁵. According to Shaykh Kamil Muhammad Uwaidah , whenever happen divorce , then the person who has the most right to nurture and care for his children is his mother who is emotional more Be patient compared to his father . However in hadhanah, the Islamic religion gives terms and conditions to caregiver that is sane, mature , have ability and willingness For educate fostered children , can trusted and also must are Muslim or faith with the child.⁶

Then the most fundamental problem in maintenance children are the conditions that will become hard, because characteristic a caregiver will influential strong to the child who becomes his care, his success a child in development, maturity and education. Because characteristics base man is nature dynamic, independent, and social. So at the moment this is it a child given the greatest education its nature like taught him a child know God as provision of monotheism and its soul . Not forever right the gift That fall to mother , father also has the right have equal rights with mother , if terms and conditions determination Mother No fulfil criteria For give interest child . Because the parenting child this is the first one must be noticed is interest children and have ability and capability for provide a sense of security to children who are victims of divorce, so that is necessary prioritized is How to give protection and kindness for children for the benefit and to avoid from things that are not wanted by his parents.⁷

3.1. Basic Principles for Determining Child Custody Rights

Basic Principles for Determining Child Custody Rights are guide laws and morals used For determine who will hold not quite enough answer main on care and welfare child after the occurrence farewell or divorce of parents . Principle This aiming For protect interest best children and make sure development physical, emotional and psychological maintained.⁸ In Islamic law, the right foster child after divorce set up with principle hadhanah, which focuses on care and maintenance children by legitimate parents, especially If child the Still small or Not yet reach age tamyiz (ability) For distinguish between good and bad). Mothers usually given right foster main For children who are still small Because bond mind and love Darling more mother strong . However , if Mother Marry Again with a man who is not a mahram for child said , the rights foster him Can fall , except If He Marry with the child's mahram the ⁹.

³ Compiled by And Dr Aditya Yuli Sulistyawan, "Legal Research and Writing Methods," ND

⁴ S Sakirman, "Akibat Hukum Dalam Praktik Nikah Sirri Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Muslim Heritage*, no. Query date: 2023-08-24 21:33:18 (2017), <https://jurnal.iainponorogo.ac.id/index.php/muslimheritage/article/view/1046>.

⁵ "Understanding Hadhanah and Conditions for Its Implementation in Islam," Kumparan, accessed December 9, 2024, <https://kumparan.com/berita-hari-ini/pengertian-hadhanah-dan-terms-implementation-dalam-islam-1w1Nv0qSiZK>.

⁶ Shaykh Kamil Muhammad, *Women's Fiqh: Complete Edition* (Pustaka Al-Kautsar, 2008).

⁷ "Household Guidelines / M. Hasbi Ashshidiqy | OPAC National Library of the Republic of Indonesia," accessed December 9, 2024, <https://opac.perpusnas.go.id/detailopac.aspx?id=163526>.

⁸ Muhammad Husni Abdulah Pakarti, "Protection of Children's Rights in Divorce According to Islamic Family Law," *Mawaddah: Journal of Islamic Family Law* 1, no. 1 (2023): 1–20, <https://doi.org/10.52496/mjhki.v1i1.1>.

⁹ Helmi Abu Bakar El-Langkawi, "Child Custody Rights in Islam After Their Parents' Divorce," *Islami[dot]co*, July 23, 2020, <https://islami.co/hak-asuh-anak-dalam-islam-setelah-perceraian-orang-tuanya/>.

Determination right foster child after divorce in Islamic law is based on principles that guarantee welfare and benefit child. Principle main is *maslahah al - 'ibad*, namely prioritize interest best children . This includes fulfillment need physical , emotional , and spiritual for ensure child grow in supportive environment . Hadhanah , or right foster children , usually given to Mother For children small , especially those under the age of seven year , because Mother considered more capable give love affection and intensive care . However , the right This No absolute ; if Mother No capable carry out his duties , rights foster can diverted to father or member other families are considered more competent ¹⁰.

Custody is also related with not quite enough answer education children , including appropriate moral and religious formation with Islamic teachings . Therefore that , the party given right foster must own ability For educate child with good . In addition , Islam pays attention to age child in determine right foster . Children who have reach age tamyiz (approx. seven year) can choose For stay with father or mother , as long as decision the support welfare them . In a situation where both parents considered No worthy , right foster can diverted to other families like grandpa or grandma ¹¹.

Islamic law provides flexibility in determination right foster child For ensure justice . Religious courts play a role important in evaluate parents ' conditions and needs child before make decision . Approach This reflect values justice in Islam which places rights and welfare child as priority main in every divorce ¹²process .

3.2. The Role of Religious Courts in Child Custody Decision Making

Religious Court holds role key in determine right foster child post divorce in accordance with provision Islamic law. As competent authority handle problem family, including divorce and rights foster child (*hadhanah*), the Religious Court is on duty to uphold principles Islamic law with still consider justice as well as interest main child ¹³. The Religious Court holds role important in determine right foster child post divorce . The main court task is ensure that decisions taken prioritize interest best children (*maslahah al - 'ibad*).¹⁴ In this process, the judge evaluates various aspect like proximity emotional child with parents , ability economy , stability psychological , and commitment disputing parties For fulfil need child .

Based on Article 105 letter a of the Compilation of Islamic Law, it states , "*In the case of the occurrence divorce : a. maintenance child who has not mumayyiz or Not yet 12 years old is right his mother* ". In Article 105 letter b KHI explains maintenance child who has *mumayyiz* handed over to child For choose between father or his mother as holder right maintenance . Then, Article 105 letter c KHI explains cost maintenance borne by his father ¹⁵. In addition , the Religious Court also prioritizes approach flexible with consider need unique every cases . In some situation, rights foster can given to the party that has connection emotional more close with child , even though party the No mother. Before give decision, court often facilitates mediation For finish conflict in a way peace, so that connection Good between both parents still awake for the sake of child.¹⁶ Although decision court is final, its implementation often face challenges, especially if one of them party reluctant comply verdict . In the case of like that , the court can request help apparatus police For carry out execution , although step This considered as effort lastly . This is due to Because execution right foster child different with execution dispute thing , remembering child own right For protected in a way emotional and physical.

With approach passive before case filed and active During the trial process , the Religious Court plays a role as facilitator and enforcer the law that ensures decision reflect justice and welfare children . Through this process , the court No only give solution law but also provide impact positive

¹⁰ Irfandi Setiya Nugraha and Shindu Irwansyah, "Haqānah in Maqāsid Ash-Syarī'ah and Compilation of Islamic Law," *Journal of Islamic Family Law Research* , July 15, 2024, 41–46, <https://doi.org/10.29313/jrhki.v4i1.3853>.

¹¹ State Islamic University of North Sumatra and Fatkhur Rohman, "Educational Responsibility: The Perspective of Islamic Education," *Intiqad: Journal of Religion and Islamic Education* 12, no. 2 (December 1, 2020): 171–80, <https://doi.org/10.30596/intiqad.v12i2.5557>.

¹² Student ID: 20103050125 Yusron Fikri Juneri, "The Best Interest of the Child Regarding the Granting of Child Custody Rights to Apostate Mothers (Study of Decision Number 314/Pdt.G/2020/Pa.Sal)" (Thesis, Uin Sunan Kalijaga Yogyakarta, 2024), <https://Digilib.Uin-Suka.Ac.Id/Id/Eprint/67533/>.

¹³ Fitriani Noor, M. Fahmi Al-Amruzi, And Ahmadi Hasan, "Problems of Child Custody Rights After Divorce Decisions in Religious Courts (Case Study Number 342/Pdt.G/2020/Pa.Mtp Jo Appeal Decision Number 32/Pdt.G/2020/Pta.Bjm Jo Cassation Decision Number 392 K/Ag/2021)," *Al Qalam: Journal of Religious and Social Sciences* 17, No. 6 (November 4, 2023): 4085, <https://doi.org/10.35931/Aq.V17i6.2808>.

¹⁴ Sakirman, "Urgensi Masalah dalam Konsep Ekonomi Syariah," *Palita: Journal of Social Religion Research* 1, no. 1 (August 16, 2018): 17–28, <https://doi.org/10.24256/pal.v1i1.58>.

¹⁵ Rofiq Hidayat, "Mumayyiz 's child custody is not forever Fall into the hands of the mother," <https://www.hukumonline.com/berita/a/hak-asuh-anak-belum-mumayyiz-tak-selamanya-jatuh-ke-tangan-ibu-lt609b706f045b6/>.

¹⁶ Sakirman, "Analisis Profesi Hakim dalam Epistemologi Hukum Islam," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 17, no. 1 (June 1, 2017): 135–54, <https://doi.org/10.18326/ijtihad.v17i1.135-154>.

social with maintain harmony in connection family post divorce ¹⁷. The role of the Religious Court is very important in ensure justice and interests best child in case divorce . Through evaluation comprehensive , approach mediation , and execution wise decision , court try create Supporting solutions welfare children and justice for all party .

3.2.1. Challenges and Controversies

Implementation law Islamic family in determination right foster child post divorce face various challenges and controversies , which include aspect legal , social , cultural , and psychological . One of challenge the main thing is difference interpretation between sect about right foster child (*hadhanah*). For example , sects Shafi'i set that children under age tamyiz be under care mother , meanwhile Hanafi school of thought more emphasize not quite enough father's answer to child . Difference This often creates uncertainty laws and interpretations vary at the level court . In addition , there are tension between Islamic law and law positive adopted in several countries , such as Indonesia. Although The Compilation of Islamic Law (KHI) provides guidelines about right foster children , its application often influenced by social and cultural norms local possible contradictory with principle Sharia . For example , views traditional which prioritizes fathers as head family can influence decision although Mother own right foster based on law ¹⁸.

Execution decision court related right foster children also become significant. Children are not object dispute like object so that the execution process often become No effective, especially if one of them party move child in a way unilateral for avoid implementation decision. In many case , court more prioritize mediation For finish conflict , but step This No always give satisfactory results .¹⁹

Challenge other is unresponsiveness to gender issues in a number of case . For example , the right foster often given to Mother without consider condition certain where the father may more worthy , or married mother Again lost right foster although No There is impact negative to parenting child . Condition This cause criticism to imbalance in implementation Islamic ²⁰law . Impact psychological to children also become attention important . When the child forced to For choose between father or mother , they often face pressure great emotional , which can influence connection they with both parents as well as development them in the future . Therefore that , challenge in implementation law Muslim families need approach holistic that integrates aspect legal , social and psychological For ensure welfare children and justice for all parties involved .

4. CONCLUSION

Custody child in case divorce based on perspective law Islamic family emphasizes principle hadhanah that focuses on welfare physical , emotional , and spiritual rights of children . In Islamic law , the rights foster generally given to Mother For child who has not reach age tamyiz , but can diverted If Mother considered No capable operate task said . The Religious Court has an important role in ensuring decisions taken prioritize interest best child through evaluation comprehensive and approach mediation. Although Thus , various challenge appear in its implementation , such as difference interpretation inter-school , the influence of social and cultural norms local , as well as difficulty in execute decision court . Approach holistic that integrates aspect legal , social and psychological are very necessary For ensure justice and welfare child in every case divorce .

THANK-YOU NOTE

I say accept love to all the party that has support and help in compilation article this. I also accept love to writers and researchers journal, books or articles that have been helped in compilation article This through thinking they. Speech accept we also convey our gratitude to readers who have take time out time For enjoy and reflect Contents article This . Your support and participation mean a lot for us and become motivation For Keep going produce useful work. Hopefully article This can give inspiration and useful information for all.

¹⁷ " Script Publication.Pdf ," Accessed December 8, 2024, <https://Eprints.Ums.Ac.Id/72297/9/Naskah%20publikasi.Pdf>.

¹⁸ Fahrur Rozi, " Thoughts Imam Syafi'i School of Fiqh," *Hakam: Journal of the Study of Islamic Law and Islamic Economic Law* 5, No. 2 (2021), <https://Doi.Org/10.33650/Jhi.V5i2.3502>.

¹⁹ Muhammad Fikri Mubarak , Diah Arimbi, and Endang Eko Wati, "Execution of Court Decisions on Child Custody Rights," *Economics, Social, and Humanities Journal (Esochum)* 3, No. 2 (May 5, 2024): 71–84.

²⁰ Ahmad Baidawi and Muhammad Zainuddin Sunarto, "CHILD CUSTODY IN THE PERSPECTIVE OF KHI AND SYAFI'I SCHOOL," *HAKAM: Journal of Islamic Law Studies and Islamic Economic Law* 4, no. 1 (June 13, 2020), <https://doi.org/10.33650/jhi.v4i1.1928>.

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