



Who Should Exercise Child Custody after Divorce?

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ABSTRACT

By law, children under the age of ten must be passed on to their mothers. Meanwhile, children over the age of ten have the right to vote, even though in reality they will be cared for more by their fathers. This study aims to find out how the implementation of post-divorce child custody that occurred in Sidenreng Rappang District was not following the judge's decision. This study uses a sociological juridical approach which concludes that the implementation of post-divorce child custody is not by the decisions of the Religious Courts. This research is descriptive, namely research that provides data about something or social phenomena that develop in society so that this research is expected to obtain a comprehensive, complete, and systematic picture of the object to be examined. The Plaintiff's lack of sense of responsibility, and mental condition that is not ready for divorce is the trigger for child custody not being fully taken over by the ex-wife. Defendant feels a lack of sense of responsibility from Plaintiff who is not ready for a divorce. A sense of responsibility that is not realized that children are entrusted by God who will be held accountable later.

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1. Introduction

According to Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Article 2 states that "marriage is valid if it is carried out according to the laws of each religion" then regarding its registration is regulated in Government Regulation Number 9 of 2019. 1975 as referring to Law Number 32 of 1954 concerning The Registration of Marriages, Divorces, and Reconciliation.

Marriage is the beginning of a process of embodiment of a form of human life. Therefore, marriage is not just the fulfillment of mutual needs.³ Marriage is the beginning of living together between a man and a woman. Marriage is a legal relationship between a man and a woman who meets the requirements of marriage for as long as possible, even though the breakup of the marriage relationship (divorce) may occur.⁴

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³ Prayogi, A., and Jauhari, M. (2021). Bimbingan Perkawinan Calon Pengantin: Upaya Mewujudkan Ketahanan Keluarga Nasional. *Islamic Counseling: Jurnal Bimbingan dan Konseling Islam*, 5(2), 223-242.

⁴ Krisharyanto, A. R. A., Hutagalung, S. M., and Supriatna, S. (2019). Akibat Hukum Kawin Kontrak terhadap Kedudukan Istri, Anak dan Harta Kekayaan dalam Perspektif Hukum Islam. *Krisna Law*, 1(3), 7-16.

The Compilation of Islamic Law regulates child rearing after parents' divorce. Article 105 of the Compilation of Islamic Law states, if a divorce occurs, the maintenance of a child who is not yet *mumayyiz* (under 12 years of age) is given to the mother. If the child is *mumayyiz*, maintenance is left to the child to choose between the father or the mother as the custody holder, and the maintenance costs are borne by the father.⁵

The Religious Courts have absolute authority regarding the divorce process and registration of marriages, while the supervision and registration of marriages is the authority of the Office of Religious Affairs which is headed by a Marriage Registrar.⁶ Minor children who are not under parental authority must be placed under guardianship under the Burgerlijk Wetboek (BW) system. After the parents are divorced, provisions regarding the guardianship of their children who are still underage must also be held.

In terms of fiqh, two words are used but are shown to have the same purpose, namely *kafalah* or *hadhanah*.⁷ What is meant by *kafalah* or *hadhanah* in a simple sense, is "maintenance or care".⁸ In a more complete sense, it is the maintenance of young children after the breakup of a marriage. This is discussed in fiqh, because practically there has been separation between husband and wife, while children still need help from their father or mother. Article 156 letter c of the Compilation of Islamic Law states that if the holder of child custody (*hadhanah*) is unable to guarantee the physical and spiritual safety of the child, even though the maintenance costs and *hadhanah* are sufficient, then at the request of the relative concerned the religious court can transfer child custody (*hadhanah*) to other relatives who have child custody (*hadhanah*).⁹

Accordingly, children under ten years of age, their caregivers or guardians are handed over to their mothers. Whereas for children who are over ten years old, it is up to the child's own choice, whether he will follow his mother or choose to follow his father in terms of child custody. If this happens, the court's decision determines who is more entitled to custody of the child. However, there is a case that is unique in Sidenreng Rappang Regency, South Sulawesi. Cases that can determine the position of child custody that is not determined by laws and regulations due to a specific condition. This article discusses this.

2. Method

This study uses a legal sociological juridical research approach, namely a research approach based on applicable statutory provisions associated with legal theory and looking at the reality that occurs in society,¹⁰ namely related to child custody after a divorce in Sidenreng Rappang Regency, Sulawesi South, Indonesia. This research is descriptive, namely research that provides data about something or social phenomena that develop in society so that this research is expected to obtain a comprehensive, complete, and systematic picture of the object to be examined.¹¹

⁵ Khair, U. (2020). Pelaksanaan Hak Asuh Anak setelah Terjadinya Perceraian. *JCH (Jurnal Cendekia Hukum)*, 5(2), 291-306.

⁶ Falah, M. F. (2017). *Proses Penetapan Itsbat Nikah terhadap Perkara Contensious Dalam Perspektif Hukum Islam (Analisis Putusan Pengadilan Agama Tanjung Karang Nomor: 0234/Pdt. G/2015/PA. Tnk)*. Lampung: UIN Raden Intan Lampung.

⁷ Widanengsih, A., and Maryandi, Y. (2022). Analisis Putusan Hakim Pengadilan Agama mengenai Hak Asuh Anak kepada Ayah. *Jurnal Riset Hukum Keluarga Islam*, 2(1), 53-60.

⁸ Purwaningsih, P. (2014). Hak Pemeliharaan Atas Anak (Hadhanah) akibat Perceraian Ditinjau dari Hukum Positif. *Yustisi*, 1(2), 55-65.

⁹ Malik, H. I. (2021). *Pemenuhan Hak-bak Anak Pasca Perceraian (Implementasi Pasal 41 Undang-undang No. 1 Tahun 1974 tentang Perkawinan dan Pasal 156 Kompilasi Hukum Islam (HKI) di Pengadilan Agama Kabupaten Ponorogo*. Ponorogo: IAIN Ponorogo.

¹⁰ Aziz, N. M. (2012). Urgensi Penelitian dan Pengkajian Hukum Dalam Pembentukan Peraturan Perundang-Undangan. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 1(1), 17-31.

¹¹ Nugrahani, F., and Hum, M. (2014). *Metode Penelitian Kualitatif*. Solo: Cakra Books.

After all, data has been successfully collected based on research conducted in the field, the data is put together to continue to be processed in such a systematic way. For this reason, qualitative analysis is used, namely, the results of library research will be used to analyze data obtained from the field and then the primary data and secondary data are analyzed qualitatively to answer the problems in this study. From the materials and data that have been collected from the research mentioned above, the authors will analyze it descriptively, namely comparing theory with practice in the field, so that an inductive conclusion is obtained, namely a conclusion from the specific to the general.

3. Implementation of Child Custody Rights after Divorce Based on Laws and Regulations in Indonesia

Before the enactment of Marriage Law Number 1 of 1974, in Indonesia, there were various types of marriage laws applied to various groups of people from various regions.¹² For native Indonesians who are Muslim, religious law applies which has been incorporated into customary law. For other native Indonesians, customary law applies. For Indonesian natives who are Christians, the *Huwelijke Ordonantie Christen Indonesia* applies. For other East Timorese citizens and Indonesian citizens of Chinese descent, civil law provisions apply with minor changes. And, for European and Indonesian citizens of European descent and those who are equated with them, BW applies.

Based on the results of interviews with divorce perpetrators in Sidenreng Rappang Regency. The chronology of the divorce case began after the wife filed for divorce at the Sidenreng Rappang Religious Court in 2019. The child's custody in the decision of the Religious Court fell to the plaintiff (mother), where the child is still 4 years old. Even though child custody fell to the Plaintiff, the child was still handed over to the Defendant (Father) by entrusting it to the driver from her ex-husband.

The implementation of child custody is not by the decision of the Sidenreng Rappang Religious Court, nor is it by the Compilation of Islamic Law, Article 105 which states that in the event of a divorce, the right to care for children who are not yet *mumayyiz* or who are not yet 12 years old is given rights to the mother.

According to Article 199 BW, the dissolution of a marriage can be divided into four types,¹³ namely: the death of one of the parties, the absence of a husband and wife for 10 years followed by a new marriage, the existence of a judge's decision regarding divorce or annulment of marriage by a judge's decision, and the demands of one of the parties in that marriage. In the event of a divorce, there is no obligation to live together again. In Law Number 1 of 1974 concerning Marriage this matter is not regulated, but we can see the provisions in Government Regulation Number 9 of 1974 which is the implementing regulation of Law Number 1 of 1974. In Article 24 paragraph 1 it is stated that during a lawsuit divorce, at the request of the plaintiff or the defendant based on consideration of the dangers that may arise, the court may allow the husband and wife not to live in one more house to prevent harm from occurring if the husband and wife live in one more house.

The legal consequences of breaking up a marriage due to divorce for husband and wife are not regulated in detail. There is only one article that regulates, namely Article 41 Letter C Law Number 1 of 1974, which reads: "The court may oblige the ex-husband to provide living expenses and/or determine an obligation for his ex-wife".

¹² Eric, E. (2019). Hubungan antara Hukum Islam dan Hukum Adat Dalam Pembagian Warisan di dalam Masyarakat Minangkabau. *Jurnal Muara Ilmu Sosial, Humaniora, dan Seni*, 3(1), 61-70.

¹³ Amajihono, K. D. (2018). Akibat Hukum Perceraian dari Perkawinan yang Tidak Dicatatkan di Kantor Catatan Sipil. *Jurnal Education and Development*, 6(1), 141-153.

Isn't determining something this obligation must be based on law. Juridically, the position of children in marriage is regulated in Article 42 of Law Number 1 of 1974 which contains a definitive provision that a legitimate child is a child born in or as a result of a legal marriage. Then, according to the limitation provisions in Article 43 paragraph 1 of Law Number 1 of 1974, it stipulates that a child born out of wedlock only has a civil relationship with his mother and his mother's family. This means that Law Number 1 of 1974 concerning Marriage Article 45 paragraphs 1 and 2 contains provisions that both parents are obliged to look after and educate their children as well as possible. This obligation applies until the child marries or can stand alone, which obligation continues even if the marriage between the parents is broken.

According to Article 229 BW, the court determines the guardian of a minor. If the party handed over as guardian is unable to pay for the maintenance and education of the child, then according to Article 230 BW, the judge can determine the amount of money that must be paid by the other party to finance the underage child.¹⁴ According to Marriage Law No. 1 of 1974, Article 41 stipulates that both the mother and the father are obliged to look after and educate their children, solely based on the interests of the child. If there is a dispute over the control of the children, the court makes a decision.

The costs of caring for and educating the children are the responsibility of the father, unless in the implementation the father is unable to carry out these obligations, the court may determine that the mother may share these costs. Except, the court can also give a decision about which of the two of them has the right to care for and educate him if there is a dispute between the two.

Child custody after divorce is not regulated in Law Number 1 of 1974 concerning Marriage. There is no specific word in the provision that says child custody. Law Number 1 of 1974 concerning Marriage says in Article 45 which states that: "Parents are obliged to care for and educate their children as well as possible. This obligation applies until the child marries or can stand alone even though the parents are divorced.

Custody of children after divorce remains the responsibility of both parents no matter what. Both parents should be given the right to raise.¹⁵ Which makes them lose their custody if they are revoked from the power of their parents. This is by Law Number 1 of 1974 which stipulates that children under the age of 18 are under the authority of their parents as long as they are not deprived of their authority. Therefore, as long as parents do not revoke their powers, they have the same right before the court to care for and educate their children without separating their custody rights.

Law Number 23 of 2002 concerning child protection also states that parents are obligated and responsible for their children. This obligation is translated by nurturing, educating, and protecting children. So, in principle, each parent has rights as long as their powers are not revoked. But Law Number 1 of 1974 previously closed the power of parents as referred to in Article 47 paragraph 1 with Article 41 paragraph 1. The two articles say that if there is a dispute over the control of children, then the court will decide. The Islamic Law Compilation further regulates post-divorce child custody. This regulation also has clear limitations, which apply to children who are under 12 years of age (not yet *mumayyi*).¹⁶

¹⁴ Khair, U. (2020). *Op.Cit.*

¹⁵ Singal, E. C. (2017). Pembagian Harta Gono-Gini dan Penetapan Hak Asuh Anak Akibat Perceraian Berdasarkan Undang-Undang Nomor 1 Tahun 1974. *Lex Crimen*, 6(5), 90-97.

¹⁶ Islami, I. (2019). Legalitas Penguasaan Hak Asuh Anak Dibawah Umur (Hadhanah) kepada Bapak Pasca Perceraian. *Jurnal Al-Qadau: Peradilan dan Hukum Keluarga Islam*, 6(2), 181-194.

Article 105 of the Compilation of Islamic Law states that the care of a child who is not yet *mumayyiz* or who is not yet 12 years old is the right of the mother, the care of an adult child is left to the child to choose between the father or mother as the holder of the right to care for it, and the maintenance costs are borne by the father. According to Article 229 BW, the court determines the guardian of a minor. If the party handed over as guardian is unable to pay for the maintenance and education of the child, then according to Article 230 BW the judge can determine the amount of money that must be paid by the other party to pay an amount of money to support minors.

In settling a case, a judge may not argue, because no law regulates it. Therefore a judge must find and determine the law. The legal principles regulated in the law need to be filtered which can be made into a living law and must be implemented. In claiming living expenses for children, it is usually the mother who will act to file a lawsuit against the father (ex-husband) if the ex-husband does not fulfill his obligations in providing a living for the children under his care. The demands made by the mother (ex-wife) are not only regarding the fulfillment of living expenses and children's education but also regarding the problem of child-rearing. Things like this are done by courts in several decisions regarding child-rearing issues, so after a divorce and it is decided that the child goes with the mother, the ex-husband will be given the obligation to provide alimony and the cost of education and maintenance of the child.

District or religious courts in resolving cases of child rearing and responsibility for child maintenance tend to delegate the responsibility for child care to the biological mother and the father is responsible for meeting all maintenance and education costs. In post-divorce child protection is not only limited to fulfilling statutory provisions. As long as the divorced parents are aware and have good faith in carrying out their obligations by the existing provisions, the problems caused by divorce, especially children's problems, will be minimized.

The assumption is that when the physical needs of children are met, the problem of child protection is over. But it's not that simple, because in reality even though there has been a decision that obliges the father to pay for the maintenance of his child at a later date the father no longer cares about his obligations. Therefore, it is necessary to think about efforts to optimize child protection after parents' divorce, which is primarily by conducting a review of the concept of single parental power and affirming sanctions for fathers who neglect their obligation to pay for the maintenance of their children. If the mother who has been entrusted with the right to care for the child turns out to be neglecting her obligations, then the penalty for her is to revoke the right to care for the child or the right of guardianship through a request from the party who objected to the mother's actions to the court.

Under the law, to determine guardianship rights, child maintenance rights that must be considered are in the interests of the law of the child. So, the judge must pay attention if the child is cared for by the mother or the father has a guarantee of a better social life and welfare. The most important thing is the ability of parents to nurture and care for children. Thus, who will later hold child custody (*badhanah*), either the mother or the father, the priority is to support the positive growth of the child. However, even though child custody (*badhanah*) can only be with one of the parents, after the divorce, the parents are still obliged to look after and take care of their children until they are adults, even though they don't live in the same house.¹⁷

¹⁷ Santoso, L., and Abror, D. (2020). Pola Pemenuhan Hak Asuh Anak pada Keluarga Buruh Migran Indonesia: An Maqashid Shariah Perspective. *Al-Syakhsiyah: Journal of Law & Family Studies*, 2(1), 56-73.

Based on the results of interviews with the Defendant, as the perpetrator of the divorce, according to him, the exercise of child custody was transferred to him due to the lack of a sense of responsibility from his ex-wife. This can be seen, even though child custody in the decision of the Sidenreng Rappang Religious Court fell on the Plaintiff, but for no apparent reason, his ex-wife handed over their child to him. Even though the child is underage (4 years).

According to Satria Efendi, before *mumayyiz* cannot distinguish which is beneficial for him and which is valuable for him, it is not permissible to separate the child from the mother.¹⁸ Islam views that a mother is more understanding and understands the needs of children, this is of course if a mother fulfills the requirements as a caregiver and caretaker of children, which is based on the hadith of Abu Hurairah, namely the case of a child whose parents have divorced where the child is able helping his mother to fetch water from the child's well was seen by the prophet as a *mumayyiz* child because he was able to help his mother which in turn the child chose his mother. Requirements for babysitters: 1. Adult, intelligent, not disturbed memory, fair, honest; 2. Trust so that there is a guarantee for the good care of children; 3. Have the ability and willingness to do the job; 4. A mother can look after a child even if she is married to another man as long as her husband does not reject it.

4. Conclusion

The implementation of post-divorce child custody in Sidenreng Rappang Regency was not by the decision of the Religious Court due to obstacles in the implementation of child custody. Defendant feels a lack of sense of responsibility from Plaintiff who is not ready for a divorce. A sense of responsibility that is not realized that children are entrusted by God who will be held accountable later.

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¹⁸ Azizah, M. (2019). *Peran Ibu Dalam Mengasuh Anak Pasca Perceraian di Kecamatan Srengat Kabupaten Blitar*. Surabaya: UIN Sunan Ampel Surabaya.

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Conflict of Interest Statement:

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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