

# FOR THE SAKE OF PROTECTING PHYSICAL NEEDS: MAQASID SHARIA PERSPECTIVE TOWARD JUDGES CONSIDERATION ON CHILD CUSTODY

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**Abstract** In Islamic law, for a child who has not been *mumayyiz*, their custody falls in the hands of the mother. If the child has been *mumayyiz*, then the child is given the right to choose and determine who has the right to care for him. However, the judge of Panyabungan Religious Court decides the custody of a child who has not been *mumayyiz* to the father. This study aims to analyze the judge's considerations in determining the custody of a child who has not been *mumayyiz* to the father. Using a normative and philosophical approach by using *Maqasid Sharia* theory, this study employs a qualitative methodology to examine the judge's consideration. As for the results of this study, firstly, in consideration of the judge stipulating the custody of the child who has not been *mumayyiz* to the father is to maintain the child's physical growth. Second, the author believes that a judge who determines to whom child custody is granted should prioritize the existence of religion over the existence of the soul. It means that child custody is given priority to one of the parents with better religion, behavior, and association than prioritizing the child's physical needs.

**Keywords:** Maqasid Sharia, Judge's Consideration, Child Custody, Mumayyiz

**Abstrak:** Dalam hukum Islam, anak yang belum *mumayyiz* maka hak asuhnya jatuh di tangan ibu. Jika anak telah *mumayyiz*, maka anak diberi hak untuk memilih dan menentukan siapa yang berhak untuk mengasuhnya. Namun dalam Putusan Hakim Pengadilan Agama Panyabungan menetapkan hak asuh anak yang belum *mumayyiz* diberikan kepada ayahnya. Tujuan penelitian ini untuk menganalisa pertimbangan hakim dalam menetapkan hak asuh anak belum *mumayyiz* kepada ayah. Penelitian ini menggunakan metode kualitatif melalui analisa pertimbangan hakim dengan menggunakan pendekatan normatif dan filosofis dengan menggunakan teori Maqashid Syariah. Adapun hasil penelitian ini pertama, dalam pertimbangan hakim menetapkan hak asuh anak belum *mumayyiz* kepada ayah adalah untuk menjaga pertumbuhan jasmani anak. Kedua, penulis berpendapat seorang hakim yang menentukan kepada siapa hak asuh anak diberikan idealnya memprioritaskan eksistensi agama dibandingkan eksistensi jiwa. Hal itu berarti hak asuh anak lebih diutamakan diberikan kepada salah satu orang tua yang lebih baik agama, perilaku, dan pergaulannya daripada mengutamakan kebutuhan jasmani si anak.

**Kata Kunci:** Maqashid Syariah, Pertimbangan Hakim, Hak Asuh Anak, Mumayyiz

## Introduction

Marriage is a fundamental act for humans because humans are social creatures who cannot survive without the assistance of others. It is natural for humans to be created with a partner<sup>1</sup>. Marriage rules are required to ensure the rights and obligations of husband and wife to realize a *sakinah, mawaddah, and warahmah* household. Even married couples must want to have children. Every parent with children hopes their children will become the next generation, which will benefit and elevate them when they reach adulthood<sup>2</sup>.

Many married couples can keep their marriage going. Unfortunately, some husband and wife relationships fail in the middle of their journey and choose to divorce for various reasons. There will undoubtedly be issues that must be addressed due to the divorce, one of which is child care. Both parents must provide child care. Because underage children know nothing, they require the care of both parents. Minors require parental love to maintain their physical and spiritual well-being. Minors also require education to help them develop good character<sup>3</sup>.

The role of parents in fostering children's character has a significant influence, such as children's social education and manners when interacting with their surroundings<sup>4</sup>. Children can obtain an education if their parents do it themselves because raising children requires the cooperation of both parents.<sup>5</sup> Divorce turns the child into a victim, which is why Islam strongly advises against divorce.<sup>6</sup> Islam takes the care of minors very seriously and divides child rearing into two stages. First, the child is not yet *mumayyiz* (a newborn until he is seven or eight years old), which means that he is still learning to distinguish

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<sup>1</sup> Ahmad Atabik and Koridatul Mudhiyah, "Pernikahan Dan Hikmahnya Perspektif Hukum Islam," *Yudisia* 5, no. 2 (2014): 293–94; Santoso, "Hakekat Perkawinan Menurut Undang-Undang Perkawinan, Hukum Islam Dan Hukum Adat," *Jurnal YUDISIA* 7, no. 2 (2016): 412–34.

<sup>2</sup> Asrul Hamid, Raja Ritonga, and Khairul Bahri Nasution, "Penguatan Pemahaman Terhadap Dampak Pernikahan Dini," *MONSU'ANI TANO Jurnal Pengabdian Masyarakat* 5, no. 1 (2022): 44, <https://doi.org/10.32529/tano.v5i1.1543>; Raja Ritonga Amrar Mahfuzh Faza, Dedisyah Putra, "PERKAWINAN SEMARGA MASYARAKAT BATAK ANGKOLA: IMPLEMENTASI HIFZ AL-'IRD DAN HIFZ AL-NASL PADA SANKSI ADAT," *AL-HUKAMA': The Indonesian Journal Of Islamic Family Law* 11, no. 02 (2021): 29–54.

<sup>3</sup> Hasmiah Hamid et al., "Perceraian Dan Penanganannya Hasmiah Hamid 1," *Jurnal Ilmiah Wahana Pendidikan* 4, no. 4 (2006): 24–29.

<sup>4</sup> Fuaduddin, *Pengasuhan Anak Dalam Keluarga Islam*, (Jakarta: Lembaga Kajian Agama dan Gender, 1999), 4.

<sup>5</sup> Siti Fitrotun, *Perlindungan Anak Dalam Undang-Undang Nomor 35 Tahun 2014 dalam Perspektif Fikih Hadhanah*, (Isti'dal : Jurnal Studi Hukum Islam. Vol. 9, No.1), 88.

<sup>6</sup> Satria Effendi M. Zein, *Problematika Hukum Keluarga Islam Kontemporer*, (Jakarta: Prenada Media, 2004), 167.

between good and bad for him. If a mother meets the requirements to become a caregiver, she is expected to care for her child.<sup>7</sup>

As happened during the time of the Prophet Muhammad, a woman came to the Prophet. She told her problems with her husband, who had sued for divorce her. Her husband wanted to take their child, even though she gave birth and breastfed him. The woman's problem was then addressed by Rasulullah SAW, who stated, "You are more entitled to care for your child as long as you do not marry another man."<sup>8</sup>

Child custody is governed by Islamic Law, which states that if a couple divorces and has a child who is not yet *mumayyiz* or under 12 years old, the child will be given to the mother. However, if the child has reached 12 years old the *mumayyiz* level, he is given the right to choose and determine who is responsible for him. If the child chooses the mother to be the primary caregiver, the father is still financially responsible for the child's care.

It differs from the Panyabungan Religious Court decision No. 101/Pdt.G/2022/PA.Pyb., the judge denied a mother's request to care for her child who was not yet *mumayyiz*. The child moved in with his father after his parents divorced. As a result, the judge granted the father custody of the child. Before the wife filed a child custody lawsuit, the mother cared for the youngest child, and the father cared for the oldest child. The wife hopes to raise her two children then. The judge's decision, however, determined that the child raised by her ex-husband would remain with his father.

Several previous studies on judges' considerations of child custody have been conducted. Prasada et al. conducted research on judges consideration toward two cases of child custody at the Kayu Agung Religious Court. In the first case, the judge ruled that child custody should go to the child's father because the mother was too busy working. The mother was awarded child custody in the second case because the father failed to fulfil his obligations.<sup>9</sup> Ivana's study about judges consideration of giving child custody to the father found that the mother's bad behaviour was the main factor to transfer the custody rights to the father. The mother frequently neglected her child to the point where she

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<sup>7</sup> Zein. *Problematika Hukum Keluarga Islam Kontemporer*, 170.

<sup>8</sup> Abu Daud, Sunan Abu Daud Bi Tahqiq Shidqi Muhammad Jamil, Juz II (Lebanon: Darul Fikr, 1994), 167.

<sup>9</sup> Erisa Ardika Prasada Dkk, "Pertimbangan Hakim Dalam Menetapkan Hak Asuh Anak Akibat Perceraian Di Pengadilan Agama Kayuagung," *Jurnal Hukum UNISKI* Vol.6, no. 1 (2017), 35–46.

forgot her responsibilities.<sup>10</sup> Maryati explained another reasons on her research. She explained that the judges of Jambi Islamic Court determined that the father was granted child custody for psychological reasons because the child's biological mother lacked the skills and ability to care for her child properly.<sup>11</sup> The following research by Widanengsih and Maryandi found that a mother needs to be more trustworthy in educating her child because she is too preoccupied with her job. Therefore, in this case, the rights to custody has to be transfred to the father.<sup>12</sup>

This research is different from previous studies. The author will reveal the judge's primary considerations in granting child custody to the father, even though the mother can still properly educate and care for her child. This study employs a qualitative method in which the author analyzes judicial decisions using a normative approach, i.e. an approach based on primary law by examining theories, concepts, legal principles, and legislation relevant to research.<sup>13</sup> The philosophical approach also used in this study because the writer deploys *maqsid sharia* theory to examine judges consideration. This theory will determine the extent of the judge's protective power against the interests of the child.

## Discussion

### Child Custody In Islam

*Hadhanah*, which means "taking care of children in Arabic, is a form of *masdar* (a word denoting an event or action that lacks time, place, and subject information) derived from the origin of the word *hadnu as-shabiy*. Understanding child custody through language, explicitly placing something near the ribs or in the lap. When a mother feeds her child, she places the child in her lap to protect and nurture her.<sup>14</sup> Meanwhile, in terminology, child custody

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<sup>10</sup> Renita Ivana Dkk, "Dasar Pertimbangan Hakim Terhadap Putusan Perceraian Dengan Pemberian Hak Asuh Anak Kepada Bapak," *Jurnal Privat Law* Vol.8, no. 2 (2020), 295–302.

<sup>11</sup> Maryati, "Dasar Pertimbangan Hakim Menetapkan Hak Asuh Anak Kepada Suami Selaku Pemohon Pada Pengadilan Agama Jambi," *Jurnal Ilmiah Universitas Batanghari Jambi*, Vol. 21, No. 03 (2021), 1299–1311.

<sup>12</sup> Ajeng Widanengsih Dkk, "Analisis Putusan Hakim Pengadilan Agama Mengenai Hak Asuh Anak Kepada Ayah," *Jurnal Riset Hukum Keluarga Islam*, Vol.2, No. 1 (2022), 53–59.

<sup>13</sup> Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 48.

<sup>14</sup> Hikmatullah, *Fiqh Munakahat* (Jakarta Timur: Edu Pustaka, 2021), h.129.

is caring for children unable to survive, care for themselves, or protect themselves from things that can harm them.<sup>15</sup>

According to Abdurrahman al-Juzairi, caring is a form of defence for young children and adults who are physically and mentally ill against anything that can harm them. Caring for and maintaining their needs, such as eating, drinking, health, and other requirements is also included.<sup>16</sup> Wahbah Zuhaili as explained by Afifi and Hafiz defined *hadhanah* as caring for children who are not yet *mumayyiz* and unable to care for themselves, such as bathing, washing clothes, and protecting themselves from danger. Care encompasses the origins of guardianship and child custody. Women are preferred in this case because they are more gentle, compassionate, educated, friendly, and active in caring for the children they care for. Fiqh scholars determined that this authority was ideal for women because their feminine instincts were better suited to caring for and educating children. Their patience in dealing with children's problems is also more significant than men's.<sup>17</sup>

Child custody results from a divorce between a husband and wife who had biological and adopted children during their marriage. When a child is underage and requires care, child custody can be exercised.<sup>18</sup> Parenting entails parents educating, caring for, and maintaining their child's growth and development until he can stand on his own or be an adult. Even if the parents have divorced, parenting must continue. Child custody is granted to one of the parents, either the father or the mother, during a divorce. Child custody is not an issue if both parents agree to care for the child simultaneously.<sup>19</sup> If the two parents disagree about who should have custody of the child, Islamic law states that the mother has the most right to care for her child.<sup>20</sup> It is based on the hadith narrated by Abdullah ibn Amr. He told that a woman complained to Rasulullah SAW that her husband wanted to take her child while she gave birth, nursed, and raised the child. Then, Rasulullah saw. said, "you have a greater right to your child if you have not married another man."<sup>21</sup>

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<sup>15</sup> Ibid., 130 .

<sup>16</sup> Syaikh Abdurrahman Al-Juzairi, *Fikih Empat Mazhab*, Jilid, 5 (Jakarta: Pustaka Al-Kautsar, n.d.), 1137.

<sup>17</sup> Wahbah Zuhaili, *Fiqh Imam Syafi'i*, ed. Muhammad Afifi dan Abdul Hafiz (Jakarta: Almahira, 2010).

<sup>18</sup> Umar Haris Sanjaya, *dkk. Hukum Perkawinan Islam Di Indonesia* (Yogyakarta: Gama Media, 2017), 132.

<sup>19</sup> Ibid., 140.

<sup>20</sup> Sanawiah, "Peralihan Hak Hadhanah Jatuh Kepada Bapak Terhadap Anak Belum Mumayyiz," *Anterior Jurnal* Vol.18, No. 2 (2019),159.

<sup>21</sup> Hikmatullah, *Fiqh Munakahat*, 132.

Most of scholar (*jumhur ulama*) stated that parents must look after and educate their children. It has nothing to do with child guardianship, whether related to marriage or assets. The meaning of educating and caring for children, according to Islamic law is an action taken on a child who has not been able to use his clothes, clean himself, or do other activities to meet his needs. If the father and mother divorce, the mother can care for a child who has not been *mumayyiz* as long as she has not married another man.<sup>22</sup>

There are some conditions for that parents who want to raise children; *baligh* (mature), reasonable, capable and willingness, trustworthy, intelligent, and Muslim. *Baligh* means maturity so that the child can be well cared for in his or her care. Reasonable means being physically and mentally healthy. Capable and Willingness are required to educate, nurture, and care for the child. So that the child will be neglected. Trustworthiness has become a requirement for anyone who wishes to raise a child. In this case, those who care for children do not do wrong to children or teach them to do things forbidden by religion. Then, intelligent means that the person responsible for the child must be intelligent, not insane. The last, Muslim means that parents are responsible for educating their children to become good Muslims who follow religious teachings.<sup>23</sup>

Regarding who is entitled to care for children, the following rules apply:

- a. The mother's family takes precedence over the father's family;
- b. Grandmothers take precedence over sisters;
- c. Sibling families are prioritized over non-relatives, and maternal families are prioritized over paternal families;
- d. Families with a *mahram* relationship (everyone who is forbidden to marry forever due to heredity, breastfeeding, and marriage in Islamic law).<sup>24</sup>

That is the hierarchy of those with authority to care for children. If the child is with the mother's family, they have no right to prevent the child from visiting or being brought by the father's family. However, the father's family must return the child to the mother's side. If the child is on the father's side, the father has no right to stop the mother from visiting or bringing the child. When

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<sup>22</sup> Agus Mahfudin, "Hak Asuh Anak Jatuh Kepada Bapaknya Perspektif Hukum Islam Dan Positif," *Jurnal Hukum Keluarga Islam*, Vol.4, No. 2 (2019), 124-42.

<sup>23</sup> Elimartati, dkk. "Hak Hadhanah Dalam Putusan Pengadilan Agama," *Juris: Jurnal Ilmu Syariah*, Vol.17, No. 2 (2018), 238.

<sup>24</sup> Moh. Ali Wafa, *Hukum Perkawinan Di Indonesia*, (Tangerang: YASMI, 2018), 253.

the business with the child is completed, the mother's side is obligated to return the child to the father's side.<sup>25</sup>

Most scholars believe that child custody begins at birth and ends with being *mumayyiz*. Scholars, however, disagree on the time limit for child custody. According to Hanafiyah scholars, the deadline for parental custody for boys is until the child can stand up for himself in taking care of himself or until the child is around seven years old. It is based on hadith which states, "Invite your children to pray when they are seven years old." In the case, time of the custody for girls is puberty.<sup>26</sup> According to Malikiyah scholars, a boy's custody time limit is until puberty, and a girl's custody time limit is until she marries. Meanwhile, scholars from Syafi'iyah and Hanabilah agree that the custody time limit for boys and girls ends when they reach the age of *mumayyiz* (around 7 or 8 years old). Children can live with their father or mother after becoming *mumayyiz*. However, if the girl has reached *mumayyiz*, custody will be given to the father, according to Hanabilah scholars.<sup>27</sup>

### **Judges Considerations in Transferring the Rights of Custody To the Father**

The wife is the plaintiff in this child custody case at the Panyabungan Religious Court, with registration number 101/PDT.G/2022/PA.Pyb. Previously, the plaintiff and defendant had been legally married since July 12, 2018, and had two children who had not yet reached the age of *mumayyiz*. They were divorced, however, on January 18, 2022, at the Panyabungan Religious Court, with case number 19/Pdt.G/2022/PA.Pyb. In the decision on child custody cases that have not yet been *mumayyiz*, the Panyabungan Religious Court panel of judges decided that the plaintiff had custody of the second child. In contrast, the defendant had custody of the first child. As a result, the author intends to analyze the judge's considerations in determining his father's child custody, which will be decided in 2022.<sup>28</sup>

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<sup>25</sup> Wafda Firyal, "Pemberian Hak Hadhanh Kepada Ibu Tiri Dalam Putusan Pengadilan Agama Sidoarjo No: 0763/ PDT.G/2018/PA. SDA Perspektif Masalah Mursalah," *AL-HUKAMA': The Indonesian Journal Of Islamic Family Law*, Vol.9, No. 1 (2019), 247.

<sup>26</sup> Wafda Firyal, "Pemberian Hak Hadhanh Kepada Ibu Tiri Dalam Putusan Pengadilan Agama Sidoarjo No: 0763/ PDT.G/2018/PA. SDA Perspektif Masalah Mursalah," 254.

<sup>27</sup> Nurul Huda. Dkk, "Perspektif Masalah Terhadap Pertimbangan Hakim Pada Putusan Perkara Nomor: 1376/Pdt.G/2019/Pa.Tnk Tentang Penetapan Hak Hadanah Kepada Ibu Kandung," *Ijtima'iyyah: Jurnal Pengembangan Masyarakat Islam*, Vol.14, No. 2 (2021), 263.

<sup>28</sup> Putusan Pengadilan Agama Panyabungan Nomor: 101/PDT.G/2022/PA.Pyb Tentang Penguasaan

Anak.<https://putusan3.mahkamahagung.go.id/direktori/putusan/zaed3e2c3e817f12c061313331383436.html>

It was explained to the judge that the plaintiff requested custody of her first child from her ex-husband because their two children were still minors in need of a mother's love. If she did not care for his first child, the plaintiff was concerned about the child's psychological development. The plaintiff also believed that the defendant was untrustworthy regarding child care because the defendant frequently gambled online. The plaintiff had also requested permission from the defendant and his family to care for their first child, but this was denied. The plaintiff then requests to be determined as the holder of custody of the child in the defendant's care, based on Article 105 of the Compilation of Islamic Law, because both the plaintiff's and the defendant's children are underage or not yet *mumayyiz*.

Furthermore, the judge's consideration explained why the defendant did not give the plaintiff custody of their first child. It is because, as long as the defendant's first child is in their care, the defendant and their parents believe they have adequately cared for the child, as evidenced by the child's physical and spiritual health. Another reason for the defendant is the plaintiff's living situation, which is overcrowded if their two children live with the plaintiff. If the plaintiff cannot always pay attention to their first child, including providing proper education, a crowded house causes concern for the defendant.

In the judge's consideration, there was also information from the witness stating that the plaintiff worked as a temporary employee at the Agriculture Service and sold snacks. In contrast, the defendant worked as a temporary employee at the Mandailing Natal Regency Public Works Service and sold phone credit. The witness also said that the defendant had a side job as a duck breeder but currently has no income from the breeding. The plaintiff and the youngest, Child 2, live in their mother's rented house in Pasar Kotanopan Village. Apart from his mother, the plaintiff's twin sister, her husband, and their child also live in the house. The defendant lives at his parents' house in Hutapungkut Village with his parents and their eldest child, Child 1.

Based on the legal facts revealed, the plaintiff and defendant have divorced. Since then, Child 1 has lived with the defendant and his parents in the defendant's parents' private residence in Hutapungkut village. The child was adequately cared for and looked after while living with the defendant and his parents. Meanwhile, after divorcing her husband, the plaintiff lives in Pasar Kotanopan Village in the plaintiff's mother's rented house with the plaintiff's mother, the plaintiff's twin sister, her husband, and their child. Child 1 was cared for by the defendant's parents when the defendant was at work. Child 2 was cared for by the plaintiff's mother while the plaintiff was working.



In addition to caring for Child 2, the plaintiff's mother also looks after the child of the plaintiff's twin sister. As a result, the panel of judges determined that Child 1 is now at ease living in the defendant's and his parents' care and maintenance to ensure the child's best interests better. Furthermore, the plaintiff lives in their mother's rented house with her twin sister, her husband, and their child. It is feared that Child 1 will not receive adequate care, attention, and affection in such a situation.

The judge's consideration in determining who has the right to care for the child is solely for the child's benefit. Child rearing is done for the child's interests, physical development, spiritual and intellectual intelligence, and religion. These conditions for granting child custody are not based on the parent's best interests. It is consistent with Article 2 of Law No. 23 of 2002 on Child Protection, as amended by Law No. 35 of 2014 and the second amendment to Law No. 17 of 2016.

The judge's decision to award child custody to the father was based on Articles 105 and 156 of the 1991 Compilation of Islamic Law in Indonesia, which state that in the event of a divorce, the mother has the right to care for children who are not yet *mumayyiz* or who are not yet 12 years old. However, this cannot be the sole basis for determining custody of children under the age of 12, which would inevitably fall into the hands of the mother and automatically eliminate a father's right to obtain child custody. Many things and factors must be considered to ensure children's best interests and benefits.

Furthermore, according to the United Nations Child Rights Committee, several factors must be considered to determine the child's best interests. Among them are child care, protection, and safety. As a result, parents who care for children must be able to provide the best care possible to ensure the child's proper growth and development. Furthermore, parents who care for children must ensure their children's protection and safety to ensure their mental and physical well-being. Another aspect is ensuring children's well-being, which includes everything from clothing and food to housing, education costs, and proper health. Another factor to consider is the protection of children's rights so that they can be happy and enjoy their childhood until they reach adulthood. Furthermore, aspects of the family environment and children's social relationships must be a primary concern to promote healthy children's physical and mental growth and development.

## **The Loss of Mother's Rights in Child Custody: an Analysis of *Maqasid Sharia***

The author will analyze the judge's considerations using the *maqasid sharia* method based on the judge's considerations who have determined that child custody has not been *mumayyiz* to the father. According to Jasser Auda, *Maqasid sharia* is a set of reasonable goals pursued by Islamic law by allowing or prohibiting something. Many divine purposes and moral concepts, such as justice, human dignity, freedom of will, chastity, convenience, solidarity, and others, underpin the drafting of laws based on Islamic law in *maqasid sharia*.<sup>29</sup>

According to Imam Asy-Syatibi, the goal of Sharia in establishing a law based on the Qur'an and Sunnah is *maqasid sharia*. As a result, Allah's prescribed Islamic law is for the benefit of all humanity and will be fulfilled in the afterlife. In this case, all of its laws are beneficial (*maslahat*). Furthermore, the primary goal of Islamic Sharia is to protect/preserve religion, soul, mind, lineage, and property. *Al-Kulliyat al-Khamsah* or *al-Qowaid al-Kulliyat* are the five points. The presence of *Kulliyatul al-Khams* ensures the well-being of the servants. So, in this case, Imam Shatibi divides the needs into three categories: primary needs (*ad-Dharuriyah*), secondary needs (*al-Hajiyat*), and tertiary needs (*at-Tahsiniyat*).<sup>30</sup>

To maintain *kulliyatul al-Khams*, *hifz ad-din* (maintaining religion), for example, can be attained in two ways: first, by obeying Allah's commands and His messengers, which is the embodiment of maintaining religion from an *al-Wujud* perspective; and second, *al-Adam* perspective that embodies religion by leaving behind what Allah has forbidden. Performing prayers, fasting, pilgrimage, and other orders are examples of *al-Wujud*. Maintaining the soul (*hifz an-nafs*) in terms of *al-Wujud*, such as meeting basic needs such as food to sustain life. While preserving the soul from the point of view of *al-Adam*, Islam forbids him from throwing himself into destruction. Islam teaches body maintenance, such as exercise.

Similarly, reason is a source of knowledge in maintaining the human mind. Humans can be distinguished from other creatures by their ability to distinguish between what causes harm and what causes good. Allah commands us to take good care of it at all times. In terms of *al-Wujud*, for example, Allah prescribes acquiring knowledge to maintain reason. In the sense that all forms

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<sup>29</sup> Ahmad Imam Mawardi, "Maqasyid Syariah Dalam Pembaharuan Fiqh Pernikahan Di Indonesia" (Surabaya: Pustaka Radja, 2018), 16.

<sup>30</sup> Mesraini, dkk. "Hak Keluarga Dan Implikasinya Dalam Perkawinan Diaspora: Konsep Mashlahah Mursalah Dalam Hukum Islam," *Jurnal Bimas Islam*, Vol.15, No. 2 (2022), 203-236.

of action or deeds that can lead to the perfect mind form of *al-Adam* are good actions or benefits in the context of *jalbu* of benefit. While retaining reason from the perspective of *al-Adam* can be seen in how Allah prohibits (forbids) drinking and the like.

For example, in terms of *al-Wujud*, caring for offspring is prescribed by marriage because it protects and preserves offspring, and their lineage is well maintained. Meanwhile, according to *al-Adam*, Islam strictly prohibits (forbids) adultery and threatens severe punishments such as flogging and the death penalty. Adultery can jeopardize the integrity of offspring, as well as the ambiguity of the lineage. In this case, Abdul Wahab Khalaf explained that to obtain assets, Islam prescribes the obligation to seek fortune and allows *mu'amalah* (business relations), *mudharabah* (trading with other people's assets), and *tijarah* (trading). So people can protect their property from destruction or damage, the *maqasid al-Sharia* in terms of *al-Adam* can be pursued; in this case, for example, Islam regulates reasonable ownership procedures and prohibits theft.

Child custody is a common issue when a husband and wife divorce because both want to be the custodian of the children. As the author previously explained, the judge will usually refer to the existing rules in this case. However, a judge may make a different decision. According to Yahya Harahap, if the provisions of the law conflict with the public interest, decency, civilization, and humanity, the judge is free and has the authority to make decisions that are contrary to the law's articles. In this case, for example, parenting, the judge makes a decision that is outside or contrary to the regulations to protect the child's benefit by applying the *maqasid sharia* theory.

The benefit sought here includes safeguarding the wise sharia's will, which is valuable, has been designed, and has defined boundaries. It is not carried out for the sake of lust and simple pleasure. If parents disagree about child custody after a divorce, both feel capable and worthy of being caregivers. For example, we can see in the Panyabungan Religious Court's decision No. 101/PDT.G/2022/PA.Pyb. While the child being contested is still a minor, custody is granted to the father. According to *maqasid sharia*, *hifz ad-din* (maintaining religion), or creed, a child whose custody rights are given to the father will interfere with the child's religious knowledge because the father and the father's family have very little religious knowledge. In contrast, the mother and her family are highly religious.<sup>31</sup>

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<sup>31</sup> Abdul Malik Lubis, Wawancara pada Tanggal 13 Desember 2022, beliau salah satu saksi dalam Persidangan Hak Asuh Anak ditetapkan kepada Ayah

The main thing to consider in a child carer is the quality of her religion; even if a divorced father and mother want to become caregivers, the judge makes religion the main factor in obtaining custody of a child who has not been *mumayyiz*. Alaidin Koto explained that to keep religion alive, Allah commanded Muslims to pay attention to things that could ensure religious continuity. For example, performing prayers and avoiding or fighting against those obstructing Islam's spread.<sup>32</sup> What Alaidin Koto said is appropriate for maintaining religious continuity by transferring child custody.

Child custody is inextricably linked to power because a child in someone's care will be influenced in various ways. Religion, morals, and behaviour are all included. Sayyid Sabiq explained that child care, also known as child guardianship, is inextricably linked to guardianship issues involving assets and marriage.<sup>33</sup>

Maintaining the belief in *hifz ad-din* is the foundation for all other *maqasid sharia* obligations. Other obligations are meaningful in the context of this pillar. This goal, too, includes other objectives. Any action taken by a Muslim should be reviewed regarding belief maintenance. One of the goals of *maqasid sharia* is to meet *ad-Daruriyat* needs. Maintaining and carrying out religious obligations is a primary priority in maintaining religion (*hifz ad-din*). According to *al-Wujud*, Allah ordered the establishment of prayer, whereas according to *al-Adam*, Allah ordered His servants always to do good.

Children are the most valuable asset in any family. As a result, parents are responsible for properly caring for and educating their children because they require supervision, care, and protection from anything that can harm them. To determine the benefit, a judge who is a representative of Allah on earth must make a decision and is always required to make decisions following Allah's sharia. Determining child custody means he is fully responsible for the child's well-being in this world and the afterlife. Allah says in at-Tahrim, verse 6, "O you who believe, protect yourselves and your families from the fires of hell whose fuel is humans and stones; guardians of angels who are rough, harsh, and obey Allah in what He commands them and always do what they are ordered to do,"<sup>34</sup>

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<sup>32</sup> Alaidin Koto, "Ilmu Fiqih Dan Ushul Fiqh" (Jakarta: Raja Grafindo Persada, 2004), 107.

<sup>33</sup> Sayyid Sabiq, "Fiqh Sunnah," ed. dkk M. Ali Nursyidi (Jakarta: Pena Pundi Astaka, 2011).

<sup>34</sup> Nurul Huda, dkk. "Perspektif Masalah Terhadap Pertimbangan Hakim Pada Putusan Perkara Nomor: 1376/Pdt.G/2019/Pa.Tnk Tentang Penetapan Hak Hadanah Kepada Ibu Kandung, 249-276.

In addition to *hifz ad-din*, one of the most important reasons for obtaining child custody, which is a requirement for *ukhrawi* (hereafter), Islam also considers the worldly side. *Hifz an-nafs* (self/soul maintenance) is mentioned in *maqasid sharia kulliyatul khams*. As a result, in addition to considering the existence of religion in obtaining child custody, it must also consider the physical needs of children because *hifz an-nafs* in this context refers to the right to live well, healthily, safely, and honourably. A child requires a caregiver because he is unable to live independently. As a result, maintaining at the emergency level, such as meeting primary (essential) needs, is ultimately the responsibility of the child custody holder.

When faced with two problems in determining child custody, for example, a judge transfers custody of a child from mother to father out of concern for the child's life. Meanwhile, the contested child still desperately needs a mother's love and upbringing, so a judge, in this case, prioritizes *hifz ad-din* (maintaining religion). Meanwhile, the judge allows or orders the father to continue providing for the child's physical needs in the location where the child is cared for by the mother, with the caveat that the father may not give anything prohibited in Islamic teachings.

Apart from preserving religion and the physical health of children who will be cared for by one of the two parents, *hifz al-aql* (mind preservation) is also a determining factor in determining who is more entitled to be a caregiver after the divorce, the mother or the father. According to Ahmad al-Mursi Huasian Jauhar, the reason is the source of guidance and knowledge. The reason is also what sets humans apart from other creatures. Humans' brilliant minds will easily distinguish between what is right and wrong and what is lawful and illegal. Humans will feel safe and comfortable if reason works appropriately.

With the concept of *maqasid sharia*, Islam promotes the protection of the mind from anything that can harm it. In this case, a child still in the care of his caregiver will significantly impact his mental development in the future because of how he was educated, treated, or schooled. Of course, this is directly related to how he was raised and the environment in which he grew up. Because the Qur'an provides an essential warning against the existence of reason, Allah condemns those who waste it. Allah explains in Surah Al-A'raf verse 179 which means: "And verily we have made for the contents of Hell Jahannam most of the jinn and humans, they have hearts, but they do not use them to understand the verses of Allah. And they have eyes but do not use them to see signs of Allah's power. They have ears but do not use them to hear Allah's verses. They are livestock, and they are even more astray. They are the heedless ones."

Ibnu Katsir explained the verse above they did not use the five senses that Allah had made as a source to get guidance (Ibnu Katsir). Furthermore, Yusuf al-Qardawi explained that protecting one's mind can be done in various ways. For example, a Muslim man and woman must seek knowledge from birth to death or other things that can support the existence of reason that can bring confidence and reject wrong prejudice and lust.<sup>35</sup>

It is where a judge's ability is genuinely tested because whom a child is raised with will affect a child's religion, health, and the existence of reason. Preserving religion, soul and mind is an element that is highly considered in Islam. Regarding which one is given priority to young children who have not yet attained *mumayyiz*. Even scholars have different opinions regarding this matter, whether the safety of the soul (*hifz an-nafs*) is prioritized or the existence of religion (*hifz ad-din*) for these young children. In this case, they consider that a father can guarantee a child's physical needs, even though, in this case, a mother can meet the physical and spiritual needs of a child who is still underage. That is because a mother is synonymous with love, care, and warm hugs for her child.<sup>36</sup>

Wahbah Zuhaily states that the person caring for the child must be trustworthy. Thus a wicked person (far from religion) may not become a child carer. However, Ibn Abidin explained that the wickedness that hinders is the wickedness of a father so that he can waste or even abandon a child. However, Ibn Abidin explained further that the wicked father in question can still be a child carer on the condition that the person being cared for does not understand the wickedness of the caregiver. However, if the child can understand the wickedness, he must be kept away from his father (caregiver).

According to the author, this difference of opinion can be responded to by quoting the opinion of Imam Izzuddin bin Abd Al-Salam. He, who, at the same time, is faced with two problems that require choosing between one benefit and another or choosing to reject mafsadah (harm that leads to damage), is prioritized over gaining benefit. With the same meaning, Imam Izzuddin stated that rejecting harms is important than reaching benefits.<sup>37</sup>

Based on the preceding rules, a judge deciding who gets custody of the child should prioritise the existence of religion over the existence of the soul/self. The sense that child custody should be given to one of the parents

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<sup>35</sup> Yusuf Qardawi, *Dirasah Fii Fiqh Maqasid Syariah*, ed. Aris Munandar (Jakarta: Pustaka al-Kautsar, 2017).

<sup>36</sup> Al-Juzairi, "Fikih Empat Mazhab, 1138."

<sup>37</sup> A Djazuli, "Kaidah-Kaidah Fiqih, Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah- Masalah Praktis" (Jakarta: Kencana, 2017), 231.

with better religion, behaviour, and associations than one who prioritises the child's physical needs. If a mother is more religious than the father, or for example, the father prefers to associate with people who enjoy drinking alcohol or gambling. The mother can care for the child if she meets the requirements.<sup>38</sup>

## Conclusion

The author can draw one conclusion from the explanation above. One of the factors considered by the judge at the Panyabungan Religious Court in determining custody of a child who has not been *mumayyiz* to the father is the judge's concern for the child's development and safety if he is cared for by his mother. However, in determining custody of children who have not yet been *mumayyiz*, the author differs from the panel of judges. According to Islamic law, the biological mother is the person who has the right to care for a child who is not yet *mumayyiz* if the mother meets the requirements for childcare. The judge heard several testimonies from witnesses and the child's mother, who stated that the father who cared for the child was untrustworthy because he enjoyed online gambling. Furthermore, the parents of the child's father care for the child, not the father himself.

According to *maqasid sharia*, the mother is most entitled to the mandate to care for the child, which is why *hifz ad-Din*. The child's mother is an alumna of an Islamic boarding school with a solid religious foundation in which to raise her child. Meanwhile, his father, in witness testimony, due to his preference for online gambling, the judges deemed him very far from religious values. In terms of *hifz an-nafs* (self-care), a child who has not been *mumayyiz* requires the love and upbringing of a mother. Regarding the child's physical needs, the father must meet those needs in the exact location where the child is cared for by the mother. Then, in terms of *hifz al-aql* (mind maintenance), a child still in the care of his caregiver will significantly impact his mental growth in the future, depending on how he was educated, treated, or schooled. Of course, this is directly related to how he was raised and the environment in which he grew up.

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<sup>38</sup> Ali Akbar, "Analisis Putusan Pengadilan Agama Tentang Hak Haḍonah Bagi Ibu Murtad Berdasarkan Tinjauan Maqosid Syariah," *USRAH: Jurnal Hukum Keluarga Islam* Vol.3, No. 1 (2022), 31–51.

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