

Study Of Determination Of Child Care Rights On Parents Who Are Divorced Due To Different Religions

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ABSTRACT

Law No. 1 of 1974 concerning Marriage raises the consequence that interreligious religious mixed marriages are prohibited. But in reality, people still do that. Families of different religions are one of the many problems that exist. In the family, not all of them can go according to what is aspired to in a marriage bond. In the family, there are often disputes that will eventually lead to divorce, where the child is indirectly one of the victims. The right to care for children after a divorce because one of the parents has apostatized is a discussion that needs to be studied, especially those related to religion which is very urgent for the continuity of the faith followed by the child. This research uses a juridical-normative approach. The problem approach in this research is statutory. The results of the study show that child custody is mandatory. All scholars agree that the mother who bears custody of the child and bears the cost of child custody is the father's responsibility. In the Compilation of Islamic Law Article 105, it is stated that a child who is not yet mumayyiz or not yet 12 years old is the right of the mother to look after him, whereas if the child is already mumayyiz, he can choose between his father or mother to act as his caretaker; and (2) if there is a divorce of parents who have different religions, then the custody of the child that should be with the mother becomes null and void, if the mother is proven to have embraced another faith or is an apostate, then the mother is deemed no longer eligible to obtain custody of the child and is considered valid. And it is appropriate for the court judge to grant custody to the father, who is still a Muslim.

Keywords: Child Custody, Different Religions, Divorce

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I. INTRODUCTION

Marriage is a sacred event to bind the love between two human beings. Marriage is interpreted as a social contract between two individuals, two families, relatives, and the community who witness the event. In this Marriage, love will develop, not only limited to husband and wife but also between them and their children, especially all family members (Shihab, 2005).

In Indonesia, Marriage is regulated by Law Number 1 of 1974. In article 1, it is stated that Marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family or household based on Belief in the One and Only God. In article 2, it is stated that Marriage is valid if it is carried out according to the law of each. Each religion and belief. Generally, it can be understood that Marriage can only occur between a man and a woman of the same faith in Indonesia.

The marriage bond, as mentioned above, must be built based on the values of affection and kinship. However, combining two human elements with different characters is difficult, so disputes often arise in married life due to the failure to combine these two characters.

Divorce was chosen when the relationship could no longer be maintained because it was considered a solution to reducing the tangled threads of the household's journey. One of the disputes resulting from divorce is the issue of child custody and the division of assets back and forth.

Divorce cannot be separated from negative impacts, especially when there are children in the Marriage. The child is the party that is harmed by the divorce of his parents. Children lose the love that is entirely needed from both parents; no child who only wants to get affection from his father or mother, in addition to that income and education can be disrupted. After the divorce, the husband and wife must accept and carry out the obligations of the consequences. One of the consequences of divorce is the upbringing of children who are automatically no longer able to be raised jointly by both parents.

Regarding this matter, it has been regulated in the Compilation of Islamic Law, namely article 149 D, which contains one of the rights and obligations of a husband and wife who are divorced to be obliged to provide hadanah costs for their children who have not reached the age of 21 years. Furthermore, in Article 105, it is stated that the child's custody (hadanah) is with the mother when the child has not yet reached the age of mumayyiz. At the same time, children who have reached the age of mumayyiz are allowed to choose who the child goes with or to their mother or father. Then in article 156, Compilation of Islamic Law, it is stated who the child will be cared for when the mother dies.

According to Nuruddin and Tarigan (2009), the best condition for children is when the child is in the care of both parents because good maintenance and care, as well as optimal attention from both, will build them physically and psychologically to prepare the child maturely to live life. Furthermore, Law Number 17 of 2016 concerning Child Protection defines custody as the power of parents to care for, educate, nurture, foster, protect and develop children according to the religion they adhere to and their abilities, talents, and interests. This arrangement implies that child custody should be given to parents with the same faith as the child's religion so that the child's growth and development are good.

Even though according to positive Indonesian law, interfaith Marriage cannot be carried out, interreligious marriage cases are a natural phenomenon in society. The phenomenon of interfaith or mixed marriages often makes a wedding disharmonious and ends in divorce, followed by a struggle for child custody.

The above becomes a problem when couples of different religions divorce and fight over child custody, considering that Article 42 paragraph (2) of Law No. 23 of 2002 concerning Child Protection stipulates, "Before a child can make his choice, the religion that the child embraces follows the religion of others." old." In the case of couples of different religions, it becomes challenging to determine the child's beliefs considering that the parents' faith is different from one another, so it becomes another problem to decide to whom the custody of the child is given.

Regarding the terms of care, the scholars of the madhhab agree, namely, in upbringing, it is hinted that the person who cares for them has good sense, can be trusted, is pure in himself, is not a perpetrator of immorality, is not a dancer, and is not a drinker of khamr, and does not neglect the child he is caring. "These characteristics are necessary to maintain and guarantee children's health and moral growth. These conditions also apply to male caregivers (Marzuki, 2010).

Scholars of the Mazhab differ on whether being Muslim is a requirement for upbringing. Imamiyah and Shafi'iyah: an infidel may not raise a Muslim child, while some other schools of thought do not require it. It's just that the scholars of the Hanafi school of thought state that the apostasy of a woman or man who cares for them aborts the right to upbringing. Imamiyah argues: caregivers must avoid infectious diseases. "Hambali also believes that caregivers must be free from leprosy and stripes and, most importantly, they do not harm the child (Gasita, 1985),

Over time, many life problems are bound by law to adapt to the times. When discussing children as victims of divorce, this cannot be separated from the obligation of parents to care for children (ḥadānah). The Fuqaha have different opinions regarding child-rearing; as long as there are no things that prevent them from caring for children, then it is certain that the mother must carry out ḥadānah.

If there is a divorce between a Muslim husband and wife, but when one of them (father or mother) leaves Islam (apostates), the children must be cared for by their Muslim parents. Likewise, the right to have ḥadānah becomes invalidated by parties who strongly indicate efforts to influence children to change religions. In such conditions, the most powerful thing is the discretion of the judge to determine that the party who will commit ḥadānah to the child is the party where the child's religious safety is guaranteed. That is, the child is no longer given the right to vote whether the child follows his father or mother. New suffrage rights can be guided if it is not openly detrimental to the child's side.

The aims of the research are: (1) to find out the arrangements for child custody(hadhanah) based on Law Number 1 of 1974 concerning Marriage, and (2) to find out the settlement of child custody of interfaith divorce in Islamic law.

II. RESEARCH METHODS

This study uses a normative juridical approach. According to SoerjonoSoekanto, normative juridical research is library research on legal principles, legal systematics, vertical and horizontal synchronization levels, comparative law, and legal history.

Sources of legal materials in this study are through:

1. Primary legal material consists of statutes, official records, or treatises on making laws and decisions of judges, including the 1945 Constitution of the Republic of Indonesia, the Civil Code, the Law Number 17 of 2016 concerning Child Protection, Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

2. Secondary legal materials consist of legal documents or materials that explain primary legal materials such as books, articles, journals, research results, papers, and others relevant to research.
3. Tertiary Legal Materials, namely legal materials that provide instructions and explanations of primary and secondary legal materials, such as dictionaries and encyclopedias.

Techniques for gathering legal material sources through library research and document studies. The collected legal materials were analyzed using the following analytical methods; (1) descriptively, (2) interpretation, and (3) legal reasoning.

III. RESULTS AND DISCUSSION

A. Arrangements for Child Custody (Hadhanah) Based on Law Number 1 of 1974 Concerning Marriage

Marriage is an agreement between a man and a woman, a sacred contract to form an eternal and happy family; even in the view of society, Marriage is aimed at building, fostering, and maintaining harmonious and peaceful kinship relations. Marriage does not merely mean the bond between a man and a woman as husband and wife to get offspring and building and foster a household's family life but also represents a legal relationship involving members of the relatives from the wife's side and the husband's side.

Over time, the purpose of Marriage is not achieved or divorced. The consequences can be separated, which can then be called talak (Terms in Indonesian). The basic meaning of divorce is to release the bond or the agreement. Divorce is the end of a relationship between two people who once lived together as husband and wife.

Divorce has a broad psychological impact on children and families, and divorce also impacts the destruction of social order. One result of divorce is parenting. A child, at the beginning of his life, until he is declared an adult needs other people in his life, both in his physical management and in the formation of his morals; a person who performs hadhanah duties plays a significant role in this. Therefore, the issue of hadhanah receives special attention in Islamic law. On the shoulders of both parents lies the obligation to perform these duties. However, if the parents or one of them cannot carry out the hadhanah duties, it should be determined who has the right to care for the child.

When a marriage is broken due to death or divorce, the children resulting from their Marriage will also be separated automatically after the divorce is usually a court decision about who is more entitled to get custody of the child. The breakup of a marriage caused by divorce contains various legal problems other than the divorce that occurs, such as the distribution of joint assets. If the husband and wife have children, there will also be issues of custody of their children.

A divorce between the parents generally causes the emergence of topics around child custody. As parents, of course, both want to obtain possession of their children. If control of the child is received, then either the father or the mother has the right to live with the child and care for it.

The party that will get custody of the child is not necessarily the mother. Several possibilities or things allow fathers to gain control of their children who are still underage. A father does not even get custody of his child and still should provide for the child.

Child custody is the responsibility of both parents. Child custody, in this case, covers various matters, economic issues, education, and everything that is children's basic needs. In the Islamic concept, financial responsibility rests with the husband as the head of the household. Therefore cooperation and mutual help between husband and wife in caring for children and delivering them until the child is an adult.

The father's responsibility for child-rearing costs cannot be separated from the legislative policies in the Marriage Law and the Compilation of Islamic Law. The two regulations have included several provisions regarding the obligations of parents (especially fathers) towards their children. Article 45 of Law Number 1 of 1974 Concerning Marriage states that "parents are obliged to look after and educate their children as well as possible until the child marries or stands alone, and this obligation will continue to apply even if the marriage of his parents is broken."

As a result of the breakup of a marriage due to divorce, Article 41 of Law Number 1 of 1974 Concerning Marriage states that:

1. Both mother and father are obliged to look after and educate their children solely based on the interests of the child; if there is a dispute regarding the control of the child, the Court makes a decision;
2. The father is responsible for all the costs of raising and educating the child, and if it turns out that, in reality, the father is unable to fulfill these obligations, the Court may determine that the mother shares in these obligations;
3. The Court may oblige the ex-husband to provide living expenses and determine an obligation for the ex-wife.

Based on the explanation from Article 41 of Law Number 1, the Year 1974, Concerning Marriage above, child custody is associated with post-divorce parents of different religions. In that article, it is said that if there is a dispute regarding the control of children, it will be resolved through the courts. However, as an

illustration of the division of custody, if we look at it from Islamic law, we can refer to the Compilation of Islamic Law.

Based on Article 105 of the Compilation of Islamic Law, in the event of a divorce, caring for children who are not yet mumayyiz or not yet 12 (twelve) years old is the mother's right. In contrast, the care of children who are already mumayyiz is left to the child to choose between the father or mother as the holder of maintenance rights. Regarding Article 105 Compilation of Islamic Law, there is an exception; namely, if it is proven that the mother has converted and embraced a religion other than Islam, then the mother's right to care for the child is nullified. "This follows the Jurisprudence of the Supreme Court of the Republic of Indonesia No.: 210/K/AG/1996, which contains a legal abstraction that religion is a requirement for determining whether or not a mother's right to maintenance and custody of children (hadhanah) for children who are not yet mumayyiz."

B. Settlement of Child Custody for Interfaith Divorce in Islamic Law

Child-rearing duties (hadhanah) receive special attention in Islamic law. On both parents' shoulders lies the obligation to care for the child. However, if the parents or one of them cannot carry out the hadhanah duties, it should be determined who is entitled to care for the child. As stated in Law Number 1 of 1974, in Article 104 paragraph (1) of the Compilation of Islamic Law, it is clearly stated that the father accounts for all child-feeding costs. To his father or guardian."

It is further explained in Article 105 of the Compilation of Islamic Law in the event of a divorce, the maintenance of children who are not yet mumayyiz or not yet 12 years old is the mother's right. In contrast, those who are already mumayyiz are left to the child to choose between father or mother as the holder of maintenance rights with maintenance costs borne by his father."

Regarding child rearing, the Compilation of Islamic Law provides arrangements as contained in Chapter XIV Article 98, namely as follows:

1. The age limit for a child who can stand alone or as an adult is 21 years old, as long as the child is not physically or mentally disabled or has never been married;
2. The parents represent the child regarding all legal actions inside and outside the Court;
3. The Religious Courts can appoint one of the closest relatives who can fulfill this obligation if both parents are unable.

Furthermore, article 156 of the Compilation of Islamic Law regulates the maintenance of children when their biological mother dies by giving them the order in which they are entitled to care for children, including:

1. A child who has not been mumayyiz has the right to get hadhanah from his mother, except if his mother has died, then his position is replaced by:
 - a. The women are in a straight line up from the mother;
 - b. Father;
 - c. The women are in a straight line up from the father;
 - d. Sister of the child concerned;
 - e. Women's blood relatives on the side of the father.
2. Children who are already mumayyiz have the right to choose to get hadhanah from their father or mother;
3. If it turns out that the hadhanah holder cannot guarantee the physical and spiritual safety of the child, even though the maintenance and hadhanah costs have been sufficient, then at the request of the relative concerned, the Religious Courts may transfer the hadhanah rights to other relatives who also have hadhanah rights;
4. All costs of hadhanah and child support are the responsibility of the father according to his ability, at least until the child is an adult and can take care of himself (21 years);
5. If there is a dispute regarding hadhanah and child support, the Religious Courts will render a decision based on numbers (1), (2), and (3);
6. The Court can also, bearing in mind the father's ability, determine the costs for the maintenance and education of children who do not participate.

The power of parents over children after divorce, according to the provisions of the two laws, is in line. It must be considered logical, considering that the meaning of parental power over children is highly correlated with the purpose of Marriage and divorce as regulated by the Marriage Law and the Compilation of Islamic Law.

The meaning contained in these two laws is also in line with the purpose of child protection as stipulated in Law Number 17 of 2016 concerning Child Protection, which is to provide the best for children. Thus the meaning of parental power over children after divorce, in the context of the relationship between the Compilation of Islamic Law and the Child Protection Act, is to have a good level of harmonization. As for those who have the right to take care of children, Article 41 (a) of the Marriage Law states that both mothers and

fathers are still obliged to care for and educate their children solely based on the interests of the child if there is a dispute regarding the control of children, the Court shall give decision.

The Court must choose and determine which of the two parents is equally entitled to carry out maintenance, so the Court must examine carefully which father or mother is better at taking care of the child's interests. Meanwhile, the costs of maintaining, caring for, and educating children are regulated in Article 41 (b) and 49 paragraph 2 of the Marriage Law. Article 41 (b) of the Marriage Law states that the father is responsible for all the maintenance and education costs the child needs. If the father cannot fulfill this obligation, the Court may determine that the mother must share these costs.

Based on the above provisions, it can be stated that whether the child is under the care of the father or the mother, the father guarantees the total costs of raising and educating the child. Regarding the amount, the fee is determined based on the child's needs, and this provision is aligned with the parents' economic situation. Parents who are financially stable must provide costs according to the child's needs. Conversely, if the parent's financial situation is in trouble, the mother must also support the child. In Article 49, paragraph 2 of the Marriage Law, even though parents are revoked of their powers, they are still obliged to care for the child.

The limits on the obligation to care for and educate children are also regulated in Article 45, paragraph (2) of the Marriage Law: The responsibilities of the parents referred to in paragraph (1) of this article apply until the child marries or can be independent, which obligation continues even if the Marriage between the two parents broke up. So the primary limits of the responsibility of parents to care for and educate their children are not determined until a specific age limit but are seen from the child's condition. A child is only 17 years old; on the other hand, a child who is 25 years old but cannot yet stand up for himself, parents are still obliged to look after and educate him.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusion

1. Legal child custody is mandatory. All scholars agree that the mother who bears custody of the child and bears the cost of child custody is the father's responsibility. The Compilation of Islamic Law Article 105 states that a child who is not yet mumayyiz or not 12 years old is the mother's right to look after him. In contrast, if the child is already mumayyiz, he can choose between his father or mother as his caretaker.
2. If there is a divorce of parents who have different religions, then the custody of the child, which should be with the mother, becomes void; if the mother is proven to have embraced another faith or is an apostate, then the mother is deemed no longer eligible to obtain custody of the child and is deemed valid and proper for court judges to grant custody to the father who is still a Muslim.

B. Suggestion

1. In fact, the Marriage Law and Compilation of Islamic Law are very much in favor of the interests and future of children. It's just that Law Number 1 of 1974, Concerning Marriage, only touches on the aspects of responsibility for care that are still material and places less emphasis on the elements of care that are non-material.
2. Divorce regulations in Indonesia should provide more detailed rules, especially regarding interfaith divorce. The government should be more sensitive to the fact that there are many cases of interfaith divorce where no laws and regulations regulate this other than the Compilation of Islamic Law.

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