

## Protection of Children's Rights in Post-Divorce Custody Disputes Comprehensive Study on the Best Interests of Children

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### Abstract

In the framework of Indonesian positive law, it is only the KHI that assigns child custody to the mother. Other legal provisions merely indicate that both parents are responsible for their children's care without clarifying which parent is awarded custody following a divorce. Various rulings exist that have granted custody to mothers, yet there are also instances where custody has been awarded to fathers. This creates ambiguity regarding the determination of child custody post-divorce. The objective of this study is to assess the most effective indicators for judges to consider in making child custody decisions, grounded in the principle of prioritizing the child's best interests. The methodology employed for this research is prescriptive normative legal analysis with a conceptual focus. Findings indicate that several factors can be utilized when deliberating on custody matters, including the child's wellbeing, the behavior of the parents, cooperation between them, and the allocation of parenting time. Should there be a need for additional factors, judges are permitted to incorporate these, provided they align with the principle of the child's best interests.

**Keywords: Best Interests of the Child, Child Custody, Post Divorce.**



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### INTRODUCTION

Based on Article 1 contained in Law Number 1 of 1974 concerning Marriage, which has been amended by Law Number 16 of 2019 concerning amendments to the Marriage Law, it is explained that "marriage is a physical and emotional relationship between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household), based on the Almighty God.

People who are married certainly hope that their relationship will last forever to create a happy family as they wish. However, often in real life, the marriage ends in divorce. The divorce that occurs certainly has legal implications for both parties, including regarding the custody of children born from the marriage bond. (Muhammad Rais, 2016) In many cases of divorce, children often become less cared for and receive less affection. Although after divorce parents still have the responsibility to care for and educate their children, as explained in Article 45 paragraph (1) of the Marriage Law. However, in reality, the care, treatment and education of children will be difficult to do together after divorce. Therefore, a determination or decision is needed regarding the authority of child custody to one of the father or mother, to ensure the welfare and best interests of the child. (Abdurahman, 1990)

The principle of prioritizing the best interests of the child is a legal rule that makes the prosperity, welfare and interests of the child the main goal in every decision related to their

circumstances. This principle can be understood as an effort or guideline that aims to ensure that the child's essentials are not neglected due to the divorce of their parents. This rule must also ensure that child custody must be prioritized solely based on the child's essentials and is not influenced by other essentials such as the essentials of the parents. (Muhammad Husni Abdulah Pakarti, 2023)

An explanation of the principle of the child's best interests can be found in Article 2 paragraph (2) of the Law on Child Protection which states that the principle and objectives of the child's best interests describe that in every behavior involving a child carried out by the government, society, legislative institutions, and judicial institutions, the main barometer must be based on the child's best interests. Even though there is an explanation of the criteria for the meaning of the principle of the child's best interests, the interests of the child can vary based on the needs of each child. It can be concluded that the definition of the child's best interests is something subjective, depending on the perspective or point of view of the decision maker, the situation and conditions of the child that they consider to be best for them. (Pakarti et al., 2023)

The principle of child custody in Islam is basically an extension of the law of *hadhanah*, (Hikmatullah, 2 CE) without changing the legal status, lineage, or *mahram* between adopted children and their biological parents and family. (Ahmad et al., 2024)

Child custody is an important aspect of family law that is often a source of dispute. Custody is generally applied when a divorce occurs between a husband and wife, and the couple has a child who is not old enough to be separated from his mother. (Dian Yudhantara Syahputra & Syaifuddin Zuhdi, 24 CE) In this situation, the child still needs protection, care, and education for the benefit of his/her growth and development. In the legal context in Indonesia, child custody disputes often occur between husband and wife. However, in certain conditions, such disputes can also arise between biological parents and foster parents. Cases like this create complexity in the application of the law because they involve two parties with strong emotional ties to the child. (Linda Firdawaty et al., 23 CE)

Furthermore, the understanding and principles of child custody include the specific rights of each individual to a child, including in the aspects of care and control. (MdSalleh et al., 2020) In the application of the law in force in Indonesia, there is no clear explanation that states that child custody is in the hands of the father or mother. In the Compilation of Islamic Law, there are only provisions regarding child control which state that children under the age of 12 are considered unable to differentiate and are considered less capable, so their custody is given to their mother. This is due to the assumption that the mother is the figure who has carried her for nine months and has given birth to her, so that a strong emotional relationship grows between mother and child. In addition, the figure of a mother is considered more capable of looking after, caring for and educating her children. (Cristine, 2008)

Even though there are provisions stated in the Compilation of Islamic Law stating that custody of children who are not yet *mumayyiz* (not yet puberty) must be given to the mother, in reality many court decisions prefer to give custody to the father. This condition clearly causes legal confusion regarding the determination of child custody. Therefore, it is considered very important to have accurate and reliable criteria or indicators in the judge's legal considerations when determining to whom child custody should be given or imposed. (Mansari, 2016)

## RESEARCH METHODS

This study uses a juridical-normative method (*literature*), namely an approach that relies on the study of primary legal materials, *the principle of the best interest of the child*, through a review of theories, concepts, legal principles, and laws and regulations that are relevant to the main problem. While the analysis of the judge's decision falls into the category of case studies or empirical, namely the decision is studied as a case study with *content analysis techniques* to identify the pattern of judges' considerations regarding the principle of the best interests of the child in custody disputes. This research method identifies the gap between positive law and practical needs. The purpose of this study is to describe and analyze the application of the principle of the best interests of the child in custody disputes between a mother and father. (Zainuddin Ali, 2009)

This research was conducted through an analysis of judges' decisions in child custody dispute cases at the first level, appeal, and cassation. The method used relies on legal sources such as court decisions, laws and regulations, judges' codes of ethics, legal theories, and legal interpretation methods. In addition, this study also utilizes secondary data obtained from literature studies. The characteristics of this legal research method are prescriptive, in which this study seeks to provide solutions to the legal problems or issues being studied. This prescriptive approach is taken to address legal issues related to child custody regulations and seeks to provide advice and recommendations on judges' considerations that prioritize the interests of children, as well as revisions to policies related to *the best interest of the child standard* in laws and regulations. (Muhammad Hifni, 2016)

## RESULTS AND DISCUSSION

Divorce should be seen as the last resort after various efforts have been made to improve the quality of the marriage. If all efforts have been made to maintain the household, but what happens is suffering rather than happiness, then the last option is to take the step of divorce. (Islami & Sahara, 2019) Divorce ends the relationship between a husband and wife, but not with their children. The divorce process does not eliminate the bond between the father, mother and child. As a result, children are also affected by the effects of the divorce because they remain emotionally connected to their parents. (Mansari, 2016)

Most children who have divorced parents will usually feel the loss of affection from one or even both of their parents. They often grow up to be individuals who are gloomy, sad, and feel alienated, especially when they see their peers who still have parents together. Therefore, when determining child custody, the judge must pay attention to these feelings and conditions. (ASyahan Nur Muhammad H, 2024) Therefore, when determining child custody, the judge must pay attention to these feelings and conditions, really paying attention to the needs of the child so that they can develop like children in general. In the laws in force in Indonesia, there are various provisions that regulate child custody after divorce, including the following:

### Legal Source Provisions Regarding Child Custody Rights in Indonesia

Among the studies related to legal sources regarding child custody rights in Indonesia that can be used as legal guidelines are:

1. Law Number 1 of 1974 concerning Marriage.

There is a sentence in article 41, explaining that when a marriage ends, both male and female parents have an obligation to care for, maintain and look after the child for the benefit of the child. Article 45 states that in general, both parents must educate and care for their children even though they have separated.

2. Law Number 23 of 2002 concerning Child Protection.

It is stated in Article 26 that parents are responsible and have obligations that must be carried out, namely caring for, educating, nurturing and protecting their children.

3. Compilation of Islamic Law (KHI).

There is Article 105 which states that if there is a child who has not reached mumayyiz age, or under 12 years of age, then custody falls to the mother.

4. Circular Letter of the Supreme Court (SEMA) Number 1 of 2017.

In the statement or formulation of civil law, it is stated that custody of a minor child can be given to the father if it is known that the decision has a positive or best influence on the growth, survival and development of the child.

Of the many provisions that form the legal basis for child custody, there is not a single rule that clearly states that after divorce, child care becomes the responsibility of the mother or father, except in the Compilation of Islamic Law, especially in Article 105 letter a, which clearly states that custody of children under the age of 12 will be given to the mother. (Ahmad et al., 2024) However, in practice, there are many decisions that occur, especially in Religious Courts which generally refer to the Compilation of Islamic Law as material law, which violate the article by granting custody to the father because it is considered that the article is no longer in accordance with current developments. The Compilation of Islamic Law was formulated as a Presidential Instruction considering its history which functions as additional law and is applied only when there is an issue that is not regulated by the Marriage Law.

If we look at the history of the formation of Article 105 of the Compilation of Islamic Law, it will be seen that this article was made based on the principles of previous Islamic Law. At that time, Islamic culture tended to position women in the home to care for children, while men were more active in the work environment, such as factories, companies, shops and others. Based on this consideration, when developing the concept of child custody in the fiqh book, women are encouraged to have the right to custody because they are considered to have a closer bond and are more patient in caring for children. (Sulastri et al., 24 CE) However, this thinking is now no longer appropriate in the context of disputes over child custody, because many mothers choose to have careers rather than stay at home to care for their children. In addition, the view that mothers are always closer to their children is also no longer valid, because mothers do not always have closeness or are able to be responsible for the care and education of children. (Aulia, 2022)

### **Judge's Arguments in Child Custody Against the Best Care for the Child Study**

As previously explained, the principle of the best interests of the child is subjective. This means that what is best for one child is not always the same as another child, depending on the factors that influence how those interests can provide value to the child. This principle is one of the crucial elements that need to be considered in the issue of child custody, because children are the most vulnerable party in divorce matters, so their interests must be the top priority. (Syafiuddin, 2022)

In order to maintain children's rights, clear criteria are needed in determining child custody. Several parties have tried to identify what criteria can be used in the process of determining custody, as explained in the article entitled *Paradigma Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance* which notes that the National Conference of Commissioners on Uniform State Laws has agreed on a number of criteria that can be applied in determining child custody, (Elrod & Dale, nd) namely:

1. Aspirations held by parents.
2. The hopes that children have.
3. The relationship between a child and his/her parents, siblings, and other individuals who can have a major impact on the child's best interests.
4. Children's adjustment to their surroundings, both at home, at school, and in the community.
5. The physical and mental well-being of all individuals who interact with the child.

In addition, there is Mansari's view in the Journal of Law and Sharia Science which states that there are a number of criteria that can be used as a reference for judges. Among these criteria are the following (Mansari, 2016) :

1. Interests of the child
2. Collective agreement
3. Explanation from the plaintiff and the defendant
4. Financial aspects
5. Unreliable mother
6. The relationship between a child and his/her father or mother
7. Cultural norms and values

In addition, there is a view from the judge (Drs. Muntasir, 2023) who stated that there are two important things that must be considered when deciding on child custody. First, the best interests of the child must be the main basis for determining custody. The individual who is best able to meet the child's best needs should be given custody. Second, it is important to thoroughly investigate the parents' track records. This aims to assess who among them is most worthy of caring for them. Factors that can be considered include morals, health, and availability of time to educate their children. (Tarmizi et al., 2023)

Through a number of indicators that have been described previously, coupled with several other references, the author can draw conclusions regarding the indicators that can be used to determine child custody rights with the principle of what is best for the child, as follows:

### **Dimensions of Child Welfare in the Perspective of Post-Divorce Custody**

Child welfare refers to a situation where all of a child's needs can be met and satisfied. Welfare here does not only include physical or material aspects, but also involves the child's emotional and psychological health. Psychological considerations of children are very important because a child's life can change significantly due to parental divorce. Child welfare is closely related to the fulfillment of their needs, so that if all of these needs are met, then the completeness of the child's prosperity can be achieved. According to (Dian Yudhantara Syahputra & Syaifuddin Zuhdi, 24 CE) this child's prosperity or welfare includes five dimensions of primary needs as follows:

a) *Spiritual Need* (Spiritual or spiritual needs)

The need experienced by every individual to gain confidence and hope in life. This need functions as a source of internal strength for humans and has an important role for individuals in forming their own character. In addition, this need acts as a link between humans and God, where religion is the means used.

b) *Psychological Needs* (Psychological needs)

Needs related to a person's emotions, such as the desire to be loved and accepted by others, the need for security, and the freedom to express oneself and interact with the surrounding environment. Freedom of expression is also included in this category, as regulated in the Convention on the Rights of the Child.

c) *Physical Needs* (Physical or bodily needs)

Basic needs related to a person's physical condition. These needs are important to support a child's development. Among these needs are basic things such as clothing, food, and shelter.

d) *Intellectual Needs* (Need for education)

Children clearly need education to build a strong foundation for their future. Through education, children will gain knowledge and skills that are useful for facing various life challenges. This knowledge will also be capital for them to respond to the challenges of globalization in the future.

e) *Social Cultural Needs* (Social Cultural Needs)

Needs related to the interaction between individuals and their environment. This aspect is understood through a child's behavior towards their place of residence and the child's ability to control their ego, show empathy for others, and offer help to others. In the context of this need, there is a reciprocal relationship between humans and the atmosphere that surrounds them.

The principle of child welfare can be implemented in various situations, one of which is when a child has been cared for and raised for a long time by one of his parents. This is in line with the principle of non-disruption of custody in international family law, (Aulia, 2022) which emphasizes the importance of stability of care. In such conditions, care should be continued by the parent, especially if it is proven that the child's development is going well according to his age. This is based on the fact that children are not as easy as adults to adapt to new environments. Therefore, when the child has felt comfortable and adjusted to his environment, it would be better if he remained in the familiar environment.

### **The Influence of Parental Behavior in Determining Child Custody Rights**

The behavior of parents in the characteristics of future child care candidates is very important, because the nature of the caregiver can have a significant impact on the growth and development of the child. Caregivers who have and demonstrate negative behavior may face rejection in their custody applications because there is concern that the bad attitude could interfere with their responsibilities in caring for the child and could even be transmitted to the child itself. In accordance with Article 109 of the Compilation of Islamic Law, the Religious Court has the authority to revoke an individual's guardianship rights if the guardian or caregiver is involved in behavior such as drunkenness, gambling, wastefulness, or behavior that reflects mental instability, and if they are negligent or abuse their rights and powers for the benefit of the child they are caring for. In addition, Article 49 paragraph (1) of Law Number 1 of 1974 concerning Marriage (jo. Law No. 16 of 2019) states that one or both parents can lose their

rights to the child if they seriously neglect their obligations towards the child and demonstrate very bad behavior. It is also emphasized in Article 30 paragraph (1) of the Child Protection Law that parents who do not fulfill their responsibilities to care for their children can be subject to supervision measures, and their custody rights can be revoked. (Ahmad et al., 2024)

This parental behavior is closely related to the way they care for their children, because positive actions will also contribute to good child care. Childcare is the obligation of parents to supervise, provide the best services, and meet the financial needs of children. These three responsibilities will continue until the child reaches adulthood and is able to be independent. (Sari, 2011)

Furthermore, regarding the financial responsibility of the child, parents who have sufficient income to meet the needs of themselves and their children will be considered by the Judge in determining child custody. However, regarding the financial responsibility of the child, this is actually only an additional factor for the judge, or used as *a subsidiary consideration* that can strengthen the main consideration. because regarding the cost of child care, both the Marriage Law and the Compilation of Islamic Law state the same thing that all costs of child care and support are the responsibility of the father. If the father is considered unable to carry out these responsibilities, then the mother can also bear the cost of child support. (Islami & Sahara, 2019)

### **Parental Access and Interaction Arrangements in Child Custody Disputes**

In the Circular of the Supreme Court (SEMA) Number 1 of 2017, the provisions of religious law explain that decisions regarding child custody must include the responsibility of the holder of hadhanah rights to provide an opportunity for parents who do not have hadhanah rights to interact with their children. Judges can also set a schedule for visits or interactions in the decision, even though custody is only given to one party. In addition, judges need to consider that if parents who do not have hadhanah rights are not given access, this can be a legal basis for filing a request for revocation of hadhanah rights to the court. It is important for parents to ensure access to their children because in the process of their growth and development, children need the emotional and social presence of both parents as a development of the child's psychology.

*Joint custody is a legal arrangement* where both parents share the responsibility and rights to care for the child, regardless of who has primary physical custody. This means that both parents have a say in making important decisions regarding the child's education, health, and other aspects of their life, even though the child may spend more time with one parent. It is important to note that joint custody does not necessarily mean equal time sharing between the parents. Some arrangements may place more emphasis on joint legal custody, where both parents are involved in decision-making, but the child spends more time with one parent. The best choice will always be tailored to the specific circumstances and needs of the family, with the child's best interests in mind. In some cases, joint custody can also help reduce domestic violence because both parents have a more balanced role and are more involved in the child's care. (Law, nd)

Even though a mother has good abilities in caring for children, her role still cannot completely replace the position of a father. Likewise, even though a father can provide good care, he cannot completely take on the role of a mother. In cases of child custody, if one parent

feels that their access to the child is hampered while the child is under the care of another party, then the person concerned has the right to file a request for custody. This aspect will also be one of the considerations for the judge in determining the child custody decision. (Muhammad Abil Anam & Yushinta Eka Farida, 2023)

### **Time Allocation Considerations in Determining Child Custody Rights**

Time allocation here refers to a situation where parents have very demanding jobs, and must consider whether they can still spare time to care for their children. The high intensity of parents' work can reduce the quantity and quality of interactions with children, potentially neglecting the emotional and psychological needs of children. In addition, this measure can be used to assess how close the relationship between parents and children is. When parents have more time to be with their children, this will certainly have a positive impact on their relationship because it strengthens the emotional bond between the two.

Bowlby's theory, or attachment theory, developed by (John Bowlby, 1982) explains the importance of early relationships between children and caregivers in shaping the child's social, emotional, and cognitive development. This theory emphasizes that bonds formed in early childhood have a profound and lasting impact throughout the individual's life.

Similar considerations were used by the Supreme Court in decision Number 349K/AG/2006 involving public figures, Tamara Bleszynski, and Teuku Rafly Pasya, in a custody dispute over their child, Teuku Rassya, who was six years old at the time. In the decision, custody of the child was awarded to Teuku Rafly Pasya. The panel of judges made this decision by considering the intensity of Tamara's work as a public figure, which was considered to limit direct involvement in parenting. Therefore, if custody was handed over to her, it was feared that it would result in a lack of attention, affection, and emotional attachment between mother and child due to her busy schedule. (Sari, 2011)

As time goes by, many mothers are now more active in their careers outside the home than fathers. Because of the busyness of the mother, the child may experience a lack of attention, love, and time that a mother should give. To ensure that the child's needs are not neglected, the Judge may decide to give custody to one of the parents who is able to spend time every day with the child. (Lyne Ranson, 2025)

### **CONCLUSION**

Of the various regulations governing the best interests of children, there are no provisions that explicitly determine who, between the mother or father, has the right to care for the child, except in Article 105 of the Compilation of Islamic Law which emphasizes that the mother has more rights to care for children who are not yet of puberty (*mumayyiz*). Although stated in the Compilation of Islamic Law, this regulation basically only functions as a Presidential Instruction and is not included in the legislative sequence, plus the provision has lost its relevance in the current era. This shows the need for several criteria that must be met to obtain child custody. The appropriate criteria for the judge's legal considerations in accordance with the principle of the child's best interests that can be used in decisions regarding child custody include the child's welfare, parental behavior, cooperation between parents, and parental time management. The judge can also add other criteria if he feels it is necessary as long as the child's best interests are maintained.



Judges need to be more careful, thorough, and accurate in every legal decision taken when approving who holds child custody. In addition, judges are expected not only to follow existing legal regulations, but also to pay attention to the facts that emerge during the trial. This aims to protect the interests of the child by granting custody to individuals who are capable of caring for and educating the child. In relation to determining child custody, judges must always consider the best interests of the child and the behavior of the parents who will be responsible for them in the future. These considerations must always be used as a basis for determining child custody, because if these two aspects are ignored, it is clear that the fulfillment of the child's interests will not be achieved.

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