

Determination of Custody Rights (Hadhanah) for Children Who Are Not Yet Mumayiz to the Father

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ABSTRACT

Background. One of the legal consequences of the breakdown of marriage due to divorce is the custody of children, which in fiqh literature is called Hadhanah.

Purpose. The purpose of this paper is to: (a) provide information on the distribution of hadhanah rights to fathers for children who are not yet Mumayiz due to divorce.

Method. The research method used in this research is a qualitative method with the type of normative juridical research based on primary and secondary legal materials, namely research that refers to the norms contained in the legislation. Hadhanah is a right that must be fulfilled by adults who are required to take care of the needs of a child including providing education and support to children who are not old enough.

Results. The results of this study indicate that hadhanah in Islamic law prioritizes the best interests of the child. This is in accordance with the basic principles of Islamic law (found in the Qur'an and Hadith), which state that children have inherent rights in relation to both parents. Likewise, it is used in positive law in Indonesia. Parental authority over children after divorce according to the provisions of the two laws (Islamic Law and Indonesian Positive Law) is in line. Both divorced parents must continue to fulfill their children's hadhanah in accordance with the rights of children in the Child Protection Law, namely, the rights to life, growth, protection and participation.

Conclusion. Therefore, when a divorce occurs, it will have certain legal consequences, especially the issue of Hadhanah (child custody). Hadhanah itself in fiqh terms is used two words but intended for the same purpose, namely Kafalah and Hadhanah. what is meant by Hadhanah or Kafalah in a simple sense is 'Maintenance or 'Care.

KEYWORDS

Children, Divorc, Hadhanah

INTRODUCTION

Over the course of a lifetime, mankind encounters three very important laws of significant events, namely birth, marriage and death (Di Vaio dkk., 2020). As social beings, humans have an innate desire to live in close proximity and engage in continuous interaction with each other (Tambe dkk., 2019). Marriage occurs because everyone has a desire within themselves to be with another person. It is a sacred bond as a link in forming a family or building a household as a man and a woman.

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It is stated in Article 1 of Law Number 1 of 1974 concerning Marriage that Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the Almighty God. eternal based on God Almighty (Coppola dkk., 2019). Humans do marriage because humans as living beings must support their offspring (Paul dkk., 2021). The enactment of Law No. 1 of 1974 is actually an attempt to implement unification of family law, especially in the field of marriage and other aspects related to marriage (Morel dkk., 2020), but the intended unification is not as perfect as expected. To say that Law No. 1 of 1974 has not regulated all aspects related to family law, it is necessary to look at the substance of Law No. 1 of 1974, which broadly regulates (Y. Yang dkk., 2019): (1) the basis of marriage; (2) the conditions of marriage; (3) the prevention of marriage; (4) the annulment of marriage; (5) marriage agreements; (6) the rights and obligations of husband and wife; (7) property in marriage; (8) the dissolution of marriage and its consequences; (9) the position of children; (10) the rights and obligations between parents and children; (11) guardianship; (12) proof of the origin of children; (13) child custody.marriage outside Indonesia; and (14) mixed marriage.

Marriage is a binding agreement, and a marriage can break up or end due to several factors, one of which is divorce (Chandrasekar dkk., 2020). Although divorce is allowed and legal in law. In this case, the divorce issue must be resolved properly. A family split will result in the roles, rights and obligations of both parties (W.-Y. Yang dkk., 2019). Divorce is a traumatic event for all parties involved for couples who can no longer live together and also for children, in-laws / in-laws, friends, Divorce in the family is a major change, for children will experience emotional and behavioral reactions due to the loss of one parent (Sudarsono, 2010).

Juridically, divorce has been regulated in Law No. 1 of 1974 concerning marriage (Karimi-Maleh dkk., 2022). Based on Law Article 41 Number 1 Year 1974, it is clear that even though a marriage has broken up due to divorce, it does not result in the relationship between parents (divorced husband and wife) and children born from the marriage being broken up (Zhang dkk., 2020). Article 41 above clearly regulates that a divorced husband and wife still have the obligation as parents, namely to raise and educate their children, including financial problems arising from raising and educating the child.

The legal consequences caused by divorce are at least three. First, the legal consequences for the child. Second, the legal consequences for the former husband or wife. Third, the legal consequences of joint property (Luque dkk., 2019). When a divorce occurs, it will have certain legal consequences, especially the issue of Hadhanah (child custody). Hadhanah itself in fiqh terms uses two words but is intended for the same purpose, namely Kafalah and Hadhanah (Riess dkk., 2019). what is meant by Hadhanah or Kafalah in a simple sense is 'Maintenance' or 'Care'. In a more complete sense, it is the maintenance of a young child after the breakup of a marriage. This is discussed in fiqh because practically between husband and wife there has been a separation while the children need help from their father and/or mother (Syarifuddin, 2014).

RESEARCH METHODOLOGY

The method used in this research is qualitative. Qualitative Research Method is in a qualitative research process that things that are subject perspective are more highlighted and theoretical foundations are utilized by researchers as a guide, so that the research process is in accordance with the facts encountered in the field when conducting research (Stuart dkk., 2019). The type of research used is juridical-normative, where law is conceptualized as what is written in legislation (law in books) or law is conceptualized as rules or norms that are benchmarks for human behavior that are considered appropriate (Nosyk dkk., 2021). This normative legal research is based

on primary and secondary legal materials, namely research that refers to the norms contained in laws and regulations (Callhoff dkk., 2020). Qualitative methods are used in writing this article, namely by conducting a literature study approach (Library Reseach), by reading, collecting the necessary data and information collected from books (Fiqh Sunnah, Kifayah al-Akhyar, Fiqh of Children, Islamic Methods in Raising and Educating Children and Laws Relating to Children's Activities, Compilation of Islamic Law, etc.) that have to do with the writing of this article.

The data sources obtained by researchers are: 1) Primary data, in this research is legislation and also the decision of the Sukabumi city religious court 2) Secondary data is data obtained indirectly from the source (Makdessi dkk., 2019). In this study, secondary data sources were obtained from data on juridical analysis of child custody decisions (Hadhanah) that are not yet mumayiz in relation to Law number 1 of 1974 concerning marriage and the Compilation of Islamic Law (Pretorius dkk., 2021). This secondary data comes from written data such as books, journals, and relevant research results which are then scrutinized and compared with existing information so as to produce maximum results (Elvén dkk., 2022). With data collection techniques by direct observation and interviews with authorized and related parties, namely the Sukabumi city religious court.

RESULT AND DISCUSSION

Definition of Hadhanah

Etymologically, hadhanah comes from the word (حج)hadana, meaning to gather, stay, maintain, nurture, embrace, and place something in front of the armpits and navel. The word al-hidn means 'rib' (Mao dkk., 2019). Then the word Hadhanah is used as a term with the meaning of 'Childcare', namely putting something near the ribs or on the lap because a mother who cares for and carries her child often puts it on her ribs or in the lap next to her ribs (Scarabottolo dkk., 2022). As if at that moment the mother protects and nurtures her child.

In terminology, Hadhanah is the education and care of children from birth until they are able to stand on their own. Parenting means educating and caring for children, taking care of their food, drink, clothing, and hygiene (Bojanic & Warnick, 2020). According to the term of fiqh experts, hadhanah means protecting the child from all kinds of dangers that may befall him, maintaining his physical and spiritual health, maintaining his food and cleanliness, seeking his education until he is able to stand alone to face life as a Muslim....

As according to the opinion of scholars who are experts in the field, hadhanah is related to three rights simultaneously, namely:

1. the right of the person who maintains (hadhin)
2. the right of the person being cared for (mahdun)
3. the right of the father or his guardian.

If the three rights can be combined then it is obligatory to do so. However, if they conflict, the rights of the person being cared for take precedence. (Zuhaili, 2011)

According to the Compilation of Islamic Law Chapter I General Provisions, Article 1 letter g 'Child maintenance or hadhonah is the activity of caring for, maintaining, and educating children until they are mature or able to stand on their own'. Based on the last paragraph of the article, it is implied that one of the objectives of hadhanah is to take care of children who are not yet mumayyiz or cannot stand on their own by taking care of all their needs and the needs of their siblings, both physical and spiritual needs, and this must be done by people who have the right to hadhanah according to their abilities. As we know that hadhanah is the first manifestation of the relationship between the family and the holy one, therefore, as a representative of hadhanah, it is a must for you

to fulfill all the needs of the child as described above. Hadhanah also includes the notion of education of the child, as opposed to physical and spiritual care. The most effective initial education should include teaching the creed, worship, al-akhlak al-karimah, mental development, and society. No doubt Again, the portion mentioned for education is there.

Legal Basis of Hadhanah

Regarding the rules in Hadhanah, it is also regulated in the Compilation of Islamic Law and Marriage Law Number 1 of 1974. Hadhanah arrangements in the Compilation of Islamic Law are contained in CHAPTER XIV concerning Child Maintenance Article 105, namely:

In the event of divorce

1. maintenance of children who are not yet mumayyiz or not yet 12 years old is the right of the mother.
2. the maintenance of children who have mumayyiz is submitted to the child to choose between the father or mother as the holder of the maintenance rights.
3. the cost of maintenance is borne by the father.

And also explained in Article 106

1. Parents are obliged to care for and develop the property of their children who are not yet adults or under guardianship, and are not allowed to transfer or mortgage it except for urgent needs if the interests and interests of the child require it or a fact that cannot be avoided anymore.
2. The parents shall be liable for any loss incurred as a result of their fault or negligence of the obligations mentioned in paragraph 1.

Regarding the Hadhanah Arrangement in Marriage Law Number 1 of 1974, it is explained in CHAPTER VIII of the Breakup of Marriage and its Consequences in Article 41.

The consequences of the breakdown of marriage due to divorce are:

1. Both mothers or fathers remain obliged to maintain and educate their children, based solely on the interests of the child, if there is a dispute regarding the control of the children, the Court gives a decision.
2. The father is responsible for all the costs of maintenance and education needed by the child, if the father in reality is unable to fulfill this obligation, the court can determine that he shares the costs.
3. The court may oblige the former husband to provide livelihood and/or determine an obligation for the former wife.

Also found in Article 49, namely:

One or both parents may be deprived of their authority over one or more children for a certain time at the request of the other parent, the child's family in a straight line up and the child's adult siblings or an authorized official with a Court decision in cases:

1. She is grossly neglecting her duties towards her child;
2. She has behaved badly.
3. Even if the parents are deprived of their authority, they are still obliged to provide maintenance to the child.

Conditions of Hadhanah maintenance

The maintenance or upbringing of a child applies to the two elements that make up the harmony in law, namely the parent who cares for the child called hadhin and the child who is cared for called mahdhuun, each of which must adhere to the principles that have been established to carry out the necessary and appropriate care actions. After a divorce and the two of them have to separate, the mother or father is obliged to take care of the child individually (Syarifuddin, 2014).

Fathers and mothers who will act as caregivers are required to do the following: (Syarifuddin, 2014)

1. Already an adult. Immature people will not be able to carry out this heavy task, therefore the obligations and actions carried out by them have not been declared to meet the requirements.
2. Healthy thinking. A person of unsound mind, such as an idiot, is incapable of acting for himself or herself and in his or her situation will certainly not be able to act for others.
3. Being Muslim. This is the view of the majority of scholars, because the task of care is an educational task that will direct the religion of the child being cared for. If the child is cared for by someone who is not Muslim, it is feared that the child being cared for will be far from his religion.
4. Fair in the sense of doing well, by abandoning major sins and avoiding minor sins. The opposite of fair in this case is called fasiq, which is inconsistent in religion. People whose religious commitment is low cannot be expected to care for and maintain young children.

The requirements for the child to be cared for (mahdhun) are: (Syarifuddin, 2014)

1. He is still a child and cannot stand alone in taking care of his own life.
2. He is in a state of imperfect intellect and therefore cannot act on his own, even though he is an adult, such as an idiot. A person who is an adult and of sound mind should not be under the care of anyone.
3. The person who has the right

Although there has been a divorce between husband and wife, they are still obliged to maintain and educate their children solely for the benefit of the child. The problem is that if a divorce occurs, who has the right to care for the child. (Elimartati, 2013) In a hadith narrated by Ahmad and Abu Dawud there was an incident, a woman came to the Messenger of Allah and said: From Abdullah Ibn Amr that there was a woman said, "O Messenger of Allah, indeed my son is my stomach that contains him, my milk that gives him drink, and my lap that protects him. But his father who divorced me wants to take him away from me. So the Prophet said to him, "You have more right to her as long as you are not married." (Hajar, 2013) The legal content contained in the hadith illustrates that a mother has more rights than a father in terms of caring for a child, if the father wishes to take the right of care from the mother's hands. According to the majority of scholars, if the mother of the child in question has remarried another man, then the right of hadhanah for the mother is waived.

In this case, Article 156 letters a and b of the Compilation of Islamic Law emphasizes that the consequences of the breakdown of marriage due to divorce are:

Children who are not yet mumayyiz are entitled to hadhanah from their mother, unless the mother has died. Children who are not yet mumayyiz are entitled to hadhanah from their mother, except if the mother has died, then her position is replaced by:

Women in a straight line up from the mother;

1. Father
2. Women in a straight line up from the father;
3. The sister of the child concerned;
4. Women blood relatives in the side line from the father.

Children who have mumayyiz have the right to choose to get hadhanah from their father or mother; Meanwhile, the cost of caring for children is borne by the father. Everything the child needs is obliged to the father to provide it. If the nurturing mother does not have a place to live, the father must provide it so that the mother can take care of the child as well as possible. If for the purposes of good upbringing a domestic servant is needed, and the father is able, he is obliged to provide one.

If the child is still breastfeeding, and the mother needs healthy food, medicine, vitamins and so on to breastfeed the child properly, all of this is the father's responsibility. When it is time for the child to go to school, the father is also responsible for the cost of education (Azhar Basyir, 1999).

Similarities with fiqh and positive law on hadhanah for children who are not yet mumayiz.

For the benefit of the child. According to Article 41 of Marriage Law No. 1 of 1974, "the mother and father are still obliged to maintain and educate the child solely for the benefit of the child". Article 2 of Law No. 23/2002 on Child Protection stipulates the obligation to provide protection to children based on the principle of the best interests of the child. This positive law provision is in line with sharia law provisions that prioritize the interests of the child. From a fiqh perspective, the mother is more entitled and prioritized to conduct hadhanah than the father because the mother has the right to care for and breastfeed, considering that the mother understands and is better able to educate her child. Mothers are more patient than fathers, and mothers have more time than fathers. In addition, mothers have more time than fathers. Therefore, to safeguard the welfare of the child, the mother is prioritized. In this case, one of the judge's considerations in adjudicating the case was to prioritize the interests of the child. Although still a minor, the child was already attending school and being cared for by her father. The school environment is a new and important environment for the child. By acquiring new knowledge and witnessing the behavior of members of his new society, he begins to review all the lessons and behaviors he acquired in his home environment, and then chooses a permanent form for himself. Therefore, childhood is a very important and decisive period. Therefore, if the child is cared for by the mother, the child suffers because the child takes a long time to adapt to his new environment, both at school and in the surrounding environment.

In the case of hadhanah children who do not become mumayiz, the difference with fiqh and positive law is that in the provisions of fiqh the caregiver is responsible for taking care of and regulating the interests of the minor children in his care, namely the requirements of certain sufficiency and sufficiency. the conditions are baligh and reasonable, mature, educated, trustworthy and moral, Islamic, and the mother is not remarried. independent. Indonesian legislation, as is clear from the Compendium of Islamic Law, regulates childcare in this way. However, neither Law No. 1/1974 on Marriage nor the Codification of Islamic Law discusses the requirements of the person entitled to care. This is different from the fiqh rules which state that a caregiver must meet several criteria if he or she is to be given custody.

Guardianship or custody Basically, decisions need to be made to create justice and for that the judge assesses and reviews events and facts. This can be done with evidence, sorting out what is important and what is not, as well as requesting witness testimony and facts from other parties. Therefore, in the judge's decision, what needs to be considered is the legal reasoning, so as to assess whether the decision is fully in accordance with objective reasons.

In this case, there is a discrepancy between the religious court's decision and the provisions of the teachings and laws, in this case the legal provisions contained in the Codification of Islamic Law and Law Number 1 of 1974 concerning Marriage. This can be explained by consideration, namely making decisions based on the interests of the child. Article 105 of the Codification of Islamic Law states that it is the mother's right to raise a child who is aged or under 12 years. If the child is mumayiz, it is up to the child to choose between the father or mother as the custodian. Child support is borne by the father.

Article 156 of the Compilation of Laws states that as a result of the breakdown of marriage due to divorce, "children who are not yet mumayiz are entitled to hadhanah from their mother, except when the mother has died" One thing that is clear is that the Judge took the middle way by

instilling gratitude to paternal and maternal grandparents for his own children as well as extended family and school for the young ones. During this time, every organization has examined the position of "good faith" in children. If the mother of the child has expressed her concern for the child to the father and the father refuses to allow the child to meet the child, then it can be assumed that the father has the means and ability to care for the child. Thus, the sacrifice and affection of each party in this case should not be undermined by overly formal juridical considerations. Thus, it can be said that it is important to understand the Court decisions that can be used as a practical implementation of the fiqh legal text. The decisions in question emphasize concrete suggestions for improvement in everyday life, and the principle underlying the sentences also adapts the grammar of the text to suit everyday realities.

CONCLUSION

Therefore, when a divorce occurs, it will have certain legal consequences, especially the issue of Hadhanah (child custody). Hadhanah itself in fiqh terms is used two words but intended for the same purpose, namely Kafalah and Hadhanah. what is meant by Hadhanah or Kafalah in a simple sense is 'Maintenance or 'Care.

There is no Qur'anic verse or hadith that specifically talks about the provision of hadhanah rights given to children who are not yet Muslims, as stated in Article 105 letter (a), which states that the maintenance of children who are not yet mumayiz or not yet 12 years old is the right of the mother. However, when analyzing the situation that occurred in the religious court in Sukabumi, the legal basis used was Article 41 letter a of Law Number 1 Year 1974 concerning Marriage. The judge used the directed masalah al-mursalah problem solving method in dealing with the issue of hadhanah rights mentioned above by improving the psychological profile of young children.

The position of children in Islamic law is very high and noble, as in the hadith of the Prophet SAW narrated by Imam Bukhari and Imam Muslim who narrated from Sayyidina Anas bin Malik r.a., "that our lord the Prophet s.a.w. said "at first I was going to lengthen my prayer, but when I heard the cry of a baby crying, I was forced to shorten it because I knew how anxious the mother's heart was, and wherever the king was with a child, he lovingly held him holding him lovingly."

AUTHORS' CONTRIBUTION

Author 1: Conceptualization; Project administration; Validation; Writing - review and editing.

Author 2: Conceptualization; Data curation; In-vestigation.

Author 3: Data curation; Investigation; Formal analysis; Methodology

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