The Protection Of Civil Rights Against Minority In The Case Of Divorce

Marsudi Utoyo[1]; Kumba Digdowiseiso[2]
[1]Sekolah Tinggi Ilmu Hukum Sumpah Pemuda Palembang, Indonesia
[2]Faculty of Economics and Business, University of National, Jakarta
E-mail: mutoyo68@gmail.com [1]: kumba.digdo@civitas.unas.ac.id [2]

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Abstract
The child is a legal subject who needs to be protected if there is a divorce. The wife or other woman designated by the terms and conditions of the law has the primary responsibility for raising the child until they are old enough to care for themselves. Children's parents are still obligated to provide a suitable environment for them to live in and to safeguard them, including by covering their living expenses. In accordance with the child's best interests and the idea of safeguarding children's rights, parents are still required to provide for and educate their children. Even if the biological mother is allowed hadhonah privileges in the custody case since she is the child's primary caregiver, the judge.

A. INTRODUCTION

Marriage holds great sanctity for those who engage in it. The objective of marriage is to establish a humble and harmonious family unit that can cultivate happiness and tranquility for both the married couple and other members of the family (Bakry, 2020). Undoubtedly, every married couple aspires to have a family characterized by sakinah, mawaddah, and rahmah. Nevertheless, not all marriages will culminate in happiness; divorce is unquestionably one such outcome. Child support is a matter that will emerge subsequent to a divorce (Firmansyah et al., 2022).

The primary societal unit is the family. Moreover, households are an escalating social concern. If a home lacks excellence, both individuals and society as a whole will fail to progress towards becoming a good society. Within this household resides a domicile, a place where a contented family thrives. Family cohesion will be fostered (Ilham, 1420 H).

In a household, even if there are only two individuals, specifically the husband and wife, who initially cultivate a relationship replete with affection that seems impervious to the passage of time, in actuality, if this sentiment of affection is not adequately nurtured, it will diminish and potentially dissipate entirely. Hatred has

assumed its position. If a sense of animosity has arisen between the husband and wife, they will be incapable of resolving the matter and restoring the situation to its previous state of harmony, ultimately impacting their child in a detrimental manner. Hence, it is necessary to implement measures aimed at reigniting affection (Zeim, 2004).

In the event of a divorce between a husband and wife, the wife or another woman who meets specific criteria is entrusted with the duty of caring for the child until they reach an age where they can independently take care of themselves. This research aims to address the following inquiries: 1. What responsibilities do parents have towards their children following the legal dissolution of their marriage by a court? 2. What criteria does the judge consider when awarding legal protection for child custody?

B. METHODS

Legal research is a systematic and scientific process that seeks to find solutions to legal problems or issues that arise (Marzuki, 2010). It aims to provide a perspective on the expected state of affairs concerning legal difficulties. Hence, it can be argued that the study of law involves acquiring knowledge about legal principles, rules, and doctrine in order to effectively tackle encountered legal challenges (Marzuki, 2010). The preferred methodology for this research is the juridical-normative approach, which involves analyzing the implementation and execution of an issue in society, while also evaluating and analyzing it through the lens of legal concepts and principles. The research methodology utilized in this study is both analytical and descriptive, aiming to address the investigated issue by presenting a comprehensive analysis or providing illustrative examples of the current situation (Sonata, 2014).

C. RESULTS AND DISCUSSION

The duties and responsibilities of parents towards children are subject to post-divorce decisions in court.

Each individual was created as part of a pair. The act of conducting a marriage ceremony that adheres to diverse religious and philosophical customs serves as a demonstration of unity (Matouschek & Rasul, 2008). Humans possess an inherent inclination to reside within a communal setting alongside fellow individuals. This arises from the inherent sociability of human beings. Marriage is legally recognized as the act of living together as a couple consisting of one man and one woman, who must fulfill certain criteria (Prodjodikoro, 1984).

Marriage, in accordance with the relevant rules and regulations, signifies the commencement of cohabitation between a man and a woman. Marriage is a respected

and esteemed partnership between two individuals who have cohabitated for an extended period and have fulfilled the necessary requirements for marriage. The inclusion of children within a family serves as a valuable addition to the overall contentment of a marital union. Children are a divine blessing bestowed upon individuals or married couples, requiring diligent care, supervision, and optimal nurturing. This is essential for their holistic development and to ensure their future contributions to their homeland, religion, or family.

Essentially, children are unable to shield themselves from vibrant behaviors that result in internal, physical, and social harm in colorful aspects of their lives, given their circumstances and conditions. Children require protection to prevent them from experiencing harm, whether it be psychological, physical, or social in nature (Gultom, 2012).

Children are entitled to receive services that facilitate the development of their abilities and social interactions. Children are entitled to protection from any adverse environmental conditions that may hinder or impede their normal development (Firtri et al., 2022).

According to Law Number 16 of 2019 on Marriage, it specifies the entitlements and obligations of parents and children. According to Law Number 16 of 2019, specifically in Composition 45 paragraph 1, it is mandated that both parents have a duty to diligently care for and provide education to their children. Meanwhile, in paragraph 2, specifically, the scores of parents mentioned in paragraph 1 are relevant until the child reaches maturity or can function independently. This obligation persists even if the marriage between the two individuals comes to an end.

According to this composition, it is evident that even if the child's parents have separated or disassociated, their parental responsibility to grant their child's rights remains intact. It is crucial to uphold the rights of children as outlined in Composition 45 paragraph 1 of Law Number 16 of 2019 regarding Marriage.

Within the context of marriage, individuals aspire to achieve a harmonious, everlasting, and prosperous household, in accordance with the provisions outlined in Law Number 16 of 2019. Not all individuals can establish the family they envision due to various forms of dissolution, such as death, divorce, talaq divorce, or divorce based on a judicial ruling. Divorce is the legal termination of the marital bond between a man and a woman, commonly known as husband and wife. This process is conducted in a court, specifically the District Court for non-Muslims and the Religious Court for Muslims.

The marriage law governs the responsibilities that parents have towards their children, even in cases where the family unit has been disrupted as a result of divorce.

Parental obligations encompass a range of responsibilities that parents are required to fulfill:

1. Parents have a duty to provide optimal care and education for their children;
2. Parents act as legal representatives for their children in both court and non-court proceedings;
3. According to Article 41 of the Marriage Law, the father is legally obligated to cover all expenses related to the child's maintenance and education. If the father is unable to fulfill this obligation, the court has the authority to assign the mother with the responsibility of bearing these costs. This obligation remains in effect even if parental authority is revoked.

According to Sudarsono (2005), the scores of the parents mentioned earlier continue to apply until the child gets married or becomes independent. This is also true if the marriage of both parents ends. Parents are required to actively oversee and instruct their underage offspring, even if they have forfeited their maternal or guardianship rights. They remain obligated to provide financial assistance for the upbringing and education of their children, proportionate to their income (Fitri, 2021).

According to Islamic Law, parents' attitudes towards their children after divorce, based on Islamic teachings, prioritize the well-being and honor of the children. Children hold a significant role in the teachings of the Qur'an and Al-Hadith. Therefore, it is crucial to treat children with kindness, provide them with education, guidance, discipline, and instill good moral values. This will enable children to develop into responsible individuals who can meet their own needs. The compendium of Islamic Law, specifically composition 77 of the KHI, regulates the obligations of parents towards their children:

1. The husband and wife have the important responsibility to maintain a peaceful, loving, and compassionate household, which serves as the fundamental foundation of society.
2. The husband and wife have a duty to love, respect, be faithful to, and support each other both physically and spiritually.
3. Both the husband and wife have the responsibility to provide for and nurture their children, encompassing their physical, emotional, and cognitive development as well as their religious instruction.
4. Both the husband and wife have a responsibility to uphold their dignity.
5. In the event that a husband and wife fail to fulfill their responsibilities, either party has the right to initiate legal proceedings in the religious court.

Composition 9 of Law Number 4 of 1979 concerning Child Welfare regulates parents' attitudes towards their children. It emphasizes that parents have the primary responsibility for ensuring the well-being of their children in terms of their physical,

spiritual, and social development. The parental duty to ensure the well-being of their children encompasses the responsibility to monitor and instruct them, enabling their intellectual and physical growth, fostering loyalty towards their parents, cultivating virtuous qualities, nurturing a strong connection with God, and instilling the determination and competence to pursue their aspirations. The foundation of the nation's principles is based on Pancasila (Apriyanita, 2017).

Moreover, according to Law Number 23 of 2002 on Child Protection, children who experience abuse and neglect are entitled to receive specific safeguards. Hence, it is imperative to provide specific safeguards for children who have been affected by divorce, including those who are facing difficulties, as mandated by Law No. 23/2002 on Child Protection.

The obligations of parents towards their children are also governed by Law Number 23 of 2002, specifically in article 26, which states the following:

1. Parents are obliged and responsible to: care for, maintain, educate and protect children, develop children according to their abilities, talents and interests, and prevent marriage at an early age.
2. In the event that parents are absent, or their whereabouts are unknown or for some reason, are unable to carry out their obligations and responsibilities, then the obligations and responsibilities as intended in paragraph (1) can be transferred to the family, which is carried out in accordance with the provisions of statutory regulations applicable laws.

Child care also means a parent's responsibility to supervise, provide appropriate services that meet the child's living needs from his parents, the obligation to care for the child is permanent until the child is able to stand on his own. The obligations of parents towards children after divorce according to Marriage Law Number 16 of 2019, legally the obligations between husband and wife will arise if the marriage has been carried out or is taking place. In other words, the obligations of a man or husband will not exist if a man or woman has not yet married.

The scores and rights are balanced between hubby and woman, videlicet the obligation to foster and uphold the ménage which is anticipated to come the base for erecting the ménage. The author agrees with Law Number 4 of 1979 composition 9 concerning child weal which states that parents are first of all responsible for the consummation of children's weal both physically, spiritually and socially. Parents' responsibility for the weal of their children contains the obligation to watch for and educate their children, so that children can grow and develop into people who are intelligent, healthy, devoted to their parents, have noble character, are devoted to God Almighty and have the will and capability to carry on their dreams. The nation's ideals are grounded on Pancasila. (Asman, 2023).

Judge's considerations in providing legal protection for child custody

Indeed though in Law Number 1 of 1974 in confluence with Law Number 16 of 2019 concerning Marriage there's no composition that regulates what happens if a child guardianship disagreement occurs, the judge must still examine and arbitrate the disagreement. This is in agreement with the vittles in Composition 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, videlicet" The court is banned from refusing to examine, try and decide on a case submitted on the rationale that the law doesn't live or is unclear, but it's obligatory to examine and make it. ”

In the event that the law doesn't live or is unclear, also the judge as an enforcer of law and justice is obliged to explore, follow and understand the legal values that live in society. The judge must also act on his own action to resolve the case by determining what constitutes the law, indeed if statutory regulations can not help him. The judge's conduct are called legal discovery(rechtsvinding)(Fanani, 2015):

1. If the disputed case cannot be found in positive law, nor can it be found in unwritten law, the judge is justified in looking for and finding it from jurisprudence (Harahap, 2007).
2. Different from Law Number 1 of 1974 in confluence with Law Number 16 of 2019 concerning Marriage, the vittles regarding child guardianship in Presidential Instruction Number 1 of 1991 concerning the compendium of Islamic Law are regulated in further detail. There are two papers that regulate child care, videlicet Composition 105 and Composition 156. Composition 105 of the compendium of Islamic Law confirms that children who aren't yet mumayyiz(have the capability to separate between good and bad) or aren't yet 12 times old are the right of their mama . still, indeed though in principle the child's guardianship falls to the mama , the compendium of Islamic Law still provides an occasion for children who are mumayyiz, to choose for themselves whether to follow their father or mama . Meanwhile, Composition 156 regulates who has the right to replace the mama 's position as the holder of child guardianship if she dies. Judges in examining and deciding guardianship controversies must prioritize the stylish interests of the child and guarantee the fulfillment of the child's rights so that they can live, grow, develop and share optimally in agreement with mortal quality, and admit protection from violence and demarcation, for the sake of the consummation of quality, noble and prosperous Indonesian children (Fanani 2015).

Judge's Considerations in Case Decision Number 472/Pdt.G/2020/PA. Plg

The legal basis of the Religious Courts is Number 50 of 2009 concerning Religious Courts. In proceedings at the Religious Courts, the procedural law that applies is the Civil procedural law that applies in the General Court environment, except for those that have been specifically regulated.

This is explained in Composition 54 of Law Number 7 of 1989 in confluence with Law Number 50 of 2009 concerning Religious Courts. Proceedings at the Religious Courts related to guardianship issues (hadhonah) can be filed together with the divorce action or independently, videlicet by filing the hadhonah issue again after the divorce action has attained a final and fairly binding decision. This is as explained by Composition 86 paragraph (1) of Law Number 7 of 1989 in confluence with Law Number 50 of 2009 concerning Religious Courts, videlicet" Claims regarding control of children, child support, woman 's support, and common means of hubby and woman can be filed together with the divorce action or after the divorce decision has endless legal force. Similar to requests for child custody in the District Court, even in the Religious Courts, requests to the Judge regarding child custody must be included in the posita of the lawsuit (Khairuddin et al., 2020).

To get an idea of the differences between proceedings in the District Court and the Religious Court, we will explain child care (Hadhonah) cases in Decision Number 472/Pdt.G/2020/PA.Plg. The plaintiff (NN-name changed) filed a child care lawsuit (hadhonah) with the Palembang Religious Court with (M. AF -name changed) as the Defendant.

The Plaintiff and Defendant were originally legal husband and wife, but then the plaintiff filed for divorce on February 3 2020. During their marriage the Plaintiff and Defendant were blessed with 2 (two) children, namely GSA ZP (name disguised) born on December 28 2013, GIA ZP (name changed) was born on March 20 2015. The plaintiff's request for divorce was because the defendant was unstable, so there were constant disputes and fights between husband and wife and there was no hope of living in harmony in the household again.

That the defendant had an affair with another woman and the defendant apologized and because of this cheating case the defendant was imprisoned. The plaintiff and the defendant had not lived in the same house for about 2 (two) years, the plaintiff left the place of residence they shared because the defendant was evicted.

During this separation, the Defendant never provided support, the Defendant only gave money to his child in March 2019. So the Plaintiff then filed a divorce lawsuit and this hadhonah request to the Court.

One of the legal consequences of divorce is regarding custody of children born during the marriage. In the General Provisions Article 1 letter g of the Compilation of Islamic Law, regarding the issue of custody as a result of the breakdown of a marriage

due to divorce, it is better known as Hadhonah, namely the activity of caring for, nurturing and educating children until they are adults or able to stand on their own.

Based on the case example above in Decision Number 472/Pdt.G/2020/PA. Please, divorce lawsuits and hadhonah as a result of a divorce, do not always coincide with divorce lawsuits. So it can be concluded that the filing of the lawsuit can be justified even though the parties are no longer married. In child custody after divorce, the form of request for determination of custody is in the form of a lawsuit. Those who have the right to file this lawsuit are none other than the child's parents.

Regarding the issue of hadhonah, it has been regulated in detail in Article 105 of the Compilation of Islamic Law, namely: In the event of a divorce:

a. The maintenance of children who are not mumayyiz or under 12 years old is the right of the mother;
b. The care of a child who is mumayyiz is handed over to the child to choose between the father or mother as the holder of the right to care;
c. maintenance costs are borne by his father.

Article 105 letter (b) of the Compilation of Islamic Law has provided an opportunity for children who are mumayyiz, to choose for themselves whether to follow their father or mother. In the case mentioned above, GSA ZP (name disguised) GIA ZP NA has not mummayiz.

Article 2 and Article 10 of Law Number 23 of 2003 in conjunction with Law Number 35 of 2014 concerning Child Protection, namely: "The implementation of child protection is based on Pancasila and based on the 1945 Constitution of the Republic of Indonesia and the basic principles of the Convention on the Rights of the Child includes:

a. Non-discrimination;
b. The best interests of the child;
c. The right to life, survival and development;
d. Respect for children's opinions.

What is meant by the principle of respect for children's opinions is respect for children's rights to participate and express their opinions in decision making, especially when it concerns matters that affect their lives.

Another similar provision is contained in Article 10 of Law Number 23 of 2003 in conjunction with Law Number 35 of 2014 concerning Child Protection: "Every child has the right to express and have his opinion heard, receive, seek and provide information according to his level of intelligence and age for the sake of personal development in accordance with the values of decency and propriety."

When a child reaches the age of 12, he is said to be mummayiz so that the child is considered competent and able to differentiate between good and bad. Therefore,

it is considered that he can make his choice whether to go with mother or father. This can be used as a basis for the judge to assess who has more rights to care for the children resulting from the marriage.

In the lawsuit for divorce before this lawsuit regarding hadhonah was filed by the Plaintiff as the mother of children named GSA ZP and GIA ZP, the Court awarded custody to the mother, due to the problem of an unstable father. This is based on the provisions of Article 156 letters (b) and (c), so that the Hadhanah is then transferred to the Plaintiff/mother of the children.

The Panel of Judges agreed with the opinion of Islamic legal experts as contained in the Bajuri Book Juz II page 195, which reads: "If a man divorces his wife, and he has children from his marriage to his wife, his wife has more rights to look after them."

Another opinion is contained in the Book of I`anatut Tholibin juz IV page 102, namely: "And if it is mummayiz where the father and mother have divorced, then the child's hadhanah rests with the father or mother who is chosen between the two."

Indeed though the Hadhonah rights were latterly given to the Plaintiff as his natural mama, the Defendant as the father was still responsible according to his capability to bear the costs of the hadhonah and child support at least until the child was an grown-up who could take care of himself (21 times). piecemeal from that, the Plaintiff who has the right to hadhonah can not ramify ties with the Defendant as his natural father and must give him the occasion to meet or visit hischildren.However, the right to visit is banned and is truly dammed, also it doesn't rule out the possibility of transferring guardianship of the child by filing a new action, If it isn't permitted.Even though the provisions in Article 105 of the Compilation of Islamic Law provide that automatically the Hadhonah/right to care for children who are not yet mummayiz (12 years old) fall into the hands of the mother, this provision is not applied absolutely, because if the father/husband wants custody of the child, The judge can give the right to hadhanah not to the mother but to the father. This must of course be accompanied by valid reasons for terminating the mother's parental rights.

For example, a mother has bad character, is morally disabled, or is mentally disabled. In principle, what takes priority is the benefit or best interests of the child himself. This provision can be waived solely for the interests and benefit of the child.

This means that Article 105 of the Compilation of Islamic Law must be interpreted contextually, because the main parameter in determining the right to care/hadhonah must be the benefit or best interests of the child. If the child's best interests are not realized, then the provisions in Article 105 of this Law Compilation must be set aside, as in Supreme Court Jurisprudence No. 349 K/AG/2006. The determination of the granting of Hadhonah rights is to whom of the father or mother

is best able to guarantee the maintenance of the child's welfare. To measure and clarify whether or not benefits are realized for the child, aspects must be taken into account that relate to the condition of the person who will care for and care for the child (Fanani, 2015).

The ultimate goal of justice seekers is so that their rights that have been harmed by other parties can be restored through a judge's decision. Of course, this can be achieved if the Judge's Decision can be implemented/executed. A Court Decision is meaningless if it cannot be implemented. Court decisions have executorial power, namely the power to carry out what is stipulated in the decision by force by State instruments. This executorial power is contained in the head of the decision, namely "For the sake of justice based on belief in the Almighty God."

The examination of the case will end with the handing down of a Verdict, but just passing a Verdict does not end the problem. The decision must be able to be implemented or carried out, because a decision is meaningless if it cannot be implemented. If within 14 (fourteen) days after the Decision is pronounced in an open hearing there is no legal action taken by the Parties, then the decision can be implemented and the parties must immediately comply with the contents of the Decision.

The implementation of this child custody decision is carried out without execution, or voluntarily. Execution regarding child custody is a type of decision that punishes one of the parties for committing an act, so that when the court decision is read, it is immediately followed by handing over the child to the party who has the right to care for him. However, having a judge's decision determining child custody does not necessarily mean that the other party who loses is completely free from their obligations and responsibilities as parents. On the other hand, the party who wins and gets custody of the children, must not prevent the losing party from carrying out its obligations and meeting/visiting the children.

If this voluntary execution cannot be carried out because the losing party does not want to carry out the decision handed down to him voluntarily, then the other party who has custody of the child can submit a request for execution to the Religious Court which decides the case. This request can be submitted either in writing or orally. This request is submitted so that forced execution measures can be carried out immediately by the authorized institution and not carried out alone by the party holding custody of the child. If the holder of child custody carries out such coercive measures himself, especially if it is done with violence, it could result in the execution being invalid because it does not comply with the proper procedures.

After the request for execution is received by the Court, the losing party is summoned and admonished him so that he voluntarily carries out his obligations by

carrying out the decision within a maximum period of 8 (eight) days. Next, a warrant of execution is issued, and the execution is carried out at the place where the Respondent is executed. The implementation is carried out by the bailiff assisted by 2 (two) witnesses.

In the field, there are often problems because the object of execution is not goods, but humans who of course have their own will. Therefore, a heart-to-heart approach is needed so that the execution can run smoothly without affecting the psychological condition of the child, especially if the child is still a minor.

If the disputed case cannot be found in positive law, the judge is justified in searching and finding it in jurisprudence. The following is some jurisprudence related to child custody issues:

1. Decision of the Supreme Court of the Republic of Indonesia No. 102 K/SIP/1973 dated 24 April 1975. In essence it regulates: "Based on the jurisprudence regarding child guardianship, the standard is that the biological mother is given priority, especially for young children, because the interests of the child are the criteria, unless it is proven that the mother it is unreasonable to maintain it."
2. Decision of the Supreme Court of the Republic of Indonesia. No. 423 K/SIP/1980 dated 23 September 1980 In essence, it states: "In the event of a divorce, minor children are under the guardianship of their biological mother."
3. Decision of the Supreme Court of the Republic of Indonesia No. 239 K/SIP/1990

In essence, it emphasizes: "In the event of a divorce between children who are still small and need their mother's love and care, their guardianship should be handed over to their mother."

In deciding whether custody rights will be given to a husband or wife, the judge first considers many things. The principle that is firmly adhered to in determining custody is that, even if the parents divorce, the welfare of the child resulting from the marriage must not be disturbed. This is what is guaranteed by law. The judge, in determining child custody, in the trial will determine who has cared for the child since childhood through the statements of witnesses, and usually this custody will be handed down to the mother/wife based on jurisprudence related to child custody, unless the reason is for filing for divorce. is the wife cheating or committing adultery. Apart from that, if during the trial it is discovered that the mother is not behaving well, then the provisions in the jurisprudence can be set aside, and custody can be given to the father. The judge will be of the opinion that the mother cannot set a good example to her children.

According to Law Number 1 of 1974 Juncto Law Number 16 of 2019 concerning Marriage, even though the marriage between two parents has broken up, they are still

obliged to care for and educate their child until they reach adulthood and fulfill all their needs. Parents are responsible for all property owned by their children, parents are not allowed to transfer or pawn these items unless it is aimed at fulfilling the child's interests. The father is also obliged to provide support for his education and livelihood. Parents can have their authority revoked if negligence is found. Apart from that, bad behavior can also result in parents losing custody of their children.

D. CONCLUSION

The duties and responsibilities of parents towards their children following a divorce decision in court are a form of parental responsibility towards their children that does not stop with the consequences of the divorce. Parents are still responsible for carrying out their responsibilities, such as paying living expenses for their children, providing a decent place to live, and providing protection for them. Parents are still obliged to care for and educate their children solely based on the child's interests.

The judge's consideration in handing over child custody is that even though the rights of hadhonah are then given to the biological mother, as the father he is still responsible according to his ability to bear the costs of the hadhonah and child support at least until the child is an adult and can take care of himself until the child is 12 years old, determining rights care for children who are not yet adults is automatically in the hands of the mother. However, this provision is flexible, in the sense that it can be set aside if facts are found that give the father more rights to care for the children resulting from the marriage.

Regulations regarding guaranteed rights to children after divorce are only regulatory in nature without any strict sanctions attached to them, this then triggers failure of one or even both parents to fulfill their obligations after divorce. Judges should be smarter and more precise in analyzing the law and smarter in interpreting the law in situations where a family or cultural approach can still be taken so that the implementation of the law does not run too rigidly and too formally so that sometimes it will lead the law away from a sense of justice

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