

# **Fulfillment of Child Custody Rights After Divorce According to Law Number 35 of 2014 concerning Child Protection**

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## **ABSTRACT**

Children are a trust and gift from the Almighty God, in whom the honor and dignity of being a complete human being is inherent, and every child who is born has his rights. The aim of this research is to fulfill custody rights for minor children after divorce, reviewing Law no. 35 of 2014 concerning fulfillment of child custody rights after divorce. The research method uses empirical methods through a qualitative approach. The results of research reviewing child custody after divorce in Indonesia in Law Number 35 of 2014 concerning child protection, its implementation has not been fully resolved properly, so it can be said that children's rights have not been fully protected. Neglect of children's rights to receive care from their own parents, neglect of Article 14 concerning children's rights to receive care, maintenance, education and living expenses. and Ignoring Article 26 concerning the obligations and responsibilities of parents in caring for, protecting and educating children.

**Keywords:** Children, Protection, Parents, Constitution.

## **1. INTRODUCTION**

Children are a trust as well as a gift from Allah SWT that we must always take care of because in them are attached dignity, dignity, and rights as human beings that must be upheld. From the perspective of national and national life, children are the future of the nation and the next generation of the nation's ideals, so that every child has the right to survive, grow and develop, participate and have the right to freedom from acts of violence and discrimination as well as civil rights. Child custody or in Islamic law is known as the term Hadhanah. Hadhanah is an activity of nurturing, nurturing, educating a child until he grows up or is able to stand on his own. From a marriage, a child is born as an heir to his parents' wealth (Siswanto & Putri, 2021). The desire to have children for every married couple is a human instinct and by nature the children are the mandate of Allah SWT to the married couple. For the parents, the child is expected to be able to raise the degree of dignity of the parents later when he grows up, becoming a pious and pious child who always prays for and obeys both his parents (Putra, 2019).

Based on this thought, both fathers and mothers have a strong desire to be closer to their children so that they can directly guide and educate them so that in the future when their children



are adults they can achieve all their dreams. Likewise with children, they always want to be close to their parents, because they still really need love, attention, support and guidance from their parents. Children also still really need protection and care from their parents, until one day they grow up and are able to protect and take care of themselves. Child custody is something that must be carried out by both parents for children who are still small or not yet Mumayyiz without exception. Because without child custody it will result in children being neglected and their lives being wasted (Zubair, 2022).

A person who carries out child custody duties plays a very important role in this matter. Therefore, the issue of child custody receives special attention in Islamic teachings. It can be seen that child custody according to language is like placing something close to the ribs, such as carrying or placing something on the lap. For the benefit of a child, a caring attitude from parents regarding child custody issues is very necessary, otherwise it could result in a child growing up uncared for and not directed as expected. So what is most hoped for is integrated cooperation between father and mother in carrying out this task. Which is a collaboration between father and mother in carrying out this task. This relationship between the two of them will only be possible as long as the two of them remain in a husband and wife relationship. In this case, even though the task of child custody is in accordance with its nature, it will be mostly carried out by the mother, naming in creating a peaceful atmosphere in the household where the child is cared for and raised (Siswanto & Putri, 2021).

Just like marriage which creates rights and obligations, divorce has legal consequences for both parties and also for the children born. These children have to live in a family that is not as harmonious as it should be, for example they have to live in a family with a single parent, such as with a mother or with a father. However, when the marriage cannot achieve this goal, divorce becomes the last resort. When a divorce occurs, usually the problem is regarding the children, who will look after them and who will bear the costs of their maintenance. Children should not be victims and should not make them feel uneasy because parents must always protect and give them happiness and must always be responsible for their physical and spiritual happiness. That is why the custody and maintenance of children is completely the responsibility of the parents until they grow up.

The Compilation of Islamic Law also states in article 105 KHI in the case of divorce:

1. The custody of a child who has not yet reached the age of majority or who is not yet 12 years old is the right of the mother.
2. Custody of a child who is already Mumayyiz is handed over to the child to choose between his father and mother as guardians.



3. The maintenance costs are borne by his father.

Article 105 of the Compilation of Islamic Law above explains that for those who embrace Islam, the rights of custody of minors fall to their mothers. Children's rights are also contained in the 1945 Constitution and the United Nations Conference on Children's Rights in Article 41 paragraph 2 of Law Number 1 of 1974 concerning Marriage, Law No. 35 of 2014 also explains explicitly the rights of children. children's rights must be fulfilled. With the existence of this law, it becomes clearer that children are so important in the position of family, individual, society, nation and state, the state regulates through law the rights of these children (Puspitosari, 2014). Law No. 35 of 2014 about child protection. In this Law it is regulated about the rights of children which reads:

1. Article 7 paragraph (1) and article 14 regulate the right to receive care. Article 7 paragraph (1) states: every child has the right to know his parents, to be raised and cared for by his own parents. Meanwhile, article 14 states that: every child has the right to be raised by his or her own parents, unless valid reasons and/or legal regulations suggest that separation is in the best interests of the child and is a final consideration. The provisions in this article that are meant by "separation" include separation due to divorce and other situations without eliminating the child's relationship with his parents, such as children whose parents leave abroad or are in prison.
2. In article 26 of the child protection law, it is stated that: Parents have the obligation and responsibility to: Care for, maintain, educate and protect children as well as develop children according to their abilities, talents and interests and prevent marriages at the age of children. Providing character education and instilling moral values in children. In the event that parents are absent, or their whereabouts are unknown, or for some reason, cannot fulfill their obligations and responsibilities, then this matter can be transferred to the family, which is carried out in accordance with the provisions of the applicable laws and regulations.
3. In article 33 it is stated that: In the event that the child's parents and family are unable to carry out the obligations and responsibilities as in article 26, a person or legal entity that meets the requirements can be appointed as the representative of the child concerned. To become a guardian of a child is done through a court order. The appointed guardian must have similarities with the child's religion. The guardian is responsible for the child and is obliged to



manage the child's property in the best interests of the child. Further provisions regarding the terms and procedures for appointing a guardian are regulated by government regulations.

As explained in the law above, in reality the situation of children in Indonesia is still not encouraging. Their fate is not as beautiful as the verbal expressions that often position children as having important value, the future successors of the nation and a number of other symbols. At the legal level, the rights given by law to children have not been fully enforced. Children's rights as intended in legal documents regarding the protection of children's rights are still not effective enough to eliminate bad conditions for children. In reality, the world order and social behavior still have children's problems. In fact, such a situation has not only hit Indonesia, but also almost throughout the universe.

The prevalence of life in society which is related to child neglect in child custody is due to non-fulfillment of child custody rights, which creates injustice for children, who should still need love, protection, to be raised and cared for by their own parents, in other words, nowadays Most parents have not fulfilled their children's rights after divorce.

Child custody issues that occur are often inversely proportional to what is clearly regulated, both in Islamic law and the legislation in force in Indonesia. As we already know, child custody problems arise because of divorce between husband and wife who already have children. One of the biggest triggers for divorce is economic factors and harmony in the household. Conflicts that often occur in families are common if the wishes and interests of children are the victims. This is due to economic factors. This is the problem that women face after divorce, requiring them to find work that can support themselves and their children.

It is clear in the Compilation of Islamic Law article 105 that it is explained that custody of children whose custody is not yet Mumayyiz falls to their biological mother and financing until adulthood falls to the father (Krisna, 2018). Because mothers play a very important role in a child's growth. However, the mother, who was mandated by the judge's decision and the Compilation of Islamic Law as the holder of custody of the child, left the child without giving the child the rights he should have. When mothers leave to become workers, they tend to neglect their obligations towards fulfilling their children's rights and neglect their children.

As the father's duty here as the person who finances the child until adulthood, the fact is that the father neglects his duty as a father. Although the parents are no longer in the same family, the issue of the child's rights remains the responsibility of both parents and cannot be transferred to other than the two parents.



The public's understanding of carrying out their obligations as parents, especially those involved in divorce, is very minimal, as evidenced by knowledge that is limited to children's rights regarding living costs (Saraswati, 2015). Therefore, it is necessary to study legal principles regarding the implementation of child protection rights provisions, due to several factors that become obstacles, including economic limitations, parental negligence and low parental knowledge. Therefore, it is necessary to examine legal principles regarding the implementation of fulfilling children's rights in child custody after divorce, which so far has not been able to implement child protection provisions.

## **2. RESEARCH METHODS**

The research method used in this research is empirical. The research approach used is a qualitative approach. because this approach is more descriptive and there is direct interaction between the researcher and the data source. Where in this approach the researcher becomes the key instrument because he acts as a key figure in seeking meaning from the research results. To obtain data, the author conducted interviews, thus the data source that will be the basis of the research comes from interviews accompanied by several book literature, or other literature.

## **3. RESULTS AND DISCUSSION**

### **Custody of Minor Children After Divorce**

Child protection is an embodiment of justice in a society, thus child protection is sought in various areas of state and social life (Saraswati, 2015). Child protection activities have legal consequences, both in relation to written and unwritten laws. According to Arif Gosita, legal certainty is sought for the continuity of child protection activities and to prevent abuses that lead to undesirable negative consequences in the implementation of protection.

The principles of implementation of child protection are:

1. Philosophical Basis: Pancasila is the basis for activities in various areas of family, community, state and national life as well as the philosophical basis for implementing child protection.
2. Ethical Basis: the implementation of child protection must be in accordance with related professional ethics, to prevent deviant behavior in the exercise of authority, power and strength in the implementation of child protection.
3. Juridical Basis: implementation of child protection must be based on the 1945 Constitution and various other applicable laws and regulations. This juridical



application must be integrative, that is, integrated application regarding statutory regulations from various related legal fields.

Child protection can be done directly or indirectly. Directly means that the activity is directly aimed at the child who is the direct target of the violation. Activities like this can be done by protecting children from various external and internal threats, such as educating, developing, assisting children in various ways. Indirect child protection, namely activities not directly aimed at children, but other people who carry out or are involved in child protection efforts. In UU.No. 35 of 2014 concerning child protection states:

Article 1 paragraph 2

Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate, optimally in accordance with human dignity, and receive protection from violence and discrimination.

Child maintenance in Arabic is called "hadhanah". Hadhanah according to the language means "to place something near the ribs or on the lap", because when a mother breastfeeds her child, she puts the child on her lap, as if a mother at that time protects and nurtures her child, so "hadhanah" is used as a term that means: "education and the care of the child from birth until he is able to stand on his own and take care of himself is done by the child's relatives". According to (Muhajir, 2017) it is to take care of children who are still young, whether male or female or who have grown up but have not yet undergone tamyiz, without an order from him, to provide something that makes him good, to protect him from something that damages his physical, spiritual, and his mind to be able to stand on his own in facing life and be able to take responsibility when he is an adult.

Child care also means a parent's responsibility to supervise, provide appropriate services and provide for a child's living needs by the parents. Furthermore, the responsibility for care in the form of supervision and service as well as providing a living for the child is continuous until the child reaches the legal age limit as an adult who is able to stand on his own feet (Firdaus, 2018).

Hadhanah in civil law is commonly referred to as guardianship or guardianship. The right of custody or guardianship is the right of a child from a parent and is also an obligation of a parent towards a child. Article 45 paragraph (1) and paragraph (2) of the Marriage Law contains the imperative provision that both parents must take care and educate their children as best they can. The obligation applies until the child gets married or can stand on his own.

### **Legal Basis for Child Custody**

Law Number 1 of 1974 concerning marriage, it also regulates provisions related to hadhanah, this is stated in article 41 letter (a) which states that "both the mother and the father



remain obliged to care for and educate their children, solely based on their interests." child;" It is clear that this article also mentions the interests of children, and the interests of children are the most important factor that trumps other factors (Hifni, 2016).

From the article that states the right of hadhanah must pay attention to the interests of the child, if the right of hadhanah that will be given to the mother no longer has the child's interest in it, then the right of hadhanah can be given to the father. For example, if the mother is a drunkard, a gambler and other immoral acts or has a temperamental nature, it will lead to acts of violence that the mother will do to her child and may even kill the child. It can be concluded that the factors that can cause the right of inheritance to be given to the father include:

1. Putting the interests of the child first;
2. The mother has immoral qualities;
3. Refers to the interests of children according to the Child Protection Law

### **Conditions for Child Custody**

The care or upbringing of children applies between two elements that are harmonious in law, namely the parents who are caring for them, which is called hadith, and the children who are being cared for are called madun. Both must meet the conditions specified for the obligation and validity of the caregiving task. In the marriage bond, the mother and father are jointly obliged to care for the children resulting from the marriage (Khair, 2020). After a divorce occurs and the two have to separate, the mother and/or father are obliged to look after the child individually. The mother or her surrogate who is declared more entitled to care for the child must fulfill the following requirements:

1. Be sensible
2. Has reached puberty
3. Able to educate
4. Trustworthy and of noble character
5. Muslim
6. The right to care will be lost because the caretaker is an infidel. If one of the parents is an unbeliever, then their right to care for their child is lost and that right moves to the parents who are Muslim.
7. Not married to another man

Regarding the last mentioned condition, there is an opinion that says that if the new husband of the child's mother (stepfather) is a relative of the child's mahram, for example his uncle who has enough attention to the education of the nephew who later becomes his stepchild, then the mother's right to raise the child is not fall out; because





uncles are among those who have the right to nurture as well. It is different when the child's mother marries another man who is not related to the child (Nurmila et al., 2019).

In the latter case, the right to raise a child is separated from the mother, transferred to the father or someone else who is more capable of educating the child in question. But this is not absolute, it is also possible that the new husband, the child's stepfather, actually shows great concern for the success of the child's education. When this happens, the mother's right to raise the child remains. Of the six conditions, Sayid Sabiq added another condition, namely independence, because a slave is usually very busy with dealings with God, so that he does not have the opportunity to take care of a small child. While according to Abd. Rahman Ghazaly in giving the conditions of hadhanah, the conditions are:

- a. Not tied to a job that causes it not to perform hadhanah well.
- b. The hadhanah of a mukallaf person should be that he has reached puberty, has reason and his memory is not disturbed.
- c. Must have the ability to do hadhanah.
- d. Should be able to guarantee the maintenance and education of children, especially those related to character.
- and. Hadina should not marry a man who does not have a mahram relationship with the child.
- f. Hadhanah should be a person who does not hate the child. If the person who hates the child is worried about the child being in misery.

#### **Child custody costs**

A woman other than her mother can receive a hadhanah wage, from the moment she handles her gift, as is the case of a nursing woman who works to breastfeed a small child for a fee (wage). In the same way that the father is obliged to pay breastfeeding wages and allowances, he is also obliged to pay the rent of the house or its complement if the mother does not have her own house as a place to raise her young child (Faizah et al., 2021).

The father is obliged to pay the salary of the household helper or provide the helper if the mother needs it and the father has the ability. But this is only required to be issued when Hadinah handles his care. This salary (wages) becomes a debt borne by the father and he can only be free from this responsibility if it is paid off or released.

#### **Child Custody Rights After Divorce from Legal Perspective According to Law No. 35 of 2014**

Child protection can be done directly or indirectly. Directly means that the activity is directly aimed at the child who is the direct target of the violation. Activities like this can be done





by protecting children from various external and internal threats, such as educating, developing, assisting children in various ways. Indirect child protection, namely activities not directly aimed at children, but other people who carry out or are involved in child protection efforts (Fitrotun, 2022). In UU.No. 35 of 2014 concerning child protection states: Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate, optimally in accordance with human dignity, and receive protection from violence and discrimination.

#### Article 15

Every child has the right to receive appropriate health services and social security with physical, mental, spiritual and social needs. Every child while in the care of parents, guardians, or any other party responsible for their care, has the right to receive protection from abuse

- a. Discrimination;
- b. Exploitation, both economic and sexual;
- c. Neglect;
- d. Cruelty, violence and abuse;
- and. Injustice; And
- f. Other mistreatment.

In the event that parents, guardians or child caretakers carry out any form of treatment as intended in paragraph 1, the perpetrator will be subject to increased punishment

#### Article 26

- a. Nurture, nurture, educate, and protect children
- b. Develop children according to their abilities, talents and interests.
- c. Preventing marriage at the age of children is mentioned

Based on Law. No. 35 of 2014 concerning Child Protection as well as the rights and obligations of children, in this Law the protection of children is given more priority, where this must still be done even if one of the mothers or fathers who are in a dispute have beliefs outside of Islam, or they are of different nationalities, However, in deciding on the child's choice, one must look at the child's benefit, which in this case is not only the benefit of the world but also the end of this world, namely the afterlife (Yusfi, 2018).

Article 14 Law no. 35 of 2014 concerning Child Protection, which states: "Every child has the right to be raised by his own parents, unless there are valid reasons and/or legal regulations indicating that separation is in the best interests of the child and is a final consideration." In the



explanation, it is emphasized that, "The separation referred to in this provision does not eliminate the child's relationship with his parents." So, even though there is a legal provision that states one parent has "custodial power of the child", there is still no reason to prohibit the other parent from meeting the child (Pael, 2019).

#### **Efforts to fulfill children's rights after divorce**

Developments show that in most countries they are starting to require the principle of the best interests of the child as the basis for determining the right to care. The best interests of the child are determined by ensuring that children's needs are met and guaranteed to be loved, to receive affection, guidance and continuing education. This shows that the interests of the child are the main consideration rather than the needs of parents and other interested parties. Through this principle, there is no presumption that the father or mother is more entitled to custody of the child. The higher goal to be achieved through this principle is to place children in the most favorable environment and which allows them to develop healthily (Kurniati, 2018).

The principle of the best interests of children according to the explanation of Article 2 of Law Number 23 of 2002 concerning Child Protection (hereinafter referred to as the Child Protection Law of 2002) which has been updated through Law Number 35 of 2014 (hereinafter referred to as the Child Protection Law of 2014 ) states that in all actions concerning children carried out by the government, society, legislative bodies and judicial bodies, the best interests of children must be the main consideration because children are a vulnerable group/party who must receive protection from the government. Therefore, this principle is very important as a guide for judges in deciding divorce cases in which there is a dispute regarding child custody because children are vulnerable parties in the event of a divorce.

#### **4. CONCLUSION**

Fulfilling child custody rights after divorce has so far not been able to implement the provisions for protecting children's rights, especially in Indonesia, due to several factors that have become obstacles, including:

- a. Lack of responsibility from both parents after divorce
- b. Weak economy
- c. Low knowledge about fulfilling child custody rights

The public's understanding of carrying out their obligations as parents, especially those involved in divorce, is very minimal, as evidenced by the fact that knowledge of child custody is



limited to living expenses. After a divorce, both parents should still be obliged to take care of the child, provide care, care for, educate and protect the child. Synchronization between father and mother must also be interrelated for the benefit of the child even though the two have separated.

Here, cases of child neglect have very diverse motives, namely:

- a. Abandoning children secretly and not giving children the rights they should get.
- b. Leaving a child goodbye does not give the child the rights he or she should have.
- c. Leaving the child goodbye and giving the child partial rights.

Review of child custody rights after divorce in Indonesia in Law Number 35 of 2014 concerning child protection, its implementation has not been fully resolved properly, so it can be said that children's rights have not been fully protected. Neglect of children's rights to receive care from their own parents, neglect of Article 14 concerning children's rights to receive care, maintenance, education and living expenses. and Ignoring Article 26 concerning the obligations and responsibilities of parents in caring for, protecting and educating children.

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