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PROTECTION OF CHILDREN'S RIGHTS IN POST-DIVORCE CUSTODY DECISIONS: A Socio-Legal Analysis of Case No. 0461/Pdt.G/2020/PA Gresik

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Abstract: *This study examines the regulation of child custody after divorce in Indonesia, focusing on the legal dynamics arising from the general provisions of Article 105 letter (a) of the Compilation of Islamic Law (KHI) which tends to grant custody to the mother, imagining it as the best interest of the child. The problem in this study is how legal provisions in Indonesia regulate the granting of custody to the father after divorce, and the judge's legal considerations in the Gresik Religious Court Decision Number 0461/Pdt.G/2020/PA.Gs consider the best interests of the child. This study uses a Normative Juridical research type with a regulatory, case, and conceptual approach. The data analysis technique used is descriptive qualitative. This shows that custody of the three children, including those who are not yet mumayyiz, is given to the father because the mother is proven to have committed verbal and physical violence. The judge specifically Article 105 letter (a) of the KHI and adheres to Article 4 of Law No. 35 of 2014 concerning Child Protection. This decision is also based on the father's capabilities in psychological, moral, religious, and economic aspects. This study aims to analyze the legal basis and judicial reasoning for granting custody to fathers post-divorce in Indonesia, using a normative juridical method with statutory and case approaches. The findings reveal that the court prioritized the child's holistic welfare over maternal presumption under Article 105(a) KHI. The study contributes to strengthening the interpretation of child protection law consistent with the principle of the best interests of the child.*

Keywords: *Divorce; Child Custody; Best Interests of the Child; Compilation of Islamic Law; Judicial Consideration.*

INTRODUCTION

Humans are social creatures who cannot live apart from other groups. Although humans live individual lives, they cannot be separated from society, because humans essentially live in pairs. The term often used to describe living in pairs is marriage. Marriage is defined as the union of a man and a woman who fulfill the legal requirements for marriage (Nasution and Faza 2025). Marriage in Indonesia is regulated by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974. According to the law, marriage is a spiritual and physical bond between a man and a woman as husband and wife, with the aim of forming a happy and lasting family based on the One Almighty God (Fitria 2018).

In marriage, everyone wants to experience a happy, lasting, and prosperous family life, in accordance with the purpose of marriage (Khairunisa and Winanti 2021). However, in reality, the purpose of marriage does not always go well and not everyone can build the family they hope for, resulting in the dissolution of the marriage (Dewi et al. 2024). According to Article 38 of the Marriage Law, the dissolution of a marriage can be caused by death, divorce, and a court decision. In such circumstances, the main concern is the transfer of child custody rights (Baghdadi et al. 2024). The rules regarding custody are already stipulated in legislation, but in practice, there are still many questions in society about who is most entitled to custody. In the context of civil law guardianship, this includes the supervision of minors who are not under the supervision of their parents and the management of the child's property or assets as referred to in the law (Indonesia 2004).

Divorce is part of social issues related to domestic life. This situation often causes complicated problems, especially when determining who will take care of the children (Harman et al. 2023). From a legal perspective, custody is one of the main elements in the divorce process, because determining who has the right to take care of the children can affect the feelings and mental condition of the children as well as the situation of their parents (Asnawi and SHI 2022). The legal framework governing custody rights in Indonesia is clearly regulated in Law Number 1 of 1974 concerning Marriage and Government Regulation Number 9 of 1975. However, in practice, determining child custody rights after divorce still faces various challenges from legal, psychological, and social perspectives. It is not uncommon for disputes between the two parents to worsen the condition of the children they are supposed to protect.

Divorce has a negative impact, where children whose families experience divorce often face emotional turmoil, mental instability, and a lack of security in their lives. This is caused by the lack and loss of parental attention and affection, which should be given fully by both parents (Sukmawati, Akbar, and Abas 2024). In many cases, the needs and rights of children are still often neglected because conflicts between parents are more prominent than the best interests of the child. Article 41 of Law Number 1 of 1974 concerning marriage states that parents still have an obligation to care for and educate their children even after the marriage has ended (Antareng 2018). However, in reality, there are still many parents who neglect this responsibility, making children victims of conflicts that should not involve them (Dusabe et al. 2023).

Although Indonesian law generally stipulates that children under the age of 12 are in the care of their mother, this provision is based on the Marriage Law (Law No. 1 of 1974) (Rusdiana 2022). In reality, many court decisions vary depending on the judge's considerations in each case. Article 105 of the Compilation of Islamic Law states that children who are not yet mumayyiz or under the age of 12 are the right of their mother, but what happens in practice is not in accordance with this rule because there are still some mothers who should provide protection and affection to their children but instead neglect and abandon them, resulting in poor psychological and developmental outcomes for the children. This raises questions about consistency and fairness in determining child custody rights. One case of particular concern is the child custody dispute in Decision Number 0461/Pdt.G/2020/PA.Gs. In this case, there were differences of opinion and interesting legal dynamics to analyze, particularly regarding how the judge decided the custody case by considering the best interests of the child. The inconsistency of the judge's decision creates legal uncertainty, whereas law enforcement officials should apply penalties in accordance with applicable regulations in order to create certainty and fairness in the law itself.

This research is the original work of the author and is not a duplication of the work of others. As a reference for the author, there are several previous studies that are similar to this research. *First*, there is a study written by Henie Apriani entitled “Hak Asuh Anak Pasca Perceraian Perspektif Hukum Keluarga Islam (Studi Kasus di Desa Kepoh Kecamatan Sambi Kabupaten Boyolali)”. This study has similarities with the present study in that child custody was granted to the father because the mother had left and was deemed incapable or unsuitable to be granted child custody (Apriani 2024). The difference lies in the fact that this study uses a qualitative research method with a field case study approach and differs in its data collection method, which uses interviews (Fardindaputri and Hasanudin 2025).

Second, there is a study written by Hasmaniar. H, entitled “Analisis Putusan Hakim Tentang Penyelesaian Hak Asuh Anak Akibat Perceraian di Pengadilan Agama Sengkang Kelas I B”. This thesis discusses how judges refer to Article 105 of the Compilation of Islamic Law, whereby the care of children who are not yet mumayyiz is the right of their mother. The type of research used in this thesis is qualitative field research using a theological-normative and juridical approach, with data collection methods consisting of observation, interviews, and reference searches (H 2017). The similarity with this study is that it concerns court decisions on child custody. The difference lies in the data collection method used.

Finally, the third study was written by Avissa Deva Yuniar, entitled “Tinjauan Hukum Islam Terhadap Pelaksanaan Hak Asuh Anak Setelah Terjadinya Perceraian”. The thesis discusses child custody of minors due to divorce, where custody is given to the mother, but the child lives with the father. However, the father is still given access to care for and educate the child as long as it does not disturb the child's psychological condition (Jafar 2024). The type of research used in this thesis is a normative juridical approach. Data collection tools used interviews and literature research. The similarity with this research is that the approach used is the same, namely the normative juridical approach (Richards

1982). The difference between the two studies lies in the discussion of child custody rights granted to the mother and the differences in data collection. Recent data from the Indonesian Religious Courts show a significant rise in post-divorce custody disputes, with conflicting interpretations of Article 105(a) KHI often resulting in inconsistent judgments. This inconsistency highlights the need for a normative review of how judges apply the 'best interests of the child' principle.

This study aims to understand the regulation of child custody after divorce according to Indonesian law and the practical application of these regulations, with a particular focus on the judge's considerations in determining custody (Faizi 2023). This study also examines inconsistencies in court decisions related to custody, even though there are legal provisions governing it. The results of this study are expected to provide input for improving legal protection for children and can be used as consideration for judges in making policies and legal practitioners to prioritize the interests of children in every policy made.

RESEARCH METHOD

This research is normative legal research which focuses on the study of written legal norms and legal principles as a basis for answering specific legal issues (Soekanto 2003). The unit of analysis in this study is Decision No. 0461/Pdt.G/2020/PA.Gs from the Gresik Religious Court, which serves as a representative case of custody granted to the father under exceptional circumstances. Supporting cases and statutory provisions are examined for comparative interpretation. In this research article, the author uses a statute approach, a case approach, and a conceptual literature approach. The Statute Approach was conducted by examining all laws and regulations related to the legal issues being addressed by the researcher. In this approach, the researcher will examine laws and government regulations as a reference for researching the cases to be discussed (Marzuki 2017). The second approach is the case approach, which is carried out by analyzing cases concerning child custody after divorce. Finally, the conceptual approach is carried out by using legal concepts from scholars or relevant legal theories to analyze the legal issues being studied. This approach does not originate directly from regulations or cases but from ideas, doctrines, and legal principles. The author collected data by searching for legal materials through library research and conceptual literature. Then, this study used qualitative descriptive data analysis techniques.

RESULT AND DISCUSSION

Legal Provisions in Indonesia Governing the Granting of Custody Rights to Fathers After Divorce

In Indonesia, provisions regarding child custody after divorce are clearly regulated in the marriage law. Child custody rights affirm that both parents remain responsible for caring for and educating their children to the best of their ability even after divorce (Hasanah 2025). These provisions are contained in Law Number 1 of 1974 concerning

marriage and the Compilation of Islamic Law (KHI), which is the main reference in affirming that custody rights are principally aimed at ensuring the best interests of the child.

Children are seen as a gift and trust from Allah SWT entrusted to parents. Their presence is the joy of life and a concrete manifestation of the hopes and ideals that underlie a marriage bond (Triyanita and Pranangityas 2022). Every married couple always looks forward to the birth of a child. Therefore, children must be cared for, nurtured, protected, and given maximum guidance, education, support, and direction (Krisna 2018). The goal is for them to grow and develop optimally, forming a future generation that is pious, highly moral, and dignified (Rizal, Sahidin, and Herawati 2018).

There are differences in the legal definition of a child. Based on Article 47 of Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974, a child is categorized as an individual who has not yet reached the age of 18 (Krisna 2018). Meanwhile, Article 98 of the Compilation of Islamic Law (KHI) defines a child as an individual who has not yet reached the age of 21, unless they have a physical or mental disability, or have entered into marriage. The existence of these two provisions shows that there are variations in the interpretation of the age limit for children in regulations (Ihwan 2023). To address these differences, it is important to refer to Article 1 paragraph 1 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, which explicitly states that a child is someone who has not reached the age of 18 (eighteen) years, including those who are still in the womb.

Based on Article 41 of the Marriage Law, both fathers and mothers continue to have the same obligations in caring for and educating their children even after the marriage has ended (Mandey 2021). However, in reality, this often raises questions about the extent to which fathers have the opportunity to obtain custody after divorce, given the perception that children tend to be cared for more often by their mothers (Siswanto 2020). This is because in practice, courts often grant custody to mothers, especially when the children are still young, on the grounds that mothers are considered more capable of providing the love and emotional attention that children need at an early age (Giladi 2014).

The legal provision in Article 105 letter (a) of the Compilation of Islamic Law states that children under the age of 12 or *mumayyiz* are under the care of their mother, unless it is proven that the mother is negligent, behaves badly, or is unable to meet the child's needs (Istifadah 2024). This provision shows that Indonesian law still tends to give the main role to mothers in child care, especially in the early stages of life (Putra 2022).

However, the role of the father is still recognized as important in the child's development. After the child reaches the age of 12, the Compilation of Islamic Law (KHI) gives the child the opportunity to choose whether they want to be cared for by their father or mother (Saniah, Yuslem, and Matsum 2023). This provision reflects a more equitable approach, taking into account the child's emotional maturity and wishes as part of their best interests. However, in practice, the application of this rule is often not entirely fair, due to cultural influences and social views that still consider mothers to be the main figures in child rearing (Darlington et al. 2023).

In situations like this, fathers often find it difficult to obtain custody of their children, mainly because of the views of society and the judiciary, which still tend to favor mothers. In fact, there are many fathers who have the economic, psychological, and emotional capacity to care for their children and provide them with good attention (Johnson 2023). This issue raises a serious question: do court decisions truly consider the best interests of the child, or are they still influenced by social norms that place mothers as the primary caregivers in the family?

In addition, the concept of “the best interests of the child,” which forms the basis of every decision, should not only be measured in terms of affection, but also include financial stability, the environment for growth and development, education, and emotional support (Fauzan 2025). In this case, fathers can play a major role as providers of stability and moral guidance for children (Mulyana 2022). Therefore, when the court decides on custody, ideally all of these aspects should be considered objectively, not solely based on the gender of the parent. Several cases in Indonesia show that fathers can also obtain custody if they can prove that this decision is better for the child (Amelia et al. 2024). For example, when the mother is proven to have committed violence, neglect, or has a lifestyle that is harmful to the child's development. In such situations, the court may decide that the child's best interests will be better served under the father's care. This shows that the legal system is actually open to fathers becoming primary caregivers, as long as they present strong evidence and arguments before the panel of judges (Afzainizam, Jahar, and others 2025). Similarly, in the case under review, with the proven unfitness of the mother to obtain custody of the child, the judge considered this in the decision of the Gresik Religious Court Number 0461/Pdt.G/2020/PA.Gs, for a more in-depth analysis of the decision. protection norms. While Article 105(a) KHI grants mothers preferential custody of children under twelve, the Gresik decision demonstrates a judicial departure toward evidence-based assessment of parental fitness. This shift reflects a gradual reinterpretation of the ‘best interests of the child’ standard, aligning domestic practice with child-centered principles recognized in international law.

Legal Considerations of the Judge in the Gresik Religious Court Decision Number 0461/Pdt.G/2020/PA.Gs

Gresik Religious Court Decision Number 0461/Pdt.G/2020/PA. Gs is an interesting case of *hadhanah* (child custody) to study, because the panel of judges decided that custody of children who are not yet *mumayyiz* should be given to the father, not to the mother as is the general provision in Article 105 letter (a) of the Compilation of Islamic Law (KHI) (Ngazizah et al. 2025). This case involved Muh. Musyafak bin Abu Amar as the plaintiff (father) and Eva Oktavianita binti Ichwan as the defendant (mother). The marriage produced three children, namely Zafin Zillillah Maimun Basiq as the first child, Zayyan Miza Arfillah as the second child, and Zawa Athiyya Indillah as the third child. The first two children are *mumayyiz* and have lived with their father since the beginning, while the youngest child, who is not yet *mumayyiz*, was originally cared for by the mother (Aulia 2024). However, the youngest child often showed fear and refusal to return to her mother's

house because she was often treated harshly and spoken to in a raised voice. This condition became the basis for the plaintiff's lawsuit to have full custody of the three children.

These facts were revealed through the testimony of witnesses presented by the plaintiff at the trial. The first witness, Ahmad Zainuri, was a neighbor and relative who knew the children's condition after the divorce. He explained that the mother often behaved harshly towards the children, especially the youngest child, and that the children seemed calmer when they were at their father's house. The second witness, Nurul Hidayah, who is a family friend, also testified that the mother often scolded the children with harsh words and even hit the youngest child until he cried in fear. The panel of judges considered the testimony of the two witnesses to be mutually reinforcing and relevant to the arguments of the lawsuit, as well as fulfilling the formal and material requirements as valid evidence according to Article 171 of the HIR and Article 1905 of the Civil Code. Based on this evidence, the judge believed that the mother had committed verbal and physical abuse against the children, making her unfit to continue caring for them.

Based on the results of the examination at the trial, the judge then considered that the application of Article 105 letter (a) of the KHI could not be applied absolutely. This provision is general in nature and cannot be used as the sole basis when it is found that the caregiver actually endangers the safety or development of the child. The judge adhered to the principle of "the best interests of the child" as stipulated in Article 4 of Law Number 35 of 2014 concerning Child Protection, which emphasizes that every child has the right to live, grow, and develop normally and to receive protection from all forms of violence (Riza and Sibarani 2021). In this case, the judge's decision to grant custody to the father is a form of implementing the principle of child protection in the national legal system.

In addition to referring to the Child Protection Law, the judge also based his considerations on Article 49 of Law Number 7 of 1989 concerning Religious Courts as amended by Law Number 3 of 2006 and Law -Law Number 50 of 2009, which gives the Religious Court the authority to examine and decide on child custody cases after divorce (Vaza and Irvanul 2024). The judge also considered Articles 40 and 41 of Law Number 1 of 1974 concerning Marriage, which emphasize that divorce does not remove the responsibility of both parents towards their children. Both parents are obliged to care for, educate, and provide protection to their children solely in the best interests of the children (Burhanudin 2015). Guided by these principles, the judge decided that custody should be granted to the party who is best able to ensure the overall welfare of the children, in terms of moral, psychological, educational, and economic aspects (Elster 1987).

The panel of judges' considerations in this case covered several important aspects. From a psychological perspective, the children felt safer and more comfortable living with their father, who treated them with affection and without violence. From a moral and religious perspective, the father, who worked as a teacher, was considered to have good abilities in providing moral and spiritual guidance to his children. From an economic perspective, the father has a steady income that can guarantee his children's needs, including education and health costs. In addition, the social environment was also taken into consideration, as the

father's living environment was deemed more conducive and supportive of the children's positive growth and development. Thus, the judge concluded that the father was more suitable and capable of being the primary caregiver for the benefit of his children.

However, the panel of judges also emphasized that even though custody was granted entirely to the father, the mother still had the right to interact with and provide affection to her children. The blood relationship between a child and mother cannot be erased by divorce. Therefore, the judge stated that the mother had the right to meet and communicate with her children at appropriate times and in a manner that did not interfere with the children's interests. If, in the future, the father is proven to have obstructed this relationship, the mother can file a petition with the court to review the custody rights. This consideration is in line with Article 26 paragraph (1) of Law Number 35 of 2014, which emphasizes that parents have the obligation and responsibility to care for, nurture, protect, and educate their children for optimal growth and development.

In its ruling, the panel of judges stated that the plaintiff's lawsuit was granted in absentia and determined that the three children, namely Zafin Zillillah Maimun Basiq, Zayyan Miza Arfillah, and Zawa Athiyya Indillah, would be under the care of their father, Muh. Musyafak bin Abu Amar. The judge also ordered the mother to hand over the youngest child to the father and imposed court costs of Rp 501,000 on the plaintiff. This ruling demonstrates the practical application of the principles of child protection and substantive justice in the practice of religious courts in Indonesia, where judges not only adhere to normative provisions but also take into account the social facts and psychological conditions of the children (Situngkir and Nurbaiti 2025).

From an Islamic legal perspective, the judge's consideration is justified because in fiqh, the right of hadhanah is indeed given to the mother as long as she meets certain conditions, such as being of good character, trustworthy, and capable of ensuring the child's safety. However, if the mother is proven to be negligent, untrustworthy, or violent towards the child, then this right can be transferred to the father or another more suitable party (Faizzati 2024). This view is in line with the opinions of scholars such as Imam Malik and Imam Syafi'i, who emphasize that the welfare of the child is the main basis for determining custody rights (Marizal 2024). Therefore, the judge's decision in this case does not contradict the principles of Islamic law, but rather reflects the application of Sharia values oriented towards the best interests (*maslahah al-mahdhab*) (Ginting et al. 2021).

When viewed from the perspective of the Civil Code, which is substantially relevant to the judge's considerations, particularly regarding parental obligations, child protection, and evidence in court, the panel of judges in this case based its decision on mutually reinforcing and relevant witness testimony. Based on Article 1905 of the Civil Code, this section was directly referred to by the panel of judges in assessing the testimony. In the Civil Code, the rules regarding evidence, including witness testimony, are regulated in Chapter Three, Book Four on evidence. This article states that witness testimony must be viewed objectively and must be consistent (concordant) and cannot come from a single witness (*testis unus, testis nullus*) (Subekti and Tjitrosudibio 1994). In this case, the judge assessed the testimony of two witnesses who testified to the mother's abusive and verbal/physical

violence towards her youngest child as fulfilling the requirements for valid evidence. This shows that the standard of proof according to general civil law is considered and integrated into the religious court process, particularly in assessing the validity of the facts presented. This case illustrates the evolving judicial interpretation of *hadhanah* in Indonesia, where the Religious Court prioritized evidence of parental fitness over gender presumptions, signaling a gradual harmonization between Islamic jurisprudence and national child protection norms.

CONCLUSION

The legal provisions in Indonesia governing the granting of custody rights to fathers after divorce, as stipulated in the Marriage Law and the Compilation of Islamic Law (KHI), are in principle aimed at ensuring the best interests of the child. Although Article 105 letter (a) of the KHI generally stipulates that custody of children who have not reached the age of *mumayyiz* (12 years) is granted to the mother, this provision is not absolute. An analysis of the Gresik Religious Court Decision Number 0461/Pdt.G/2020/PA.Gs shows the application of the principle of child protection that overrides the general provisions of the KHI. In this decision, custody of the three children, including those who had not yet reached the age of discernment, was granted entirely to the father. The judge's main consideration was the proven fact that the mother had committed verbal and physical abuse against the youngest child, as confirmed by valid and relevant testimony, and assessed based on Article 1905 of the Civil Code. The judge firmly adhered to the principle of “the best interests of the child” (Article 4 of Law No. 35 of 2014 concerning Child Protection), which requires the protection of children from all forms of violence.

The judge's legal considerations in the Gresik Religious Court Decision Number 0461/Pdt.G/2020/PA.Gs were to consider the principle of the best interests of the child. The judge's decision also considered the father's capabilities from various aspects, including psychological, moral, religious (profession as a teacher), and economic, which were assessed to be more capable of ensuring the child's overall welfare than the mother. The application of this decision is in line with Islamic law (*fiqh*), which prioritizes the welfare of the child (*maslahah al-mahdhah*) and allows for the transfer of custody if the mother is proven to be negligent or violent. This decision reflects judicial practice that not only adheres to the normative provisions of the KHI, but also takes into account social facts and the psychological condition of the child in order to uphold the principles of child protection and substantive justice. This case signifies a judicial shift toward evidence-based and child-centered custody adjudication in Indonesia, reflecting greater alignment between Islamic family law and child protection norms. Future research and policy development should focus on standardizing judicial guidelines for the application of the ‘best interests of the child’ principle to ensure consistency and prevent gender bias in custody rulings.

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