

## ***Nusyuz* Wife as a Result of Transferring Child Custody Rights from Wife to Husband from the Perspective of the Compilation of Islamic Law**

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**Abstract.** *Marriage is a physical and mental bond between a man and a woman with the aim of forming an eternal and happy family according to God Almighty. In a marriage bond, husband and wife have the responsibility to fulfill each other's needs to build a harmonious and peaceful family. Divorce is the breakup of a family because one or both partners decide to leave each other so that they stop performing their obligations as husband and wife. The existence of divorce between husband and wife raises new problems, especially for children, which include the problem of caring for children's rights (Hadhanah). The concept of Maslahah mursalah, the main purpose of this concept is to realize benefit and eliminate harm, this principle aims to keep the child physically and mentally protected from his divorced parents. The first decision is, with Number 361/Pdt.G/2018/PA.Dps, in this case the Plaintiff in his lawsuit dated November 27, 2020 has filed a child custody lawsuit registered at the registrar of the Denpasar Religious Court with Number: 400/Pdt.G/2020/PA.Dps. Analysis in terms of benefit, in the Denpasar Religious Court Decision, the Judge not only decides and transfers child custody based on the law, but also in the interests of the child, which is better and greater if the four children are cared for by their mother rather than their father, as for the form of transferring custody of children who are not yet mumayyiz to the biological mother (nusyuz) shows that the legal basis of the Panel of Judges in handling this case is based on Maslahah and justice for the benefit of the child.*

**Keywords:** *Child; Court; Nusyuz; Wife.*

### **1. INTRODUCTION**

Marriage is a bond between two human beings, namely sons and daughters both physically and mentally with the noble goal of forming a household according to the provisions of Divine pleasure. The suggestion to marry was also conveyed by Rasulullah SAW as a guide for all his people. This is the basis that marriage is a recommendation as well as *fitrah* containing worship for anyone who carries it out according to the provisions of Islamic law. Then, Article 1 of the 1974 Law states:

Marriage is a physical and mental bond between a man and a woman with the aim of forming a lasting and happy family according to God Almighty. In addition, the Compilation of Islamic Law in Article 1 contains the definition of marriage. Marriage according to Islamic law is a very strong contract or worship *mitsaqan gholidhan* to obey the commandments of Allah and carry them out.<sup>1</sup>

In a marriage bond, husband and wife have the responsibility to fulfill each other's needs to build a harmonious and peaceful family. In general, the basic rights and obligations of husband and wife are divided into four types, namely: *Nafkah*, *hadhanah*, breastfeeding children, husband and wife relationships.<sup>2</sup> Then, referring to the Marriage Law No. 1 of 1974, *nafkah* is not explicitly mentioned as in Islamic law. In Indonesian legislation there is no specific sub that discusses the issue of maintenance in family life. Instead, there are only a few articles that can be drawn as a discussion related to maintenance.<sup>3</sup>

The husband's obligation to provide maintenance, in this case all household needs, is part of the husband's responsibility in realizing a happy and eternal household as the philosophy of marriage article 1. In addition, more detailed rules are found in the Compilation of Islamic Law (KHI). Over time, marriages based on lack of openness will lead to new problems from both the husband and the wife themselves. Problems like this actually then become complex, because it needs to be questioned what causes a wife to behave like that because a husband should be an imam for his wife, who must provide for the needs of the family, who must prohibit his wife from leaving her obligations as a caregiver for her children, who must order his wife to prioritize her obligations at home and many more things. However, whatever the wife's reason for refusing intimate relations with her husband without Shar'i reasons is an act prohibited in religion. or vice versa, husbands who ignore their responsibilities to their wives and family members, this kind of thing is also not justified in Islam. So that the problems that occur in the future are even conveyed resulting in divorce. In the occurrence of divorce, there are many problems that will arise after the divorce occurs, both the issue of joint property to the issue of who is more entitled to care for the child (*hadhanah*).

Divorce is the breakup of the family because one or both partners decide to leave each other so that they stop doing their obligations as husband and wife. Children in Islam are a trust that must be guarded by both parents. It is their obligation to educate their children to behave as recommended by religion. The existence of divorce between husband and wife raises new problems, especially for children, which include the problem of caring for children's rights (*Hadhanah*).<sup>4</sup> In Islam, the right to care for children is a big responsibility that must be carried out by the parties involved, namely

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<sup>1</sup>Kompilasi Hukum Islam, (2016), *Bab I Perkawinan*, cet. Ke-7, Bandung, 7Citra Umbara, art. 2.

<sup>2</sup> Kamal Muchtar, (2003), *Asas-asas Hukum tentang perkawinan*, Jakarta: Bulan Bintang, p. 213.

<sup>3</sup> Hamdan Rasyid, tt, *Pesona Kesempurnaan Islam*, p. 230

<sup>4</sup> Lutfi as-Syaukani, (2008), *Batasan Sanksi Hukum Bagi Anak-Anak dalam Politik Ham dan Isu-Isu Teknologi dalam Fiqh Kontemporer*, Bandung: Pustaka Hidayah, p.165

either the husband as a father or the wife as a mother. Because children are entrusted by the Creator that we must take care of, if we do not carry out all of that properly then we will be punished by Allah.

Islam not only regulates human relations with Allah, but also regulates all aspects of life, whether political, legal, social or cultural, among the several aspects that have been determined by Allah, in relation to fellow human beings is about child maintenance (*hadhanah*). Children are a vulnerable group in need of special protection, in Islam it is stated, that children are a valuable inheritance and a trust or entrustment that Allah has bestowed on parents, Child Custody Rights is one of the major problems that often occur in Religious Courts, because it relates to the development of children. So that in determining it requires a caution so that no mistakes occur that have bad consequences for the child. Child maintenance is basically the responsibility of both parents. This includes various things, economic problems, education, and everything that is the basic needs of children. In Islam, economic responsibility falls on the husband as the head of the household. Although in this case, it does not rule out the possibility that the wife can assist the husband in carrying out these economic obligations. Therefore, the most important thing is for the husband and wife to cooperate and help each other in raising the child and bringing him or her to adulthood. The marriage law and the compilations do not specifically regulate this issue.<sup>5</sup>

Basically, the responsibility for child maintenance falls on the parents, whether the parents are still living together or when their marriage fails through divorce. In the context of globalization in all aspects of human life, the terminology of child maintenance needs to be understood more broadly and thoroughly. This is so that parents do not only prioritize their obligations to fulfill the material needs of children, but more than that their needs for love, education, health, etc., also determine the formation of the child's personality. The quality of communication between children and their parents absolutely needs attention. If this is not met, the child will eventually seek compensation outside, which is likely to be more likely to be negatively influenced by their associations.

Just as marriage gives rise to rights and obligations, divorce has legal consequences for both parties and also for the children who are born. The children have to live in a family that is not as harmonious as it should be, for example having to live in a single-parent family such as with a mother or with a father. However, when the marriage cannot achieve these goals then and when divorce becomes the last resort. When divorce occurs, usually the problem is about children, who cares for them and who also bears the cost of their maintenance. Children should not be victims and should not make them unsettled because parents must always protect and provide happiness and must always be responsible for physical and mental happiness. That is why the custody

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<sup>5</sup> Ahmad Rofiq, (2015), *Hukum Perdata Islam Indonesia*, Jakarta: PT. Raja Grafindo Persada p. 189

and care of children is the responsibility of the parents until they reach adulthood.<sup>6</sup>

From the above provisions, we can see that the role of the wife is very important for children who are not yet *mumayiz* if there is a divorce in the household and a huge responsibility that must be carried out to all parties. As for who is more entitled to take care of children who are not yet *mumayiz*, if we look at the arguments above, the one who has the right to take care of children who are not yet *mumayiz* is the mother.

But this can be different when reviewed against divorce decisions that occur in religious courts in Indonesia, because there are several cases of child custody given to the father by looking at things that allow child custody to fall to the father, but it is not uncommon for judges to give custody to the wife especially if the child is not yet *mumayiz*.

Based on the cases that the author found in the Religious Court's decision, there were two decisions in one case. The first decision, with Number 361/Pdt.G/2018/PA.Dps, in this decision the judge decided on divorce as well as child custody and the judge gave custody to the father because the mother committed an act of infidelity (*nusyuz*). After the decision was issued, it turned out that a new problem arose, where the child custody that was previously given to the father by the mother was challenged again by filing a lawsuit in court.

In this case, the plaintiff originally only requested the living expenses of four children from the defendant without requesting custody or maintenance rights, but in her replication the plaintiff emphasized that she still requested that the custody rights be vested in her, while the defendant in his counterclaim stated that he was more entitled to the custody rights on the grounds that the plaintiff was no longer fit to be a caregiver because of bad behavior, However, the respondent has fully submitted to the best consideration of the panel of judges according to law and justice, the Panel of Judges provided certainty regarding the custody of his child who is still a minor (not yet *mumayiz*), then in accordance with the provisions of Article 105 letter (a) of the Compilation of Islamic Law, In the event of a divorce, the most entitled to care for the child is the mother, unless there is a strong reason, then the right to care for the child can be given to someone other than the mother, therefore the Panel of Judges concluded that there was a strong reason that the plaintiff was no longer fit to be the caregiver of her four children due to bad behavior as mentioned above, therefore the desire and determination of the defendant to be the caregiver for his four children should be considered.

However, there was a revocation of child custody from the father to the *nusyuz* mother in the second lawsuit, after the Denpasar Bali Religious Court Judge in determining the *hadhanah* decision in decision Number 400/Pdt.G/2020/PA.Dps on the grounds that after the father remarried the father was temperamental, and often angry with no clear end, the children felt afraid of the father and stepmother, the children felt that their activities were limited either meeting with their mother directly or through cellphone or watshapp media, if they wanted to call their mother they had to get permission from their father or through their father's cellphone.

In Decision Number 361/Pdt.G2018/PA.Dps the judge gave custody to the father. Over time, the mother who had committed *nusyuz* sued her ex-husband in the case of

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<sup>6</sup> Tihami, and Sohari Sahrani, (2019) *Fikih Munakahat (Kajian Fiqh Lengkap)*, Jakarta: Rajawali Pers, p. 216.

revocation of child custody in decision Number 400/Pdt.G/2020/PA.Dps giving custody to the mother. In this case the author is interested in seeing how the judge's consideration in revoking child custody (*hadhanah*) from the former husband and giving it to the wife who had committed *nusyuz*.

It is clear that this behavior by the respondent is *nusyuz*. However, the Judge's decision stipulated that the custody of the children be revoked and transferred to the plaintiff/mother, then the four children were in the care of the plaintiff (the biological mother). With the consideration that the child's young age is a time for the child to need his mother's attention and affection, for the benefit of the child's future, so that the right of *hadhanah* is given to the wife.

The concept of *Maslahah* mursalah, the main purpose of this concept is to realize the benefit and eliminate the harm.<sup>7</sup> The purpose of determining child custody in the concept of *Maslahah* mursalah can be seen from the principles of Hifzh an nafs and Hifzh al aql. This principle aims to protect the child both physically and mentally so that he does not lose his rights as a child of divorced parents. The purpose of determining child custody can also be seen from the principle of *maslahah* mursalah put forward by Imam Ghazali in the principle of Hifzh an nafs and Hifzh al aql which in this principle aims to keep the child physically and mentally protected from his divorced parents.<sup>8</sup>

## 2. RESEARCH METHODS

Based on the beginning of this child custody lawsuit occurred in the Denpasar Religious Court, where the case had two decisions. The first decision is, with Number 361/Pdt.G/2018/PA.Dps, in this decision the Panel of Judges decided on divorce as well as child custody and the Judge gave custody to the father because the mother committed an act of infidelity (*nusyuz*). After the verdict was issued, it turned out that a new problem arose, where the child custody that was previously given to the father by the mother was challenged again by filing a lawsuit in the local court. As a result of the marriage between the Plaintiff and the Defendant, there were four children who were underage. In this case the Plaintiff in his lawsuit dated November 27, 2020 has filed a child custody lawsuit which is registered in the registry of the Denpasar Religious Court with Number: 400/Pdt.G/2020/PA.Dps. which in its decision the Panel of Judges granted and revoked the custody of the child from the defendant (father) to the plaintiff (mother) so that the transfer of custody has been Inkraacht (Permanent Legal Force).

## 3. RESULT AND DISCUSSION

### 3.1 Legal Analysis of the Transfer of Child Custody Rights from Husband to *Nusyuz* Wife through the Religious Court Perspective KHI

In Indonesia, *Hadhanah* is regulated in the Compilation of Islamic Law Article 105. Where the regulation states that, children who are not yet *Mumayyiz*, their custody rights fall to the mother. As for children who have *Mumayyiz*, the right is on the child himself. Where the child has the right to choose whether to go with his father or mother. And the cost of such care remains the responsibility of the father.<sup>9</sup> *Fiqh*

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<sup>7</sup> Jauhar, Ahmad Al-Mursi Husain, (2013), *Maqashid syari'ah*, Jakarta: Amzah, p.23

<sup>8</sup> Musolli, Maqasid Syariah: Kajian Teoritis dan Aplikatif Pada Isu-Isu Kontemporer, *Jurnal At Turas* Volume 5 Nomor 1, June 2018, p. 6

<sup>9</sup> Art. 105 Compilation of Islamic Law

scholars agree that in the event of a divorce, the mother is more entitled to care for the child, while the material costs of operations in childcare are the obligations and responsibilities of the father.<sup>10</sup>

*Hadhanah* arises because of the divorce of both parents and both are qualified to be caregivers, so the most entitled to conduct *hadhanah* for the four children is the mother. The reason for this is that the mother has more affection than the father, while at a very young age the children need more affection. If the child is in the care of a mother, then all the costs required to remain in the responsibility of the father. Another reason for the mother's preference in *hadhanah* rights is that the mother's preference is determined by two conditions: she has not remarried and she is qualified to carry out *hadhanah* duties. If both or either of the conditions are not met, if the mother has remarried or does not meet the requirements then the mother is not superior to the father, if the condition is not met then the right of care moves to the closest sequence, namely the father.

Considerations regarding the party entitled to *hadhanah* rights, in fact the age of the four children contested between the plaintiff and the defendant there is still 1 child who is categorized as a child who is not yet *mumayyiz* or has not reached the age of 12 years. Regarding the determination of which party is entitled to the *hadhanah* rights of a child, it cannot be separated from Article 105 of the Compilation of Islamic Law which reads: In the event of divorce:

- a. The maintenance of children who are not yet *mumayyiz* or 12 years old is the right of the mother.
- b. The maintenance of a child who has *mumayyiz* is left to the child to choose between his father or mother as the holder of his maintenance rights.
- c. The cost of maintenance shall be borne by the father.

Noting further through the article above that the Compilation of Islamic Law (KHI), the definition of *hadhanah* has also been formulated in article 1 letter (g) that what is meant by the maintenance and education of children until they are mature or able to stand on their own.<sup>11</sup> In this Compilation of Islamic Law (KHI), *hadhanah* (maintenance) of children is held by the mother who has been divorced by her husband. However, if the wife has remarried another man then the mother's right to child maintenance is canceled. The Compilation of Islamic Law (KHI) in article 105 (a) which regulates child custody.

Divorce is not an obstacle for children to obtain custody rights over themselves and their parents, as regulated in Law Number 1 of 1974 concerning Marriage in Chapter VIII, Marriage Breakup and Its Consequences. Article 41 states the consequences of marriage dissolution due to divorce,<sup>12</sup> as follows:

- a. Either  
the mother or the father remains obliged to maintain and educate the children, solely based on the interests of the child; if there is a dispute over the control of the children, the Court gives its decision;

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<sup>10</sup> M. Djamil Latif, (2001), "*Aneka Hukum Perceraian di Indonesia*", Cet 1, Yogyakarta: Gama Media, p., 82.

<sup>11</sup> Daud Ali, (1999), *Kompilasi Hukum Islam Dalam Sistem Hukum Nasional*, Ciputat: Logos, p. 139.

<sup>12</sup> Ahmad Rofiq, (2003), *Hukum Islam Di Indonesia*, Jakarta : PT Raja Grafindo Persada, p. 26.

- b. The father shall be responsible for all costs of maintenance and education necessary for the child; if the father is in fact unable to fulfill such obligations, the Court may determine that the mother shall share in such costs;
- c. The Court may require the former husband to provide maintenance and/or determine an obligation for the former wife.

From the provisions of this article that both parents are obliged to maintain and educate their children, even though the parents are divorced, the father still has the responsibility to pay for all the needs of the child. The occurrence of divorce does not eliminate or erase the status of the parents towards the child being the former. Then the court can also provide a decision if there is a dispute in the maintenance / care. In Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage regulates guardianship, namely:

1. Article 50, namely: Paragraph (1) Children who have not reached the age of 18 years or have never entered into marriage, who are not under the authority of their parents, are under the authority of a guardian.  
Paragraph (2) The guardianship concerns the child's person and property.
2. Article 53, namely: Paragraph (1) Guardians may be deprived of their powers in the cases mentioned in Article 49 of this Act.  
Paragraph (2) In the event that the power of a guardian is revoked, as referred to in paragraph (1) of this article, another person shall be appointed by the Court as guardian.

Parental authority can be revoked or transferred if there are reasons that require such transfer, as stated in Article 49 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage:

1. 1. Either or both parents may be deprived of the authority over one or more children for a specified period at the request of the other parent, the child's relatives in the straight line upwards and adult siblings or an authorized official, by a court decision in the event that:
  - a. He is grossly neglecting his duties towards his child;
  - b. He has behaved badly.
2. 2. Even if the parents are deprived of their powers, they are still obliged to provide maintenance for the child.<sup>13</sup>

Although parents are deprived of their powers, they are still obliged to provide maintenance to the child. Thus, the legal consequences for parents who do not carry out their responsibilities towards children are requests for execution and revocation of custody. There are times when a father fails as a custody holder for various reasons. The judge's consideration prioritizes the principle of the best interests of the child, the judge gives custody of minors to the mother.

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<sup>13</sup> Indonesia, Law Number 16 of 2019 Amendment to Law Number 1 of 1974, art. 49

From the provisions of the Compilation of Islamic Law that the maintenance of children as a result of divorce who are still not *mumayyiz* or who are still minors, the custody rights fall to the mother, but if the child is *mumayyiz* the custody of the child is returned to the child himself to choose between his mother or father. Based on the provisions of Article 105 of the Compilation of Islamic Law, "In the event of divorce:

1. The maintenance of children who are not yet *mumayyiz* or 12 years old is the right of the mother;
2. The maintenance of a child who has *mumayyiz* is left to the child to choose between his father or mother as the holder of his maintenance rights;
3. The cost of maintenance shall be borne by the father".<sup>14</sup>

As in Article 156 letter c of the Compilation of Islamic Law (KHI):

"If it turns out that the *hadhanah* holder cannot guarantee the physical and spiritual safety of the child, even though the costs of maintenance and *hadhanah* have been met, then at the request of the relative concerned the Religious Court may transfer the right to *hadhanah* to another relative who also has the right to *hadhanah*."

Child custody rights initially given to the father can be transferred to the *nusyuz* mother if the mother is unable to fulfill the rights of the child. The judge can determine to whom it is better to give custody of the child. The legal basis for giving custody to the father rather than the mother when the child is a minor is also found in Supreme Court Decision No.102 K/Sip/1973. This decision states, among other things: "That the biological mother takes precedence, especially for young children, because the interests of the child are the criterion, unless it can be proven that the biological mother is not fit and reasonable to care for her child."

A person can be withdrawn, appointed, removed from his status as a guardian if he has certain characteristics, in Article 109 of the Compilation of Islamic Law states that the Religious Court can revoke the guardianship of a person or legal entity and transfer it to another party at the request of his relatives if the guardian is a drunkard, gambler, spendthrift, crazy and neglects or abuses his rights and authority as a guardian for the benefit of the person under his guardianship.<sup>15</sup>

Mother's action to transfer custody of minor children is the right thing if the father is proven to do or have things that can take away the rights of children, because children really need parental responsibility to supervise, provide services that should be as sufficient as the needs of children by parents. Furthermore, regarding the responsibility in the form of supervision and service as well as the provision of child maintenance applies until the child is an adult who is able to stand alone.

### **3.2 Legal Considerations and Arguments of the Panel of Judges from Husband to Wife**

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<sup>14</sup> Indonesia, Compilation of Islamic Law, Article, 105

<sup>15</sup> Irfan Islami, Aini Sahara, Legalitas Penguasaan Hak Asuh Anak Dibawah Umur (Hadhanah) Kepada Bapak Pasca Perceraian, *Al-Qadau* Vol. 6, 2019, p. 191

One of the basic considerations used by the judge in deciding case Number: 400/Pdt.g/2020/Pa.Dps which is the subject matter of this writing is because the respondent biological father is considered incompetent and irresponsible in maintaining and educating their child who is entrusted and has remarried another woman and restricts the child from meeting his biological mother After several years of divorce, there was a lawsuit regarding child custody by the former husband as the father of the children from the marriage, namely 4 (four) children. The plaintiff, namely the former wife as the mother, filed a lawsuit for the transfer of child custody for various reasons, namely that the child in the care of the father or the defendant did not take care of the child himself, but the child was handed over to his grandmother, The Defendant was deemed incapable of caring for the Plaintiff and Defendant's child because during the Defendant's care the child received less attention and affection, and the Plaintiff and Defendant's child was a minor. Judges do not have to be shackled by only looking at one regulation, namely Article 105 of the Compilation of Islamic Law, but can explore and understand the legal values that develop in society in order to obtain justice.

As in Article 45 paragraphs 1 and 2 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 Concerning Marriage; "Both parents are obliged to maintain and educate their children as well as possible until the child is married or can stand on his own, which obligation applies continuously even though the marriage between the two parents breaks up. "Parents who have been given custody of their children when proven to have neglected their responsibilities resulting in obstacles in the growth and development of children, can be deprived of their parental authority in accordance with Article 30 paragraph (1) of Law Number 23 of 2002 in conjunction with Law Number 45 of 2014 concerning Child Protection; In the event that the parents as referred to in Article 26, neglect their obligations, supervisory measures can be taken against them or the parental authority can be revoked.<sup>16</sup>

The Compilation of Islamic Law Article 105 (a) and Article 156 (a) states that custody of children who are not yet *mumayyiz* or have not yet reached the age of 12 (twelve) years is given to the mother. Taking into account the conditions of the Plaintiff and the Defendant as mentioned, each of them has weaknesses to be determined as the holder of child custody, and among the most prominent weaknesses for the Plaintiff is that she has committed *nusyuz* against her husband which is proven by divorce verdict Number 361/Pdt.G/PA.Dps which resulted in the dissolution of the divorce and the fall of custody to the husband.

Meanwhile, the weaknesses for the Defendant are the neglect of maintenance, his remarriage to another woman, thus the children have not been able to adjust themselves and are worried about being shaken physically and mentally, this is evidenced on October 29, 2020, the Plaintiff was very surprised to hear the news that

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<sup>16</sup> Law Number 23 of 2002 in conjunction with Law Number 45 of 2014 concerning Child Protection

her two children who lived with the Defendant left (ran away) from her house, and it turned out that they went to the Plaintiff's shop and coincidentally the Plaintiff was in Java to visit the Plaintiff's parents and at the time of the divorce.

The judge considers that in order to maintain the benefit of the child, in determining who is more entitled to care for the child, the smaller risk for the child must be sought / taken from various aspects of the child's interests / good. This is based on the rules of *Fiqh*:

#### إذا تعارض ضرران دفع أخفهما

Meaning: if there are two *madharat* that conflict with each other then take the lightest one.

The panel of judges considered that the lightest harm of the two was if the child was under the care of his mother. because if he stays with the defendant (father), he is worried that he will be disturbed because the father has a bad temper. So the Panel of Judges decided that custody of the child was given to the Plaintiff (mother). factors in the interests of children relating to spiritual mental growth as regulated in Article 13 of Law Number 23 of 2002 concerning Child Protection, in full reads as follows: (1) Every child while in the care of parents, guardians or any party responsible for care, has the right to receive protection from treatment: a. discrimination; b. exploitation, both economic and sexual; c. neglect; d. cruelty, violence and abuse; e. injustice; and f. other wrongful treatment (2) In the event that a parent, guardian or caretaker of a child commits any form of treatment as intended in the Article above, the perpetrator will be subject to increased punishment.

Then the panel considered that under the Defendant's care, it was proven that the Defendant was unable to look after and care for Aquo's child properly, so that the child could not grow and develop normally, while the Plaintiff, as his mother, since the coming into effect of the Aquo decision, had never been given the opportunity to care for him, even meeting him felt difficult, and based on the facts of the trial, the Plaintiff as the biological mother behaved well and was not subject to law/criminality, the Plaintiff as the mother has been proven to be able to express her love for her child directly rather than the Defendant, who of course as a man has the responsibility to earn a living for the survival of his family. more preoccupied with earning a living than caring for children, so that the children they have will be entrusted to their parents or new wife. This will of course be different from the love given by their biological mother to the love given by their grandmother or stepmother.

Based on the facts of the trial, he had left the Defendant's residence because he felt uncomfortable and depressed. At the end of the day, the child, up to the time this case was being processed at trial, had been living with the Plaintiff in good condition, growing and developing physically and mentally. Considering, that legally based on the provisions of Article 105 of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law which reads "The care of children who are not *mumayyiz* or not yet 12 years old is the right of the mother", the article specifically regulates that the right to custody of children under the age of 12 years must be given to the mother, this is in accordance with the Hadith of the Prophet Muhammad SAW, which reads: Meaning: "You/mother have more rights over your child as long as you are not

married".

Apart from these considerations, the ulama agreed that "the right to care for children who have not reached adulthood must be given priority to their mothers. This is because women are considered to have a more maternal spirit, compared to men. This opinion has a strong legal basis, namely the hadith of the Prophet Muhammad SAW which means "A woman said to the Messenger of Allah, "O Messenger of Allah, this is my child, I am the one who carries it, my milk which he drank, and in my room where he gathered with me, his father had divorced me and wanted to separate him from me." So the Messenger of Allah said, "You are the one who has more right to look after him as long as you are not married." (HR Ahmad, Abu Dawud, and al-Hakim confirmed it, this opinion is then taken over as the opinion of the panel of judges.

Thus, based on the considerations above, the Panel of Judges revoked and transferred custody of the child which was originally from the defendant (father) to the plaintiff (mother), due to several pieces of evidence before the trial, so that the Panel of Judges came to a conclusion regarding the transfer of custody rights of child to the plaintiff (mother).

Based on the matters admitted by the Plaintiff and Defendant, the recognition norm applies. So, based on the judge's considerations, the author agrees with the decision produced in this case, namely determining that custody of the child (*hadhanah*) rests with the plaintiff as the child's biological mother and the defendant is obliged to hand over the child to the plaintiff.

### **3.3 Legal Analysis of the Transfer of Custody Rights from Husband to Wife *Maslahah* Theory**

*Maslahah* is one of the basic methods for determining Islamic law, the existence of which is still disputed to this day. This is because the *maslahah* murrasa method does not have any sharia arguments governing it. This is different from the four other sources of Islamic law such as the Al-Quran, *as-Sunnah*, *Ijma'* and *Qiyas*, all of which have been agreed upon by the ulama. However, as a method of *Ijtihad*, *maslahah mursalah* can still be used as a basis for legal determination and becomes relevant for use if the conditions are met and does not conflict with sharia law.

In essence, the *mashlahat* which is the subject of hot debate among the fuqaha' is mashalih *mursalah* or what is often called al-munasib al-mursal. In this case, Abu al-Nur Zahir classified three types of groups. The first group is a group of ulama' who do not accept Mashalih *Mursalah* as proof at all, including the Shafi'iyah. The second group is the ulama' who accept the mashalih *mursalah* openly and can use it as proof, including the Malikiyah group. And finally, the third group who believes that the mashalih *mursalah* can be used as proof as long as the *mashlahat* inherent in it is *dharuriyat*, *qhat'iyat*, and *kulliyat* include al-Ghazali and al-Baidhawi.<sup>17</sup>

According to Juaini Syukri, *maslahah mursalah* is a benefit that has no basis in argument, but also has no cancellation. If there is an event for which there are no provisions of the Shari'a and there is no *illat* that comes out of the Shari'a which determines the clarity of the law of the incident, then something is found that is in accordance with the law of the Shari'a, namely a provision based on maintaining prosperity or to express a benefit, then This incident was called al-*Maslahah Al-Mursalah*. The main aim of *al-Maslahah Al-Mursalah* is benefit; namely protecting it

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<sup>17</sup> M. Abu Al-Nur Zahir, (1950), *Ushul Fiqh*, Mesir: Mathba'at Dar al-Ta'lif, Juz III, p. 185.

from disaster and maintaining its benefits.<sup>18</sup>

The scholars agree that everything actually has aspects of *mashlahah* and *madharat*. And the *maslahah* aspect is something that is very essential for the good of this world and the hereafter. The Sharia was revealed to explain to the *mukallaf* what is good and what is bad. Most *maslahah* and *madharat* are conditional in nature, and must be studied through rational discussion by looking at their connection to various aspects of human life.<sup>19</sup>

According to the author, all the deeds and actions of friends and ulama in the past which were carried out on the basis of *maslahah mursalah* as a method for determining law are still very relevant when used in the modern era. Not only that, even in the future it can still be used as long as the conditions are met and it keeps up with current developments. However, the problem will be what size can be used as a benchmark for making *maslahah mursalah* as a methodology for developing Islamic law. In this context the author agrees with the opinion of Hasbi al-Shiddiqi who created a balance sheet to be used in assessing the problem:

- a. The purpose of this reform is to maintain public benefit and goodness.
- b. Rejecting the harm that befell humanity in general and the Muslim community in particular
- c. Bringing benefits and benefits to humanity in general and the Islamic community in particular
- d. Rely on truth and justice. Truth means always being in the corridor of *syara'* while justice means maintaining the truth by not doing anything that is contrary to *syara'*.<sup>20</sup>

In the case of a child custody dispute in decision number: 400/Pdt.G/2020/PA.Dps, the Denpasar Religious Court, what the researcher found, was that the decision made by the Panel of Judges was only based on the statutory regulations that the researcher had mentioned in sub. -previous chapter. Because in every implementation of resolving various legal problems in Indonesia, everything must be based on the applicable laws. Whatever the field, all conflicts and disputes will be decided by the competent authority, in this case the Panel of Judges who examine the case through a court process.

The Religious Court is an agency that has the authority to resolve disputes between Muslims in Indonesia, in this case *hadhanah* or child custody is one of them. Although judges who examine Muslim disputes in the Religious Court area refer to applicable laws and regulations, on the other hand they may refer to Islamic laws or *fiqh* as a method of *Ijtihad* in determining a law. This could happen considering that judges in the Religious Courts at least have extensive scientific competence, not only positive law but also knowledge of Islamic law and jurisprudence as their basis, because in essence they are the ones who will resolve legal problems for Muslims.

As is also true, the legal sources used in Indonesia are not only laws made by the

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<sup>18</sup> Juaini Syukri Shofia, (2012), *Catatan Pribadi Ilmu Ushul Fiqh*, Jakarta: Ponpes Roudhotul Mubtadiin, p. 259-260

<sup>19</sup> Usman Musthafa, "Maslahah Mursalah Sebagai Metodologi Pengembangan Hukum Islam", *MUAMALATUNA: Jurnal Hukum Ekonomi Syariah*, Vol. 9, No. 2, July-December 2017, p. 12-13.

<sup>20</sup> Hasbi Ash-Siddiqi, (1990), *Falsafah Hukum Islam*, Jakarta: Bulan Bintang, p. 338.

government in the form of laws. But also among them are Islamic law and customary law which apply to certain community groups where the existence of these three sources of law has been recognized. A religious court judge today can be analogous to a mujtahid in the past because he has the same duties and functions, namely resolving legal issues, and making *Ijtihad* in determining laws that have not been regulated in the text so that they are suitable for use among the community, especially people Muslim.

In the case of a child custody dispute in decision number: 400/Pdt.G/2020/PA.Dps that researchers found, the revocation or transfer of the *hadhanah* of four children who were still minors or not yet *mumayyiz* was assigned to the children's biological mothers. The judge's legal basis in this matter is that in their opinion, although the provisions of Article 105 letter (a) of the Compilation of Islamic Law state that children who have not yet been *mumayyiz* are cared for by their biological mother, because they have not lived with the children for approximately the last 2 years after the divorce, then the Panel of Judges handed over the rights of *hadhanah* to the biological mother. Even after the researcher conducted an analysis of the judge's legal basis, there are no statutory regulations in positive law that regulate the ability to assign custody of a minor child to the biological father. For this reason, the Panel of Judges has a different view on this matter, and pays more attention to the benefit aspect for children who are not yet *mumayyiz* in the future.

In the case of determining the transfer of child custody (*hadhanah*) of a child who has not yet *mumayyiz* to the biological mother for the benefit and interests of the child who will be cared for, then the connection with Islamic law review is as an act and action carried out by the panel of judges based on *maslahah* and justice. If so, even though the removal and transfer of the *hadhanah* of a child who is not yet *mumayyiz* to a *nusyuz* mother has not been regulated in detail in the Law or the KHI provisions in its implementation, this can be considered to be correct and relevant because the *maslahah* and justice used is one of the methods in the establishment and development of Islamic law.

In decision number: 400/Pdt.G/2020/PA.Dps, the plaintiff, as the biological mother, asked the Panel of Judges at the Denpasar Religious Court to determine and revoke her rights to custody of her four children for several reasons contained in her lawsuit letter which has been registered at the Religious Court. In essence, all these reasons were put forward because after divorcing her husband in 2018, the determination of custody of their children had already been decided and recently there were problems, apart from that, the biological mother as the plaintiff wanted to take care of the administrative and other needs needed for the children. . In the explanation that the researchers have outlined previously, Islamic Ulama' have basically agreed that giving custody of children who are not yet *mumayyiz* is the right of the biological mother, although the father is still obliged to provide for the child. This custody right can be transferred to another party if the biological mother is proven to be unable to carry out custody rights, and it is possible for another party to take over custody rights.

The problems that occur in cases of transfer of child custody are something that must be resolved, because if not, in the future it will cause harm to the child and there will be no legal certainty. For this reason, this problem is a basic need and is included in the primary needs and priority matters that must be resolved immediately as a good step for the benefit and justice of the parties. In the context of *maslahah* murrasa, this is categorized as *maslahah dharuriyat*, namely the main needs that must be present in

order to support human life so that it becomes better, if it is not there then life is imperfect and becomes damaged.

As Wahbah Az-zuhaili defines that *maslahah dharuriyat* (primary needs) is what human life depends on in matters of religion and the world. When this benefit is lost then life in the world becomes damaged, and the damage spreads, eternal pleasure disappears, and punishment in the afterlife is inflicted. And this is the strongest benefit, nothing else can surpass it, therefore tertiary (*tahsini*) and secondary (*hajj*) matters are not maintained, if it actually destroys the primary (*dharuri*).<sup>21</sup>

This is in line with the urgency of determining the transfer of *hadhanah* to the biological mother which was determined by the Panel of Judges at the Denpasar Religious Court during the examination of the case in decision number: 400/Pdt.G/2020/PA.Dps. The reason is that in the judge's decision it was clearly proven that the Panel of Judges was more inclined to pay attention and consider everything for the benefit of the foster child in the future. Starting from giving custody of this child to his biological mother on the grounds that his father had gone to a different place, to granting a lawsuit which was essentially for the sake of taking care of the child's future and interests such as education, health and other needs necessary for the child. And of course all of these things cannot be separated from the very important and *dharuri* needs of children in the future.

Another important thing can be seen from the aspect of protecting the souls of the children who will be cared for and in order to protect the offspring of the caretaker from undesirable things such as neglect, neglect and irresponsibility. Therefore, the main/basic needs which are *maslahah dharuriyat* actions have an important relationship and the same goals as *Maqashid Syari'ah* in Islam.

What is meant by *Maqashid Syari'ah* is as briefly defined by Ilall al-Fasi, namely the final goal to be achieved by the syari'ah and the secrets behind every provision in sharia law. What this means is the goal to be achieved in Islamic law which has been determined by Allah SWT and His Messenger, by tracing the verses of the Koran and Sunnah as logical reasons for the formulation of a law that is oriented towards the benefit of humanity.

In the *Maqashid Syari'ah* which is closely related to *maslahah dharuriyat*, there are five levels of needs that must exist in life. The five levels and objectives are to maintain religion (*hifd al-din*), maintain the soul (*hifd al-nafs*), maintain the mind (*hifd al-aql*), maintain offspring (*hifd al-nasl*), and finally maintain property (*hifd al-mal*).

Another connection is that not all legal issues are regulated in the Koran and hadith. There are many new legal issues for which legal arguments cannot be found in the Koran and hadith. Therefore, Allah and His Messenger as law makers (*al-syari*) do not state all the *Maqashid Syari'ah* explicitly (*mantuq*), but some are stated implicitly (*mafhum*), some are even not stated (*sirr*). This is in accordance with the principle of *maslahah* which states:

الشارع لا يأمر إلا بما مصلحته خالصة أو راجحة، ولا ينهى إلا عما مفسدته خالصة  
أو راجحة

Allah SWT and His Messenger, do not order anything unless it brings pure benefit or

<sup>21</sup> Wahbah al-Zuhaili, (1999), *Al-Wajiz fi Ushul al-Fiqh*, Beirut: Dar al-Fikr al-Mu'ashir, p. 219.

the benefit is dominant. And it doesn't prohibit anything unless it is truly damaged or the damage is dominant.

According to the author in relation to the case regarding the determination of the transfer of child custody rights, the determination of this transfer is the right step for the judges who decided this case, the reason is because the child's custody rights to the biological mother are aimed at ensuring that the care of the child is more secure and that all his needs, health and other needs are guaranteed. Other matters contained in the lawsuit letter can be implemented after this decision is made. Considering that the biological father of these children also no longer lives in the same place as them and has settled in another city, it is also feared that if it is given to the biological father in such a situation it could cause harm to the children in the future.

In this way, the ideals and goals of justice based on the wishes of *maslahah dharuriyah* can be achieved and fulfilled by paying attention to these aspects, such as granting the child's *hadhanah* rights to the biological mother as a step to preserve the child's soul and to care for offspring after a husband and wife divorce. Apart from that, the judge who resolved this problem was deemed to have fulfilled his obligations well and wisely. Or in the rules of *maslahah*, the judge's behavior and actions can also be referred to as:

تصرف الإمام على الرعية منوط بالمصلحة

The priest's policies (actions) towards the people must be linked to the benefit.

Based on the presentation and analysis of the facts above, the writer and researcher draws the conclusion that the decision to revoke the transfer of custody of four children who are not yet legal to the biological mother (*nusyuz*) after divorce is in decision number: 400/Pdt.G/2020/PA.Dps Even though the Denpasar Religious Court is not yet regulated by the provisions of statutory regulations and KHI, for reasons of benefit and interests of children it is relevant and as a wise step in determining a new law by the Panel of Judges who decided this case. Not only that, the connection between the determination of the transfer of this decision and the application of the concept of *Maslahah* and justice based on *Maqashid Syari'ah* also provides a new solution and legal basis for judges in any court to handle similar cases. In this way, very complex problems in society, especially among Muslims, can be resolved not only by referring to applicable laws, but also by referring to various methods of establishing Islamic law, one of which is *maslahah*.

#### 4. CONCLUSION

Arrangements for the transfer of custody of minor children after divorce are used as a reference so that child custody can be given to the father if the mother is incapacitated, namely Article 109 of the Compilation of Islamic Law regarding revocation of guardianship, Article 156 letter c regarding child custody rights initially given to the father can be transferred. to the mother if the father cannot fulfill the child's rights. Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Article 41, namely regarding equal rights between mothers and fathers by prioritizing the interests of children in granting child custody rights, and Article 49 concerning requests for revocation of child custody rights by wrongdoing. one parent or family of the child, Law Number 23 of 2002 in conjunction with Law Number 35 of 2014 concerning Child Protection, in Article 14 concerning every child

has the right to be raised by his own parents and Article 30 paragraph (1) if the right holder If you commit negligence, your authority may be revoked. The legal argument of the Panel of Judges in Decision Number 400/Pdt.G/2020/Pa.Dps, regarding the transfer of child custody, according to the author, is appropriate, even though based on Article 105 of the Compilation of Islamic Law and Hadith, the care of minor children is the right of the ex-wife (mother). However, under certain conditions the father can also obtain custody if the mother is unable to carry out her duties to care for her children. However, this decision puts forward the principle of fulfilling children's rights even though a divorce has occurred, as is based on the applicable regulations. It is regulated in article 30 paragraph (1) of Law Number 23 of 2002 in conjunction with Law Number 35 of 2014 concerning child protection that it is feared that it could disrupt the child's growth and development physically and spiritually if they are proven to be neglecting their responsibilities, resulting in obstacles to their growth. and the child's development, the power of custody may be revoked. Children must receive attention and parents must guarantee and protect children and their rights so that they can grow and develop well. Analysis from a benefit perspective, in the Denpasar Religious Court Decision, the Judge not only decided and transferred custody of the children based on the Law, but also in the interests of the children, which is better and has greater benefits if the four children are raised by their mother rather than their father. the form of transfer of custody of children who have not yet *mumayyiz* to the biological mother (*nusyuz*) shows that the legal basis of the Panel of Judges in handling this case is based on *Maslahah* and justice for the interests of the child.

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