

The Post-Divorce Child Custody Problems Based on Court Decisions

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Abstract. *Marriage has the goal of fostering a happy, harmonious, peaceful and harmonious life. In religion, marriage is very much in the sunnah to be lived apart from having children. In its journey, sometimes many families experience cracks or destruction because each individual runs without clear guidelines as which has been regulated in their religious teachings regarding marriage. Disputes and fights often occur in building a household, if the husband and wife cannot react properly they will be vulnerable to the breakdown of family life. Between husband and wife must know the obligations and rights of each so that the relationship is maintained properly. Generally, child custody disputes are resolved through court. Divorce is a legal event that leads to the legal termination of a husband and wife marriage whose legal process is carried out in court. The goal is to protect all rights and obligations that arise as a result of divorce. After the divorce was decided by the court, this was because both the father and mother of the child were both unwilling to lose custody of their child. Through legal channels it is determined to whom the custody of the child is given. This research is to find out the legal considerations of the judge's decision at the Kendal Religious Court with case number 2126/Pdt.G/2021/PA.Kdl. At that time the plaintiff was a mother working abroad as a female worker, and the defendant was a father who involved in the crime of motor vehicle theft, which resulted in the defendant having to serve a sentence in a penitentiary. This research is normative juridical law research, descriptive in nature. Data collection is done by analyzing regulations and copies of decisions. The collected data were analyzed qualitatively. Determination of child custody rights should be carried out by considering the best interests of the child in accordance with the Child Protection Act number 23 of 2002. Based on research with the rejection of child custody claims by mothers who are abroad without considering the condition of the father who is currently serving a sentence in prison, judges have not been able to apply the principle of expediency and the principles of justice.*

Keywords: Custody; Divorce; Judge.

1. Introduction

Marriage has the goal of fostering a happy, harmonious, peaceful and harmonious life. Marriage is also a way to be able to channel instincts (biological needs) and to get offspring while sticking to religious teachings. Things that are included in religion are carrying out marriage. In the Qur'an Surah An Nisa verse 34 normatively encourages every human being to live in pairs with the aim of creating a happy and peaceful family. The Qur'an also mentions that marriage is a *mitsaqan galidhan*, which is a strong bond, namely a sacred bond that is expressed through an agreement contained in the consent *qabul*.

Many families fail to maintain their household life and experience destruction because each individual runs without clear guidelines as stipulated in their religious teachings regarding marriage. Disputes and fights often occur in building a household, if the husband and wife cannot respond properly, they will be vulnerable to the breakdown of family life. Between husband and wife must know the obligations and rights of each so that the relationship is maintained properly.

Divorce is a legal event that leads to the legal termination of a husband and wife marriage whose legal process is carried out in court. The goal is to protect all rights and obligations that arise as a result of divorce. After the divorce is decided by the court, the divorce will have several consequences in the marriage both for the husband and wife, property, income, family relations and for the children born in the marriage. If the marriage has been blessed with children, the first thing that must be considered by both parties is regarding the maintenance of children (*hadanah*).¹

After a divorce, both parents will try to get custody of the child, therefore it is legally regulated. In Act No. 1 of 1974 it is stated that when a divorce occurs the custody of a minor is handed over to the mother, unless the mother behaves badly. Apart from these reasons, there are other things that can prevent custody rights from falling into the hands of the mother, among others, if the judge sees that there is a closer relationship between the father and the child compared to the closeness with the mother.²

Fights or disputes over child custody or *Hadanah* can be resolved amicably or it can also be through a lawsuit in court. Through a court decision it will be decided who has the right to custody of the children. Both the mother and the father have

¹Ira Yuni Rachmawati et al, Problems of Child Custody After the Decision of the Religious Courts (Case Analysis Number 802/Pdt.G/2019/PA.Pct, Journal of Anthology Hukum, Vol 2, No 1 (2022) P.30

²Luh Putu Lilis Yunita Dewi et al, Determination of Underage Child Custody Rights Due to Divorce According to Law Number 1 of 1974 Concerning Marriage at the Singaraja District Court. Kerta Widya, Journal of Law, Vol 4 No.1 (2016) P.54

the same rights and obligations to get custody of their child. In Act No. 16 of 2019 concerning amendments to Act No. 1974 concerning marriage it states that every child has the right to be cared for by his own parents, unless there is a valid reason and legal rules indicating that separation is due to final considerations. Who will later get custody of their children, either the mother or the father.

In the case study regarding the lawsuit for child custody in case number 2126/Pdt.G/2021/PA.Kdl, where a mother whose position is working abroad becomes a female worker abroad files a lawsuit for child custody on the basis of the Defendant or the father of the children often gets drunk, does not worship in caring for his children. Ultimately, the defendant committed a criminal act (curanmor) which was later caught by residents and then became a convict based on a court decision. The psychological impact of this incident on their children is discrimination by friends in the play environment and school environment.

The purpose of this study is to find out the considerations of the Religious court, the case examining judge in deciding whether the aquo case is in accordance with the principles of justice and benefit as well as the benefit of the law.

2. Research Methods

The research carried out uses a normative juridical approach, by studying legal norms and rules, legal principles, which in general are to see how the application of a rule of law such as statutes or legal regulations that are related or linked in reality in practice in social life. This research is a descriptive research, describing the characteristics of individuals, circumstances and symptoms or certain groups, the relationship between other symptoms that exist in social life. The research was conducted at the Kendal Religious Court which examined a decision on child custody cases. Secondary data used: primary legal material in the form of Act No. 16 of 2019 amendment to Act No. 1 of 1974 concerning marriage, Act No. 23 of 2002 concerning child protection. Secondary legal material in the form of legal writings that have been included in journals or books. Coupled with tertiary legal material in the form of a language dictionary, (KBBI). Data collection techniques with literature study by reading, analyzing, classifying, Data analysis was done in a qualitative way, with all the collected data being analyzed in a systematic way, connecting one data with another and then presenting it descriptively.

3. Results and Discussion

3.1. Judge's legal considerations in deciding child custody cases in case number 2126/Pdt.G/2021/PA.Kdl

Divorce events in the family always have a profound impact, one of which is greatly affected, namely children. Custody is often a post-divorce issue. In determining

the right to care for children after a divorce, both according to the Islamic Law Compilation and the Islamic Law Compilation both stipulate that the right to care for children is given to the mother, as long as it fulfills the conditions that have been set. Even though the mother is the party that has the right to care for the child, this does not rule out the possibility for the father to obtain this right if the mother, as the rights holder, neglects her duties or commits acts that can cancel the child custody rights she has obtained.³

The meaning of justice according to John Rawls is justice is equality in inequality, justice in equality means that there is freedom (liberty) and the same basic political rights for humans regardless of their strengths or weaknesses, where freedom and political rights may not be reduced or compensated for by others. .⁴ Views like that can be used as a reference in providing justice. Talking about justice, it cannot be separated from the theory put forward by Jow Rawls, an American philosopher who is considered one of the leading political philosophers of the 20th century in his book "A Theory of Justice" he stated that justice is the first advantage (virtue) of social institutions. , as well as truth in systems of thought.⁵

In 2020, the plaintiff and the defendant divorced due to constant bickering and disputes caused by economic problems, the defendant often drank, gambled and had other ideal women, that was the basis and reason for the plaintiff filing for divorce through the Kendal religious court, and registered in case number 1504/Pdt.G/2020/PA.Kdl dated 04 August 2020.

The basis for filing a child custody lawsuit through the Kendal Religious Court isthat the plaintiff, the plaintiff's parents as his grandparents and also the plaintiff's siblings as his aunts, for the sake of school and their daily needs, and also for the sake of a better future, where the defendant still often drinks alcohol with his friends, had tried to ask him returned safely, but to no avail. Then on August 26, 2021, the defendant committed the crime of theft of a motorbike at a public cemetery parking lot in the Boja sub-district, Kendal Regency, namely on Thursday evening and Friday when the pilgrims were carrying out clean-up activities Clean the tomb and read Yasin Tahlil.

That in this incident, the defendant and his friend were found out by the owner and were caught red-handed when they were about to commit a crime which ended up being beaten up by a mob, then detained by the authorities or children

³Masayu Robianti et al. Juridical Analysis of the Judge's Decision Regarding the Granting of Child Custody Rights to the Father (Case Study Number: 44/Pdt.G/2012/PA.Kbj) Journal of Legal Research. Vol 01.(2022).P.145

⁴<https://business-law.binus.ac.id>

⁵John Rawls. 1999. A Theory of Justice. Harvard University Press. Massachusetts. page 3

of thieves), which causes the plaintiff's children to be embarrassed when they want to play or leave the house, so that their recitation and school activities are disrupted or stopped.⁶

That the plaintiff's first child (Ananda Ayu Pramesty) repeatedly communicated via wa/Tlp to the plaintiff and the plaintiff's family (grandparents and aunts) in secret crying to ask to move schools to Sodong, Mijen sub-district, Semarang city, but was always scolded when found out by the relatives of the defendant.

for this incident the plaintiff felt worried about the mental development, psychology of the two children who were underage and still expected affection, attention and also proper education, close to people or family who loved them, financed their daily lives in this case grandparents and also the brothers and sisters of the plaintiff, so through this lawsuit, the plaintiff requests the Panel of Judges who are examining this case so that the two children who are still underage are assigned to the care and maintenance of the plaintiff as their biological mother.

3.2. Judge's legal considerations

Considering that regarding child control or child care it has been regulated in article 1 letter g of the Compilation of Islamic Law (KHI), which states "child care or hadhonah is the activity of caring for, nurturing and educating children until they are adults or able to stand on their own" and further according to Article 1 Number 11 Act No. 23 of 2002 concerning child protection which states "parental authority is the power of parents to care for, educate, nurture, foster, protect and develop children according to the religion they adhere to and their abilities, talents and interests;

Considering that regarding the matter regarding the plaintiff's lawsuit, the panel of judges is of the opinion that according to the plaintiff's lawsuit it turns out that the plaintiff is de facto still abroad as an Indonesian worker (TKI) in the territory of Singapore until now while the child of the plaintiff and the defendant named Ananda AP, type female born in Kendal Regency on July 5 2009 and Affandra RD male gender born in Kendal district on April 27 2017 located in the Kendal district area, Central Java Province, the Unitary State of the Republic of Indonesia, so that the plaintiff is actually physically, psychologically, social culture may not be able to carry out activities of caring for, nurturing, protecting and educating the plaintiff's and defendant's children.

There are many theories about realizing a quality judge's decision, but for justice seekers who crave legal justice for their cases with judges, a quality judge's decision for him is nothing but a decision that can realize justice or a decision that

⁶Copy of Case Decision Number 2126/Pdt.G/2021/PA.Kdl

reflects a sense of justice that can be accepted or satisfies justice seekers. Citizens are entitled to equal legal protection regardless of social status, legal protection is to provide protection for human rights.

The meaning of justice according to John Rawls is justice is equality in inequality, justice in equality means that there is freedom (liberty) and the same basic political rights for humans regardless of their strengths or weaknesses, where freedom and political rights may not be reduced or compensated for by others. . Views like that can be used as a reference in providing justice. Talking about justice, it cannot be separated from the theory put forward by John Rawls, an American philosopher who is considered one of the leading political philosophers of the 20th century in his book "A Theory of Justice" he stated that justice is the first advantage (virtue) of social institutions. , as well as truth in systems of thought.⁷

For the maintenance of children must be carried out carefully, namely by providing supervision, providing services to children and trying to meet the needs of children to the fullest, problems will arise when there is a divorce between the two parents, if there is a divorce between the parents it does not mean responsibility and obligation to lost children, fathers and mothers still have an inherent obligation to care for or care for and educate their children for the benefit and future of these children to be better.

Custody of children who are not yet mummayiz maintenance falls on the mother, because a mother has a closer bond and affection than a father, the mother also has more time to interact with the child compared to the father, as long as the mother is still able to fulfill her obligations, custody of children who are still not mummayiz will still fall to the mother. Unless the mother is unable to fulfill her obligations due to reasons, the mother is an apostate or converts to Islam, the mother has bad behavior such as a drunkard, drug addict or gambler and a mother who has a mental disorder, then child custody can fall to the father.

In the event that the legal considerations and judges in deciding case 2126/Pdt.G/2021/PA.Kdl are not appropriate and not in accordance with the principles of justice, where the panel of judges is of the opinion that according to the plaintiff's lawsuit it turns out that the plaintiff is de facto still abroad as a workforce Indonesia (TKI) in the territory of Singapore until now, while the child of the plaintiff and the defendant named Ananda Ayu Pramesty, female, was born in Kendal Regency on July 5 2009 and Affandra Rahmat Darmawan, male, was born in Kendal district on April 27 2017 is in the Kendal district, Central Java Province, the unitary state of the Republic of Indonesia, so that the plaintiff is physically, psychologically, socially and culturally impossible to carry out activities of caring

⁷John Rawls. 1999. A Theory of Justice. Harvard University Press. Massachusetts. page 3

for, caring for, protecting and educating the plaintiff's and defendant's children named Ananda Ayu Pramesty and Affandra Alfa Rahmat Darmawan, the judge did not consider the condition of the defendant who is currently serving a prison sentence in the Kendal district penitentiary.

According to Article 4 paragraph 1 of the Act No. 3 of 2006 concerning amendments to Act No. 7 of 1989 concerning religious courts that "Courts are based on Belief in the One and Only God" article 16 paragraph 1 of Act No. 4 of 2004 states that " the court may not refuse to examine, try and decide on a case submitted with the argument that the law does not exist or is not clear, but is obliged to examine and try it, meaning that the judge knows the law (objective), meaning that the judge due to his position is tasked with finding and determine what point applies to the case being examined.

According to article 2 paragraph (1) of the Act No. 48 of 2009 it also states that 'trials are carried out "FOR JUSTICE BASED ON THE ALMIGHTY GOD" obstacles to achieving a simple, fast, and low-cost trial.

3.3. The Kendal Religious Court Judge's Decision in Case Number 2126/Pdt.G/PA.Kdl.

A case submitted through a court will end with a decision from a panel of judges or a court, a judge's decision is a statement from a judge, by a judge, as a State official who is authorized to do so, pronounced in court and for the purpose of ending or completing a case filed by the parties or justice seekers. Judges are God's representatives in the world, besides having to decide a case in accordance with applicable regulations, judges must also be able to use conscience in considering the decision of a case.

And finally the Kendal Religious Court tried this case with the verdict as follows;

JUDGE

- 1) Declare the defendant who has been summoned officially and properly to appear before the trial is not present;
- 2) Declare that the plaintiff's lawsuit cannot be accepted with Verstek;
- 3) Charge the plaintiff to pay court fees in the amount of Rp. 699,000,- (six hundred ninety nine thousand rupiah)

This was decided in an assembly deliberative meeting which was held on Tuesday, November 30, 2021 AD, coinciding with the 25th of Robi'ul Akhir 1443 Hijriyah. By the panel of judges.

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According to article 2 paragraph (1) of the Act No. 48 of 2009 it also states that 'trials are carried out "FOR JUSTICE BASED ON THE ONE ALMIGHTY GOD" then in article 4 paragraph (2) reads "the court assists justice seekers and tries to overcome all obstacles to achieving a simple, fast, and low-cost trial.

Prof. Satjipto Raharjo in his book Progressive Law Enforcement,awakening all of our awareness, it turns out that the law is constantly moving, changing according to the dynamics of human life, until it falls on one choice, progressive law enforcement, a law that is able to create harmony, peace, order and social welfare. Through progressive, critical, and brilliant thoughts, Prof. Satjipto conveyed his idea that humans as important actors behind legal life are not only required to be able to create and implement laws, but also to have the courage to break and tear down when the law is no longer able to present the spirit and substance of existence. In addition, it also describes the law as behavior, progressive law that liberates, or the matter of the existence of a court dictatorship.⁸

That progressive law always seeks a substantive truth that is not constrained by normative rules. Judges as law enforcers are expected to be able to make legal discoveries (*rechtsvinding*) and explore the values that develop in society.

Based on the above, the judge's decision which is the crown of the court for the community or people who seek justice is expected to be able to provide a sense of justice and truth for the community. Judges must have breakthroughs for benefit and not just adhere to rules or legislation. Justice and truth can only be realized through progressive judge decisions, namely decisions based on legal protection and justice. In deciding case Number 2126/Pdt. G/2021/PA.Kdl the panel of judges was not thorough and was still far from applying progressive law.

⁸<https://heylawedu.id/klas/Hukum-progesif>

The examining judge was still not thorough in considering his decision by not taking into account the status of the defendant who at that time was a convict.

4. Conclusion

In giving a case decision regarding this foster child, the judge previously made several considerations before deciding on the decision. One of the considerations is in accordance with what is regulated in article 1 letter (g) of the Compilation of Islamic Law (KHI), which states "child rearing or hadhonah is the activity of raising children. , nurturing and educating children until they are adults or able to stand on their own" and further according to Article 1 Number 11 of the Act No. 23 of 2002 concerning child protection which states that child custody is the power of parents to care for, nurture, foster, protect and grow develop children according to the religion they adhere to according to their abilities, talents and interests. In this case it is clear that the Plaintiff is better able to fulfill his obligations to his children even though the plaintiff works abroad.

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